INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

HYDRO S.R.L.

COSTRUZIONI S.R.L.

FRANCESCO BECCHETTI

MAURO DE RENZIS

STEFANIA GRIGOLON

LILIANA CONDOMITTI

Claimants

and

REPUBLIC OF ALBANIA

Respondent

ICSID Case No. ARB/15/28

AWARD

Members of the Tribunal
Dr. Michael C. Pryles, President
Mr. Ian Glick QC, Arbitrator
Dr. Charles Poncet, Arbitrator

Secretary of the Tribunal
Mr. Francisco Abriani

Assistant to the Tribunal
Mr. Timothy Maxwell

Date of dispatch to the Parties: 24 April 2019

REPRESENTATION OF THE PARTIES

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State Advocate General
State Advocacy Office
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Ms. Karen O'Connell
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FREQUENTLY USED ABBREVIATIONS AND DEFINED TERMS

1st ICC Arbitration	*Deutsche Bank AG v. BEG S.p.A*, ICC Case No.17496/JHN/GFG commenced by a Request for Arbitration dated 27 October 2010
1st ICC Award	Award rendered in the 1st ICC Arbitration, dated 18 April 2013 (R-033)
2nd ICC Arbitration	*Hydro S.R.L. (Italy) v. The Republic of Albania*, ICC Case No. 20564/EMT/GR commenced by a Request for Arbitration dated 16 October 2014 (R-042)
2nd ICC Award	Partial award rendered in the 2nd ICC Arbitration dated 8 January 2018 (Document attached to the Claimants' letter dated 16 January 2018)
1st Rome Arbitration	*Hydro S.r.L v. Deutsche Bank AG* commenced by application dated 15 July 2010
1st Rome Award	Award rendered in the 1st Rome Arbitration dated 17 November 2011 (R-032)
2nd Rome Arbitration	*Hydro S.r.L v. Deutsche Bank AG* commenced by petition dated 10 October 2010
2nd Rome Award	Award rendered in the 2nd Rome Arbitration dated 7 August 2013 (R-035)
1998 Broadcasting Law	Law No. 8410 on the Public and Private Radio and Television in the Republic of the Albania, 30 September 1998 (CL-033)
2007 Broadcasting Law	Law No. 9742 on Digital Broadcasting in the Republic of Albania, 28 May 2007, Article 15 (CL-057)
2013 Media Law	Law No. 97/2013 on Audiovisual Media in the Republic of Albania, 4 March 2013 (CL-084)
400 KV	400 KV Sh.p.k.
Agonset	Agonset Sh.p.k.

Agonset.it	Agonset.it S.r.l.
Agonset.uk	Agonset.uk Ltd
AKBN	National Agency of Natural Resources
Albania / Respondent	Republic of Albania
Albaniabeg	Albaniabeg Ambient Sh.p.k.
ASB	Authorised State Body
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in effect from 10 April 2006
BEG	Becchetti Energy Group Spa
BIT	Agreement between the Government of the Republic of Italy and the Government of the Republic of Albania on the Promotion and Protection of Investment, which was signed on 12 September 1991, and entered into force on 29 January 1996
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Cable System	Cable System Sh.p.k.
Claimants	Hydro, Costruzioni, Mr. Becchetti, Mr. De Renzis, Ms. Grigolon and Ms. Condomitti
Cogeco	Cogeco S.r.l.
Concession Agreement	Original Concession Agreement between BEG S.p.A and Ministry of Public Works, Land Planning, Tourism and Ministry of Mining and Energy Resources dated 24 May 1997 (C-014) Including the First Addendum to the Concession Agreement dated 2 November 2000 (C-191)

	Including the Second Addendum to the Concession Agreement dated 8 May 2007 (C-015) As of 8 May 2007, the Consolidated Concession Agreement (C-199)
Costruzioni / Second Claimant	Costruzioni S.r.l.
Counter-Memorial	Respondent's Counter-Memorial dated 23 January 2017
Deutsche Bank	Deutsche Bank AG
DigitAlb	DigitAlb Sh.a.
Enel	Enel SpA
Energji	Energji Sh.p.k.
GE06 Agreement	ITU International Symposium on the Digital Switchover Regional Agreement GE06 of 16 June 2006 (CL-051)
Hearing 1	Hearing on Jurisdiction held on 28 to 30 March 2017
Hearing	Hearing on Jurisdiction and the Merits on 4 to 14 September 2017
Hearing Transcript, Day [#], [page:line]	Transcript of the Hearing
Hydro / First Claimant	Hydro S.r.l.
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ILA	International Law Association
Investime	Investime te Rinovueshme Sh.p.k.

JVA	Joint Venture Agreement between BEG and Deutsche Bank dated 16 January 2007 (R-0101)
Kalivaç Project / Project	The construction and operation of the Kalivaç hydroelectric power plant
KESH	Korporata Elektroenergjitike Shqiptare
KGE	Kalivaç Green Energy Sh.p.k.
Memorial on the Merits	Claimants' Memorial on the Merits dated 13 May 2016
METE	Ministry of Economy, Trade and Energy
Mr. Becchetti / Third Claimant	Mr. Francesco Becchetti
Mr. de Renzis / Fourth Claimant	Mr. Mauro De Renzis
Ms. Condomitti / Sixth Claimant	Ms. Liliana Condomitti
Ms. Grigolon / Fifth Claimant	Ms. Stefania Grigolon
NCRT	The National Council of Radio and Television created by the 1998 Broadcasting Law.
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Rejoinder	Claimants' Rejoinder on Jurisdiction dated 20 February 2017
Reply	Respondent's Reply on Jurisdiction dated 20 January 2017
RTSH	Radiotelevizioni Shqiptar
Switchover Strategy	Decision of the Council of Ministers No. 292 on a Strategy of Switchover from Analogue to Digital Broadcasting, 2 May 2012 (CL-080)
Top Channel	Top Channel Sh.a.

Tribunal	Arbitral tribunal constituted on 19 November 2015
Tring	Tring TV Sh.a.
Waste Management Concession	Waste management concession agreement between Albaniabeg and Albania dated 26 May 2005

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Government of the Republic of Italy and the Government of the Republic of Albania on the Promotion and Protection of Investment, which was signed on 12 September 1991, and entered into force on 29 January 1996 (the "BIT"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention").

2. The Claimants are Hydro S.r.l. ("Hydro"), a company incorporated under the laws of Italy, Costruzioni S.r.l. ("Costruzioni"), a company incorporated under the laws of Italy, Mr. Francesco Becchetti, a natural person having the nationality of the Italian Republic, Mr. Mauro De Renzis, a natural person having the nationality of the Italian Republic, Ms. Stefania Grigolon, a natural person having the nationality of the Italian Republic, and Ms. Liliana Condomitti, a natural person having the nationality of the Italian Republic (together, the "Claimants").

3. The Respondent is the Republic of Albania ("Albania" or the "Respondent").

4. The Claimants and the Respondent are collectively referred to as the "parties." The parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to the Claimants' alleged investments in Albania's hydroelectric energy, wind energy and media industries. The Claimants claim that Albania expropriated certain of the Claimants' investments, and that Albania failed to accord fair and equitable treatment to the Claimants' investments in Albania. The Claimants further argue that all of Albania's actions against the Claimants form part of Albania's, and in particular Prime Minister Rama's, campaign against Mr. Becchetti, his companies, and associates.

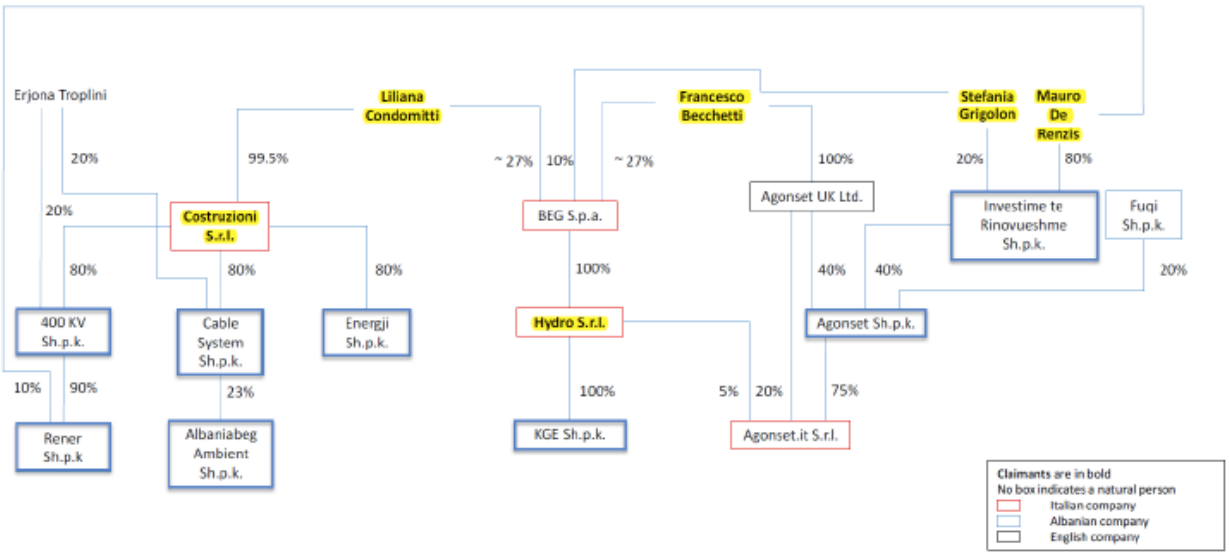
6. The parties' specific requests for relief are set forth in Section V below, and a fuller summary of their positions is also contained below. In its analysis, the Tribunal has considered not only the positions of the parties as summarised in this Award, but the

numerous detailed arguments made in the parties' written and oral pleadings not referred to in this Award as well. To the extent that these arguments are not referred to expressly, they should be deemed to be subsumed into the Tribunal's analysis.

II. THE PARTIES

A. THE CLAIMANTS

7. The Claimants in this arbitration have been helpfully summarised in a flow chart showing the shareholders and related companies:[1]



Flowchart of shareholdings dated 10 June 2015, the date of the Request for Arbitration, submitted with the Claimants' letter dated 28 July 2017

(1) Hydro S.r.l.

8. The first Claimant, Hydro, is a company incorporated under the laws of Italy. Hydro is registered under No. 09563901009 at the Register of Companies of Rome and is headquartered at Piazza di Spagna, 66, 00187 Rome, Italy.[2]

9. Hydro was created by the Becchetti Energy Group Spa ("BEG") and Deutsche Bank AG ("Deutsche Bank") to build and operate the Kalivaç Plant (the "Kalivaç Project" or the

[1] Claimants' Closing Presentation, slide 9.

[2] Hydro S.r.l.'s excerpt from the Rome Registry of Companies, 22 December 2014 (C-002).

"Project"), for which BEG obtained a concession from the Government of Albania in 1997.[3] For that purpose, Hydro acquired 100% of the shares of Kalivaç Green Energy Sh.p.k. ("KGE"), a company incorporated under the laws of Albania, in July 2007. Since 2013, Hydro has been wholly owned by BEG, which in turn is owned by members of the Becchetti family, including the Claimants Francesco Becchetti and Liliana Condomitti. Stefania Grigolon (also a Claimant) also holds a 10% share.

10. Hydro is also the sole claimant in an ICC arbitration against Albania arising out of the concession agreement for the Kalivaç Project ("2nd ICC Arbitration").[4] Hydro also owns a 5% share in Agonset.it S.r.l. ("Agonset.it"), an Italian television company and subsidiary of Agonset Sh.p.k.[5]

(2) Costruzioni S.r.l.

11. Costruzioni is a company incorporated under the laws of Italy. Costruzioni is registered under No. 07070201004 at the Register of Companies of Rome and is headquartered at Vicolo del Bottino, 10, 00187 Rome, Italy.[6] Liliana Condomitti holds 99.5% of the shares in Costruzioni.[7]

12. Costruzioni owns 80% of the shares of Energji Sh.p.k. ("Energji", a company incorporated under the laws of Albania), the project contractor on the Kalivaç Project.[8]

13. Costruzioni also holds 80% of the shares of Cable System Sh.p.k. ("Cable System"), a company created to develop a submarine cable between Albania and Italy.[9] Cable System holds a minority share (23%) in Albaniabeg Ambient Sh.p.k. ("Albaniabeg"),[10] a company that was originally created as the concessionary company on the Kalivaç Project and from

[3] First Becchetti Statement, para. 35.

[4] *Hydro S.R.L. (Italy) v. The Republic of Albania*, ICC Case No. 20564/EMT/GR ("2nd ICC Arbitration"); See 2nd ICC Arbitration Request for Arbitration, 16 October 2015 (R-042).

[5] See para. 16 below and Second Becchetti Statement, Annex A.

[6] Costruzioni's S r.l.'s excerpt from the Rome Registry of Companies, 16 May 2002 (C-003).

[7] Second Becchetti Statement, Annex A; Petrit Malaj Expert Report, para. 2.11.

[8] Energji Sh.p k.'s excerpt from the Tirana Registry of Companies, 10 September 2014 (C-313); First Becchetti Statement, para. 61.

[9] First Becchetti Statement, para. 62.

[10] Albaniabeg Ambient Sh.p k.'s excerpt from the Tirana Registry of Companies, 26 May 2014 (C-297).

which KGE was later spun off.[11] Albaniabeg also signed a concession agreement to construct and operate a waste management facility on 26 May 2005 (the "Waste Management Concession").[12]

14. Both Costruzioni and Albaniabeg are companies incorporated under the laws of Albania, and both are claimants in a separate ICSID arbitration[13] in which they allege Albania breached the Energy Charter Treaty with respect to the Waste Management Concession.

15. Costruzioni also owns 80% of 400 KV Sh.p.k. ("400 KV"), which it purchased from Cable System on 15 May 2013.[14] 400 KV, a company created to sell energy generated in Albania to Italy, in turn owns 90% of Rener Sh.p.k., which submitted a proposal to build and operate a large wind farm in southern Albania along with Energji.[15] Again, both 400 KV and Rener Sh.p.k. are companies incorporated under the laws of Albania.

16. Costruzioni is also registered as a 40% shareholder of Agonset Sh.p.k. ("Agonset"),[16] an Albanian television company that produced television programs that it broadcast in Albania on Agon Channel Albania,[17] and that Agonset's Italian subsidiary, Agonset.it., broadcast in Italy on Agon Channel Italy. Agonset owns 75% of the shares in Agonset.it. In March 2015, Costruzioni sold its 40% share in Agonset to Agonset.uk Ltd ("Agonset.uk").[18] However, due to Albania's seizure of Agonset, this transfer of shares was never recorded in the Tirana Corporate Register.[19]

[11] First Becchetti Statement, para. 52, and see further paras. 183 and 197 below.

[12] First Becchetti Statement, para. 51.

[13] ICSID Case No. ARB/14/26; see Request for Arbitration, *Albaniabeg Ambient Sh.p.k., M. Angelo Novelli, Costruzioni S.r.l. v. The Republic of Albania* 20 October 2014 (R-003).

[14] First Becchetti Statement, para. 62.

[15] Ibid.

[16] Rener Sh.p.k. excerpt from the Tirana Registry of Companies, 26 April 2016 (C-420)

[17] First Becchetti Statement, paras. 99-112.

[18] *Ibid*, para. 91.

[19] The parties agree that this transfer of shares was never recorded on the Tirana Corporate Register, see Memorial, para. 22 and Counter-Memorial, para. 91(d).

(3) Francesco Becchetti

17. The third Claimant is Francesco Becchetti, an Italian national. In the Request for Arbitration, which was filed two days after Albania issued a warrant for his arrest, Mr. Becchetti's residential address was listed as Piazza Rondinini 48, 00186 Rome, Italy. However, because of the arrest warrants and the subsequent extradition requests issued against him, Mr. Becchetti is not able to leave the United Kingdom. His address at the time of the final hearing was 1 Waverton Street, London, W1J 5QN, UK.

18. Mr. Becchetti holds just over 25% of the shares of the Italian company BEG, which wholly owns Hydro (and therefore KGE, through Hydro).[20] Mr. Becchetti founded BEG in 1995 to carry out renewable energy projects.[21] Before founding BEG, Mr. Becchetti was a shareholder in, and Executive Vice President of, the Italian construction company Cogeco S.r.l. ("Cogeco"), which was also part of the Becchetti family's group of companies.[22]

19. Mr. Becchetti holds 100% of the shares of Agonset.uk, which has owned 40% of Agonset since March 2015. Agonset.uk also holds a 20% interest in Agonset.it.[23]

(4) Mauro De Renzis

20. Mauro De Renzis is an Italian national. In the Request for Arbitration, his residence was listed as Viale della Repubblica, 258, 00047 Marino (Rome), Italy. Due to the criminal proceedings and extradition requests issued against him by Albania, however, Mr. De Renzis is not able to leave the United Kingdom. His address at the time of the final hearing was 23 Brook Mews N, London W2 3BW, UK.

21. Mr. De Renzis is the Administrator of Energji and, until December 2015, was the Administrator of Agonset. He currently holds 80% of the Albanian company Investime te Rinovueshme Sh.p.k. ("Investime"), which owns 40% of Agonset. The other 20% of

[20] First Becchetti Statement, paras. 52 and 75.
[21] *Ibid*, para. 10.
[22] *Ibid*, para. 9.
[23] *Ibid*, FN 39 at para. 106.

Agonset's shares are held by Fuqi Sh.p.k.[24], a company owned by members of Mr. Becchetti's partner's family.[25]

22. By order dated 9 June 2015, Albania seized Mr. De Renzis' indirect shareholding in Agonset.[26] Mr. De Renzis' mandate as Administrator of Agonset lapsed on 27 December 2015. Agonset is currently without an Administrator.[27] Mr. De Renzis is Ms. Grigolon's husband.[28]

(5) Stefania Grigolon

23. Stefania Grigolon is an Italian national whose residential address is Viale della Repubblica, 258, 00047 Marino (Rome), Italy. She is the only individual Claimant against whom Albania has not brought criminal charges. While she remains an Italian resident, she spends a significant amount of time in London because Mr. Becchetti and Mr. De Renzis are not able to leave the United Kingdom.

24. Ms. Grigolon currently holds 20% of the shares of Investime, which owns 40% of Agonset. She also holds a 10% share in BEG. She is Mr. De Renzis' wife. [29]

(6) Liliana Condomitti

25. Liliana Condomitti is Francesco Becchetti's mother and an Italian national whose residential address is 1 Waverton Street, London, W1J 5QN, UK. Ms. Condomitti has relocated to London from Italy due to the criminal charges brought by Albania against her and her son.

26. Ms. Condomitti acquired a 99.5% share of Costruzioni on 9 May 2002. Through Costruzioni, Ms. Condomitti owns majority interests in Energji, 400 KV, and Cable

[24] Agonset Sh.p k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 1 (C-409).

[25] First Becchetti Statement, para. 91.

[26] Decision No. 768 on Preventive Sequestration of Properties, 5 June 2015 and Prosecutor's Office at the First Instance Court of Tirana, Order to Execute the Decision on Determining the Security Measures, 9 June 2015 (C-110).

[27] Agonset Sh.p k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 1 (C-409).

[28] Hearing, Day 2, T7.22-T7.24.

[29] Hearing, Day 2, T7.22-T7.24.

System, and until March 2015, held 40% of the shares in Agonset. Ms. Condomitti also owns over 25% of BEG, which fully owns Hydro, which, in turn, fully owns KGE.

27. By order dated 9 June 2015, Albania seized Ms. Condomitti's direct and indirect shareholdings in Energji, 400 KV, Cable System, and Agonset.[30]

B. THE RESPONDENT

28. The Respondent is the Republic of Albania. Its President at the time of the final hearing was Mr. Bujar Nishani. He was elected by the Parliament of the Republic of Albania on 11 June 2012 and took office on 24 July 2012 for a five-year term. The head of Government is the Chairman of the Council of Ministers (Prime Minister). The Prime Minister at the time of the final hearing was Mr. Edi Rama. He was appointed by the President on 10 September 2013 and took office five days later, replacing Prime Minister Sali Berisha, who had been Prime Minister of Albania since 11 September 2005.

III. PROCEDURAL HISTORY

29. On 11 June 2015, ICSID received a request for arbitration dated 10 June 2015 from Hydro, Construzioni, Mr. Becchetti, Mr. De Renzis, Ms. Grigolon and Ms. Condomitti against the Republic of Albania (the "Request"), together with Exhibits C-001 through C-078.

30. On 29 June 2015, 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 Articles 37 to 40 of the ICSID Convention.

31. After letters spanning 1 July 2015 through 6 October 2015, the parties confirmed their agreement that the Tribunal should consist of three arbitrators, one arbitrator appointed by

[30] Decision No. 768 on Preventive Sequestration of Properties, 5 June 2015 and Prosecutor's Office at the First Instance Court of Tirana, Order to Execute the Decision on Determining the Security Measures, 9 June 2015 (C-110).

each party, and the co-arbitrators jointly appointing the President, in consultation with the parties.

32. By letter of 4 September 2015, the Claimants appointed Dr. Charles Poncet, a national of Switzerland, as arbitrator in this case.

33. By letter of 25 September 2015, the Respondent appointed Mr. Ian Glick, a national of the United Kingdom, as arbitrator in this case.

34. On 20 November 2015, the co-arbitrators, after consulting with the parties, agreed to appoint Dr. Michael Pryles, a national of Australia, as President of the Tribunal.

35. On 23 November 2015, the Acting 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. Aurélia Antonietti, ICSID Senior Legal Adviser, was designated to serve as Secretary of the Tribunal. On 7 December 2015, the Secretary-General informed the parties that Mr. Francisco Abriani, ICSID Legal Counsel, would replace Ms. Antonietti as Secretary of the Tribunal.

36. On 5 December 2015, the Claimants filed their Request for Provisional Measures ("Request for Provisional Measures"), together with Exhibits C-079 through C-135 and Legal Authorities CL-001 through CL-010.

37. On 20 January 2016, the Respondent filed its Response to the Claimants' Request for Provisional Measures ("Response on Provisional Measures"), together with Exhibits R-001 through R-009 and Legal Authorities RL-001 through RL-024.

38. On 22 January 2016, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the parties by teleconference.

39. On 27 January 2016, the Tribunal issued Procedural Order No. 1 ("PO 1") recording the agreement of the parties on procedural matters. PO 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the Tribunal was properly constituted, that the procedural language would be English, that the place of

the proceeding would be Paris, France, and that Dr. Albert Dinelli was to act as Assistant to the Tribunal. As the Respondent indicated its intention to file a Request for Bifurcation, no procedural calendar was finalised, and the Tribunal invited the parties to confer and produce an agreed-upon schedule.

40. On 28 January 2016, the Claimants filed their Reply on Provisional Measures ("Reply on Provisional Measures"), together with Exhibits C-136 through C-171 and Legal Authorities CL-011 through CL-018.

41. On 5 February 2016, the Respondent filed its Rejoinder on Provisional Measures ("Rejoinder on Provisional Measures").

42. On 10 February 2016, the Tribunal held a hearing on the Request for Provisional Measures by teleconference.

43. On 22 February 2016, the Tribunal ordered that:

    a. the Claimants file their Memorial by 6 May 2016,

    b. the Respondent file its Request for Bifurcation by 3 June 2016 (later amended to 13 May 2016 and 10 June 2016, respectively).

44. On 3 March 2016, the Tribunal issued its Provisional Measures Order, in which it recommended that Albania:

    a. suspend the proceedings identified as Criminal Proceeding No. 1564 until the issuance of a Final Award in this proceeding; and

    b. take all actions necessary to suspend the extradition proceedings currently pending as Case Numbers 1502751601 (for Mr. Becchetti) and 1502752144 (for Mr. De Renzis), until the issuance of a Final Award in this proceeding, and

invited the Respondent to confer with the Claimants and seek to agree appropriate measures to be taken by the Republic of Albania to preserve:

c. the seized assets and the contents of the frozen bank accounts of Energji, KGE, 400 KV, Cable System, and Agonset;

d. the current shareholdings in those companies.

The Order also provided that, should the Respondent fail to comply within 60 days, the Claimants could apply to the Tribunal for further provisional measures.

45. On 21 March 2016, the Claimants informed the Tribunal that the Respondent was not in compliance with the Provisional Measures Order and requested a telephone conference to discuss enforcement. The Respondent replied by letter of the same date.

46. On 22 March 2016, the Tribunal noted that no formal application had been made by the Claimants and therefore declined their request to hold a telephone conference.

47. On 25 March 2016, the Claimants requested that the Tribunal issue a Partial Award or order the Respondent to comply with the Provisional Measures Order ("Application for Further Measures"), together with Legal Authorities CL-019 through CL-023.

48. On 5 April 2016, the Respondent filed its response to the Application for Further Measures ("Response on Further Measures"), along with an Application to Revoke or Modify the Order on Provisional Measures ("Application for Measures Revocation").

49. On 18 April 2016, the Claimants filed their response to the Application for Measures Revocation ("Response on Measures Revocation") and their reply comments to the Response on Further Measures, together with Exhibits C-172 through C-176 and Legal Authorities CL-024 through CL-027.

50. On 19 April 2016, the Tribunal asked the Respondent to provide its reply comments on the Response on Measures Revocation, by no later than 27 April 2016. This deadline was extended until 9 May 2016, pursuant to Tribunal orders of 27 April 2016, 3 May 2016, 5 May 2016 and 7 May 2016 due to the Respondent's requests of 24 April 2016, 3 May 2016, 4 May 2016 and 6 May 2016 and with regard to the Claimants' objections on 26 April 2016 and 5 May 2016.

51. On 10 May 2016, the Claimants requested the Tribunal to decide the Applications for Further Measures and Measures Revocation based on the submissions already made.

52. That same day, the Respondent submitted its reply comments to the Response on Measures Revocation, together with Exhibits R-010 through R-016 and Legal Authorities RL-0025 through RL-0030.

53. On 13 May 2016, the Claimants submitted their Memorial on the Merits ("Claimants' Memorial"), together with Exhibits C-177 through C-553, Legal Authorities CL-028 through CL-106, and two expert reports:

    a. First Expert Report of Paul Rathbone dated 13 May 2016; and

    b. Expert Report of Brent Kaczmarek and Kiran Sequeira dated 13 May 2016.

54. On 1 June 2016, after considering the parties' comments of 23 May 2016 through 31 May 2016, the Tribunal confirmed that it would hold a hearing on the Applications for Further Measures and Measures Revocation on 15 June 2016 in London.

55. On 1, 2 and 10 June 2016, the Claimants updated the Tribunal on the status of the extradition proceedings pending in the United Kingdom, and submitted Exhibits C-554 through C-558.

56. On 10 June 2016, the Respondent submitted its Request for Bifurcation ("Request for Bifurcation"), together with Exhibits R-017 through R-018 and Legal Authorities RL-031 through RL-043.

57. On 12 June 2016, the Tribunal invited: the Respondent to provide its comments on the Exhibits submitted by the Claimants with their 10 June 2016 letter by 17 June 2016 and the Claimants to submit their reply to the Request for Bifurcation by 20 June 2016.

58. On 14 June 2016, the Respondent requested that Exhibits C-557 through C-558 be excluded from the record.

59. On 14 June 2016, the Claimants requested an extension until 24 June 2016 to submit their reply on the Request for Bifurcation. On 15 June 2016, the Tribunal granted the requested extension.

60. A hearing on the Applications for Further Measures and Measures Revocation was held in London on 15 June 2016. The following persons were present at the Hearing:

Tribunal:

Dr. Michael Pryles	President (By Video Conference)
Dr. Charles Poncet, M.C.L.	Co-Arbitrator
Mr. Ian Glick, Q.C.	Co-Arbitrator

ICSID Secretariat:

Mr. Francisco Abriani	Secretary of the Tribunal

Assistant to the Tribunal:

Dr. Albert Dinelli	Assistant to the Tribunal (By Video Conference)

For the Claimants:

Mr. Philippe Pinsolle	Quinn Emanuel Urquhart & Sullivan UK LLP
Dr. Tai-Heng Cheng	Quinn Emanuel Urquhart & Sullivan LLP
Mr. Alexander Leventhal	Quinn Emanuel Urquhart & Sullivan UK LLP
Mr. Marco Garofalo	Quinn Emanuel Urquhart & Sullivan UK LLP
Mr. Christopher J. Tahbaz	Debevoise & Plimpton LLP
Mr. Shaun Palmer	Debevoise & Plimpton LLP
Mr. Karel Daele	Mishcon de Reya LLP
Mr. Julian B. Knowles, QC	Matrix Chambers
Mr. Francesco Becchetti	Claimant

For the Respondent:

Mr. Toby Landau, QC	Essex Court Chambers
Mr. Siddharth Dhar	Essex Court Chambers
Mr. Peter Webster	Essex Court Chambers
Mr. Ben Brandon	Three Raymond Buildings
Mr. David Breslin	Gowling WLG (UK) LLP
Ms. Karen O'Connell	Gowling WLG (UK) LLP
Ms. Alma Hicka	State Advocate General, State Advocacy Office (Albania)
Ms. Brunilda Lilo	State Advocate, State Advocacy Office (Albania)

Court Reporter:

Ms. Claire Hill	English-Language Court Reporter

61. On 16 June 2016, the Tribunal: (i) invited the Respondent to provide any undertakings it was willing to assume by 27 June 2016, and the Claimants to respond by 6 July 2016; (ii) decided not to admit the Claimants' exhibits C-557 and C-558 into the record; (iii) asked the Respondent to confirm the current status of the Interpol "Red Notice" in respect to the relevant Claimants; and (iv) ordered the parties to provide the judgment of the English court on the application to stay the extradition proceedings for an abuse of process to be handed down on 8 July 2016. The deadlines for (i) and (ii) were respectively extended until 29 June 2016 and 8 July 2016, pursuant to Tribunal orders of 27 and 28 June 2016, due to the Respondent's requests of the same dates.

62. On 24 June 2016, the Claimants submitted their Objections to the Request for Bifurcation ("Objections to Bifurcation"), together with Exhibits C-557 and C-558 and Legal Authorities CL-107 through CL-115.

63. On 27 June 2016, the Tribunal invited the Respondent to file its reply, if any, to the Objections to Bifurcation by 1 July 2016.

64. On 29 June 2016, the Respondent laid out the details of its undertakings.

65. On 1 July 2016, the Respondent submitted its Reply to the Claimants' Objections to Bifurcation ("Reply on Bifurcation"), together with Exhibits R-017 through R-018 and Legal Authorities RL-0044 through RL-0048.

66. On 3 July 2016, the Tribunal invited the Claimants to submit a rejoinder on Bifurcation by 8 July 2016.

67. On 8 July 2016, pursuant to the Tribunal's order of 16 June 2016, the Claimants provided the UK Magistrates Court's decision granting the Claimants' application to stay extradition proceedings on the ground of abuse of process, submitted as Exhibit C-560.

68. That same day, the Claimants provided their comments on the Respondent's 29 June 2016 letter, and submitted Legal Authorities CL-116 and CL-122.

69. Further, the Claimants filed their Rejoinder on the Request for Bifurcation ("Rejoinder on Bifurcation"), together with Legal Authorities CL-118 through CL-121 and CL-123.

70. On 11 July 2016, the Tribunal invited the parties to provide their comments, if any, on the relevance of Exhibit C-560 to these proceedings by 18 July 2016.

71. On 18 July 2016, the Claimants informed the Tribunal that Albania would not appeal the decision submitted as Exhibit C-560, and submitted the notification of same as Exhibit C-561.

72. That same day, the Claimants submitted their comments on Exhibit C-560.

73. On 18 July 2016, in light of the decision submitted as Exhibit C-561, the Respondent requested an extension until 22 July 2016 to submit its comments. The Tribunal granted this extension. On 19 July 2016, the Claimants noted that the Respondent's request implied that they required additional time in order to respond to Exhibit C-561, not Exhibit C-560. Consequently, the Claimants reserved their rights to make comments on Exhibit C-561.

74. On 21 July 2016, the Claimants submitted the Notices of Discharge issued by the Westminster Magistrates' Court as Exhibits C-562 and C-563.

75. On 22 July 2016, the Respondent made its comments on Exhibits C-560 and C-561.That same day, the Tribunal requested that the Respondent provide an explanation for the delay as its submission included issues it was meant to address by 18 July 2016.

76. On 23 July 2016, the Respondent explained that it was confused regarding the deadlines and requested that the Tribunal admit the contents of the 22 July 2016 submission. On 24 July 2016, the Tribunal decided to allow the contents of the Respondent's 22 July 2016 letter in their entirety.

77. On 19 August 2016 (dated 19 July 2016), the Claimants provided the Tribunal with an update on the status of the Interpol Red Notices against Messrs. Becchetti and De Renzis. On 22 August 2016, the Tribunal invited the Respondent to provide any comments on the

Claimants' letter by 24 August 2016. On 24 August 2016, the Respondent noted to the Tribunal that it had no comments on this letter.

78. On 1 September 2016, the Tribunal issued its Decision on the Applications for Further Measures and Measures Revocation ("Decision on Further Measures and Revocation"). In this Decision, the Tribunal decided that "[its] Provisional Measures Order of 3 March 2016 is revoked and, in lieu thereof, the Tribunal recommends that the Respondent (a) take no steps in the proceedings identified as Criminal Proceeding No. 1564 to recommence extradition proceedings in the United Kingdom against Messrs. Becchetti and De Renzis until the issuance of a Final Award in the proceeding; and (b) take all actions necessary to maintain the suspension of the extradition proceedings (Case Numbers 1502751601 (for Mr. Becchetti) and 1502752144 (for Mr. De Renzis)) currently stayed, and not to take any steps to resume those proceedings, until the issuance of a Final Award in this proceeding." The Tribunal also decided that the Applications were otherwise dismissed.

79. On 1 September 2016, the Tribunal informed the parties that it had decided not to bifurcate the proceedings and a reasoned decision would be issued in due course. This was duly issued on 7 December 2016 ("Decision on Bifurcation"). The Tribunal invited the parties to confer on a procedural calendar and to submit their joint proposal by 9 September 2016. On 10 September 2016, the parties requested an extension until 13 September 2016 to produce a calendar. That same day, the Tribunal granted the extension.

80. On 13 September 2016, the parties informed the Tribunal that they were unable to agree on a schedule for the proceedings.

81. On 19 September 2016, the Tribunal issued Procedural Order No. 2 ("PO 2") fixing the timetable for the remainder of the proceedings. On 23 September 2016, the Respondent requested that the date for its Counter-Memorial be pushed back by one week, with the deadlines for the Claimants' submissions being adjusted accordingly. On 26 September 2016, the Tribunal issued an updated procedural calendar accounting for the Respondent's requested date change.

82. On 28 November 2016, the Claimants informed the Tribunal of a civil claim brought in Albanian courts against Mr. Becchetti, Mr. De Renzis, and Ms. Condomitti (notice of which was submitted as Exhibit C-564) and reserved their rights to update quantum damages claimed in this arbitration and to request further provisional measures. The Tribunal invited the Respondent to reply to the Claimants' letter by 12 December 2016. As the Respondent did not reply by this date, the Tribunal noted the contents of the Claimants' letter, but did not propose taking any action at that time.

83. On 24 December 2016, the Respondent requested an extension until 20 January 2017 to submit its Counter-Memorial. On 30 December 2016, the Claimants asked the Tribunal to reject the Respondent's request.

84. On 1 January 2017, the Tribunal issued Procedural Order No. 3 ("PO 3") amending the procedural calendar in line with the Respondent's 24 December 2016 request.

85. On 20 January 2017, the Respondent requested until 23 January 2017 to file its Counter-Memorial. The Tribunal granted the request. On 2 February 2017, the Tribunal stated that the Claimants' deadline for filing their Reply was likewise extended until 25 May 2017.

86. On 23 January 2017, the Respondent submitted its Counter-Memorial ("Respondent's Counter-Memorial") together with Exhibits R-019 through R-098, Legal Authorities RL-0049 through RL-0101 and two expert reports:

    a. First Expert Report of Gervase MacGregor dated 20 January 2017; and

    b. First Expert Report of Petrit Malaj dated 20 January 2017.

87. On 10 February 2017, the Claimants requested confirmation that the Respondent's counsel, Gowling WLG, had been "validly retained pursuant to Albanian law."

88. On 14 February 2017, the Respondent submitted the transcripts from the 2nd ICC Arbitration as Exhibits R-099 and R-100. By email of 16 February 2017, the Tribunal invited the Claimants to submit any comments on the Respondent's submission by 22 February 2017. On 24 February 2017, the Tribunal noted that it had not received any

comments from the Claimants and informed the parties of its decision to enter the transcripts into the record.

89. On 23 March 2017, the Respondent noted continued disagreements between the parties in the matter of document production and asked the Tribunal to decide on the issue.

90. On 4 April 2017, the Tribunal issued Procedural Order No. 4 ("PO 4") on the production of documents.

91. On 6 April 2017, the Claimants requested from the Respondent "a written assurance from the Minister of Justice of Albania that external counsel were retained with the necessary approvals of the Minister of Justice as provided by the law and to receive the relevant copies of such approvals made at that time." On 19 April 2017, the Respondent stated that it had already addressed this issue and provided a copy of a letter from the State Advocate General dated 23 March 2017 confirming the retention of Gowling WLG UK LLP as counsel for Albania.

92. On 25 April 2017, the parties were informed that Dr. Dinelli had resigned as Assistant to the Tribunal and that the Tribunal proposed to replace him with Mr. Timothy Maxwell, unless the parties objected. In the absence of objection, on 13 May 2017, Mr. Maxwell was appointed as Assistant to the Tribunal.

93. On 2 and 11 May 2017, the Claimants stated that the Respondent's delay in complying with the document production ordered in PO 4 had prejudiced their ability to prepare their Reply and requested an extension until 8 June 2017. On 10 and 11 May 2017, the Respondent objected to the Claimants' requests and asked that the procedural calendar be preserved and asked that, if the Tribunal were nevertheless minded to grant it, the Respondent be given a commensurate two-week extension to file its Rejoinder. On 11 May 2017, the Tribunal ordered the parties to comply with PO 4 by no later than 19 May 2017, and granted the Claimants an extension until 2 June 2017 to file their Reply.

94. On 16 May 2017, the Respondent confirmed that Albania had retained Gowling WLG UK LLP and provided a signed power of attorney.

95. On 22 May 2017, the Tribunal asked the parties: (i) to submit a joint list of abbreviations by 31 May 2017; (ii) to submit an agreed *dramatis personae*, a list of issues to be decided by the Tribunal, and a chronology by 21 August 2017; and (iii) to confirm by 25 May 2017 their availability for a pre-hearing conference call.

96. On 30 May 2017, the parties informed the Tribunal that they would submit their joint list of abbreviations by 7 June 2017. The Tribunal agreed to the revised deadline. The parties submitted the list of abbreviations on 6 June 2017.

97. On 31 May 2017, the Tribunal asked the Claimants to provide a detailed table of companies and shareholders included in Annex A to their Memorial and any concerned investments that are the subject of the current arbitration. This was provided on 12 June 2017.

98. On 2 June 2017, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction ("Reply on the Merits"), together with Exhibits C-575 through C-661, Legal Authorities CL-133 through CL-229 and the following expert reports:

    a. Second Expert Report of Paul Rathbone dated 2 June 2017;

    b. Third Expert Report of Paul Rathbone dated 2 June 2017;

    c. Second Expert Report of Brent Kaczmarek and Kiran Sequeira dated 2 June 2017;

    d. Consultant's Report of Enyal Shuke dated 2 June 2017;

    e. Expert Report of Alberto Pasquale dated 2 June 2017;

    f. Expert Report of Arben Qeleshi dated 2 June 2017; and

    g. Expert Report of Sergio Garribba dated 2 June 2017.

99. On 6 June 2017, the Respondent requested permission to make an application to the Tribunal in response to Claimants' Reply on the Merits. On 7 June 2017, the Tribunal asked the Respondent to explain why this could not be addressed in its forthcoming Rejoinder.

100. On 13 June 2017, the Claimants, referring to their letters of 10 February and 6 April 2017, sought the Tribunal's permission to apply for the removal of the Respondent's external counsel. On 14 June 2017, the Tribunal asked the Respondent to reply to the Claimants' request.

101. On 15 June 2017, in reference to their request of 6 June 2017, the Respondent further elaborated on its request, asking for permission to submit an application for the exclusion of evidence presented by the Claimants. On 16 June 2017, the Tribunal informed the parties that the Respondent's application would be allowed.

102. On 16 June 2017, the Respondent submitted its application for the exclusion of the three expert reports submitted with the Claimants' Reply on the Merits, namely the reports of Mr. Pasquale, Professor Garribba, and Mr. Qeleshi. Alternatively, should the Tribunal decide not to exclude the reports, the Respondent requested an extension until 4 August 2017 to file its Rejoinder ("Application to Exclude Reports"). On 19 June 2017, the Tribunal invited the Claimants to reply to the Application to Exclude Reports by 20 June 2017.

103. On 20 June 2017, the Claimants requested that the Application to Exclude Reports be rejected in its entirety, including the proposed modification of the procedural calendar and filed Legal Authorities CL-230 through CL-236 ("Response to Exclude Reports").

104. That same day, the Claimants separately, *inter alia*, requested permission to address substantive points made in the Respondent's 16 June 2017 letter regarding their application to disqualify the Respondent's counsel, and requested that the upcoming hearing be moved from Paris to London.

105. On 20 June 2017, in the absence of a response on the issue from the Respondent, the Tribunal granted the Claimants permission to submit their application for the removal of the Respondent's external counsel.

106. On 21 June 2017, the Respondent sought permission to reply to the Response to Exclude Reports.

107. On 21 June 2017, the Tribunal asked the parties to confirm by 27 June 2017 if they were in agreement on moving the hearing from Paris to London, and stated its intention to make its decision upon receipt of the confirmation.

108. On 22 June 2017, the Tribunal granted the Respondent's request to reply to the Response to Exclude Reports, giving it until 23 June 2017 to do so. The Claimants were invited to provide any further comments on the issue by 27 June 2017.

109. On 23 June 2017, the Respondent maintained its Application to Exclude Reports.

110. On 27 June 2017, the Claimants applied to the Tribunal to submit an additional document onto the record.

111. That same day, the Claimants separately reiterated their position stated in the Response to Exclude Reports.

112. On 27 June 2017, the Tribunal issued Procedural Order No. 5 ("PO 5") stating that the expert reports of Mr. Pasquale, Professor Garribba and Mr. Qeleshi would remain on the record, while the reports of Mr. Nesho and Mr. Taylor were to be excluded. In PO 5, the Tribunal modified the procedural calendar, requiring the Respondent to submit its Reply on Jurisdiction by 7 July 2017, the Respondent to submit its Rejoinder on the Merits by 4 August 2017, and the Claimants to submit their Rejoinder on Jurisdiction by 4 August 2017.

113. On 28 June 2017, the Claimants informed the Tribunal that the Respondent did not agree to their request to move the hearing to London. The Claimants asked that no further arrangements regarding the hearing in Paris be confirmed before they could submit an explanation as to why holding the hearing in Paris would cause them undue hardship. The Claimants explained later that same day that Messrs. Becchetti and De Renzis were unable to travel outside of the United Kingdom in light of the Interpol Red Notices placed on them due to the criminal proceedings in Albania that were addressed in the Provisional Measures phase of this arbitration. As such, the Claimants reaffirmed their request that the hearing be moved from Paris to London.

114. On 28 June 2017, the Claimants submitted an application that the Tribunal, *inter alia*, declare that Gowling WLG and members of Essex Court Chambers were never valid representatives of the Respondent and that all evidence submitted by such counsel be excluded from the record ("Application to Remove Counsel"), together with Exhibits C-662 through C-671 and Legal Authorities CL-237 through CL-239.

115. On 28 June 2017, the Tribunal asked the Respondent to respond to the Claimants' application to move the hearing by 4 July 2017, and to respond to the Application to Remove Counsel by 5 July 2017.

116. On 30 June 2017, the Respondent requested an extension until 12 July 2017 to file its response the Application to Remove Counsel. On 3 July 2017, the Tribunal granted the Respondent until 10 July 2017. On 4 July 2017, the Respondent requested a short extension to submit its comments on the hearing venue. The Tribunal granted the extension.

117. On 5 July 2017, the Claimants submitted Exhibits C-672 through C-675 in support of the Application to Remove Counsel.

118. On 5 July 2017, the Respondent asked the Tribunal to reject the Claimants' application to change the venue of the hearing.

119. On 7 July 2017, the Respondent submitted its Reply on Jurisdiction ("Reply on Jurisdiction") together with Exhibits R-099 through R-113 and Legal Authorities RL-102 through RL-131.

120. On 9 July 2017, the Tribunal issued Procedural Order No. 6 ("PO 6") in which it requested that the Respondent confirm by 14 July 2017 that it would not seek the arrests of Messrs. Becchetti and De Renzis should they travel to Paris to attend the hearing.

121. On 10 July 2017, the Respondent requested an extension until 12 July 2017 to file its comments on the Application to Remove Counsel. The Tribunal granted the requested extension. On 12 July 2017, the Respondent requested a further one-day extension. On 13 July 2017, the Tribunal informed the parties that it expected a response from the Respondent that week.

122. On 14 July 2017, the Respondent submitted its response to the Application for Removal of Counsel ("Response on Removal of Counsel"), together with Exhibits R-114 through R-117.

123. That same day, the Respondent separately noted that, as previously confirmed, there were no outstanding Interpol Red Notices against Messrs. Becchetti and De Renzis; however, for the sake of efficiency, it had decided to agree to a change of venue from Paris to London.

124. On 14 July 2017, the Claimants requested leave to submit reply comments on the Response on Removal of Counsel. On 15 July 2017, the Tribunal granted the Claimants leave to submit their comments by 18 July 2017.

125. On 18 July 2017, the Tribunal: (i) confirmed the hearing venue would be moved to London; and (ii) admitted Claimants' Exhibit C-662 into the record.

126. On 18 July 2017, the Claimants submitted further comments regarding the disqualification of the Respondent's counsel ("Reply on Removal of Counsel").

127. On 19 July 2017, the Tribunal invited the Respondent to submit any response to the Reply on Removal of Counsel by 25 July 2017. On 25 July 2017, the Respondent requested a one-day extension to make its submission. That same day, the Tribunal granted the requested extension.

128. On 26 July 2017, the Respondent submitted comments on the Reply on Removal of Counsel.

129. On 1 August 2017, the Tribunal issued Procedural Order No. 7 ("PO 7"), dismissing the Application to Remove Counsel.

130. On 4 August 2017, the Respondent requested an extension to file its Rejoinder on the Merits, due that day, until 6 August 2017. The Tribunal granted the extension.

131. On 4 August 2017, the Claimants asked the Tribunal to consider that the Respondent's repeated delays in the filing of the Rejoinder on the Merits highly prejudiced the Claimants, and reserved their rights to raise the issue in an application for costs.

132. On 4 August 2017, the Claimants filed their Rejoinder on Jurisdiction ("Rejoinder on Jurisdiction"), together with Exhibits C-682 through C-687 and Legal Authorities CL-240 through CL-263.

133. On 6 August 2017, the Respondent requested a further one-day extension to file its Rejoinder on Jurisdiction. That same day, the Tribunal allowed the extension.

134. On 7 August 2017, the Respondent filed its Rejoinder on the Merits ("Rejoinder on the Merits") together with Exhibits R-118 through R-220, Legal Authorities RL-132 through RL-138, and the following expert reports:

    a. Second Expert Report of Gervase MacGregor dated 4 August 2017;

    b. Second Expert Report of Petrit Malaj dated 4 August 2017;

    c. Expert Report of Paolo Marino dated 4 August 2017; and

    d. Expert Report of Luis Borrell dated 4 August 2017.

135. On 8 August 2017, the Tribunal held a pre-hearing telephone conference with the parties.

136. On 8 August 2017, the Claimants requested leave from the Tribunal to submit new evidence into the record. That same day, the Tribunal asked the Respondent to submit any objections to this request by 14 August 2017.

137. On 12 August 2017, the Claimants: (i) stated that the Respondent's expert report of Mr. Paolo Marino should not be submitted into the record due to a conflict of interest; and (ii) requested that references in the Rejoinder on the Merits to the Rejoinder on Jurisdiction be struck from the Respondent's submission, as the two Rejoinders were scheduled to be submitted simultaneously. On 14 August 2017, the Tribunal invited the Respondent to respond by 17 August 2017.

138. On 14 August 2017, the Respondent objected to the Claimants' 8 August 2017 request to submit new evidence into the record.

139. On 15 August 2017, the Tribunal admitted the Claimants' documents of 8 August 2017 into the record without prejudice to the Respondent's right to raise further objections.

140. On 15 August 2017, the Respondent submitted the Expert Report of Arben Rakipi dated 15 August 2017 in support of the Rejoinder on the Merits.

141. On 16 August 2017, the Claimants made an application to submit new evidence into the record and asked the Tribunal to compel the Respondent to produce documents relied on by their experts, including translations where necessary, and submitted Legal Authority CL-264. On 17 August 2017, the Tribunal invited the Respondent to comment on the Claimants' application by 21 August 2017.

142. On 17 August 2017, the Respondent requested a one-day extension to respond to the Claimants' 12 August 2017 letter. The Tribunal granted the extension. On 18 August 2017, the Respondent asked the Tribunal to reject both of the Claimants' 12 August 2017 requests.

143. On 21 August 2017, the Tribunal issued Procedural Order No. 8 ("PO 8"), concerning the organisation of the hearing, and Procedural Order No. 9 ("PO 9"), addressing the Claimants' 12 August requests. In PO 9, the Tribunal decided: (i) to provisionally admit Mr. Paolo Marino's expert report, while inviting the Claimants' to make a brief argument at the hearing on why it should be excluded; and (ii) to strike references to the Rejoinder on Jurisdiction from the Rejoinder on the Merits. The Respondent submitted a new version of the Rejoinder on the Merits on 28 August 2017.

144. On 21 August 2017, the Respondent asked the Tribunal to dismiss the Claimants' 16 August 2017 application.

145. On 22 August 2017, the Tribunal issued Procedural Order No. 10 ("PO 10"), denying the Claimants' 16 August 2017 application to submit new documents.

146. On 23 August 2017, the Claimants commented on the Respondent's document production. That same day, the Tribunal stated that it "expect[ed] the Respondent to produce the documents it has undertaken to provide," with outstanding matters to be addressed at the hearing.

147. On 25 August 2017, the Claimants applied to the Tribunal for an extension to submit the points of disagreement of Professor Garribba. On 26 August 2017, the Tribunal granted an extension until 5 September 2017. On 5 September 2017, this was submitted.

148. On 1 September 2017, the Claimants submitted their points of disagreement, excluding those of Professor Garribba.

149. A hearing on jurisdiction and the merits was held in London from 4 through 14 September 2017 (the "Hearing"). During the Hearing, the parties submitted Exhibits C-688 through C-693, CH-001 through CH-002, CL-265 and R-221. The following persons were present at the Hearing:

Tribunal:

Dr. Michael Pryles, AO PBM	President
Dr. Charles Poncet	Arbitrator
Mr. Ian Glick, QC	Arbitrator

ICSID Secretariat:

Mr. Francisco Abriani	Secretary of the Tribunal

Assistant of the Tribunal

Mr. Tim Maxwell	Assistant of the Tribunal

For the Claimants:

Counsel:

Mr. Philippe Pinsolle	Quinn Emanuel Urquhart & Sullivan LLP
Dr. Tai-Heng Cheng	Quinn Emanuel Urquhart & Sullivan LLP
Mr. Alexander Leventhal	Quinn Emanuel Urquhart & Sullivan LLP
Mr. Marc Reifsnyder	Quinn Emanuel Urquhart & Sullivan LLP
Mr. Marco Garofalo	Quinn Emanuel Urquhart & Sullivan LLP
Mr. David W. Rivkin	Debevoise & Plimpton LLP
Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Mr. Romain Zamour	Debevoise & Plimpton LLP

Mr. Shaun A. Palmer	Debevoise & Plimpton LLP
Mr. Alexandre de Fontmichel	
Prof. Andrea Saccucci	Saccucci & Partners
Support Personnel:	
Ms. Mali Torres	Debevoise & Plimpton LLP
Parties:	
Mr. Francesco Becchetti	Claimant 3
Mr. Tim Fritz	Costruzioni S.r.l.
Ms. Marzia Amiconi	Costruzioni S.r.l.

For the Respondent:

Counsel:	
Mr. David Breslin	Gowling WLG (UK) LLP
Mr. Michael Darowski	Gowling WLG (UK) LLP
Ms. Karen O'Connell	Gowling WLG (UK) LLP
Ms. Anna Packwood	Gowling WLG (UK) LLP
Mr. Bertie Rooke	Gowling WLG (UK) LLP
Mr. Myles Wallbank	Gowling WLG (UK) LLP
Mr. Jonathan Zane	Gowling WLG (UK) LLP
Ms. Ellie Ismaili	Gowling WLG (UK) LLP
Mr. Siddarth Dhar	Essex Court Chambers
Mr. Felix Wardle	Essex Court Chambers
Mr. Peter Webster	Essex Court Chambers
Mr. Artan Hajdari	Haxhia & Hajdari Attorneys at Law
Parties:	
Ms. Alma Hicka	State Advocates Office, Republic of Albania
Ms. Brunilda Lilo	State Advocates Office, Republic of Albania

Court Reporter:

Mr. Trevor McGowan	English-language court reporter

Interpreters:

Mr. Genc Lemani	English-Albanian interpretation
Mr. Ragip Luta	English-Albanian interpretation
Ms. Elvana Moore	English-Albanian interpretation
Ms. Delfina Genchi	English-Italian interpretation
Ms. Daniela Ascoli	English-Italian interpretation
Ms. Monica Robiglio	English-Italian interpretation

Silent Observer

Ms. Caitlin Moustaka	Michael Pryles Law Firm

150. On 4 September 2017, the Tribunal reminded the parties that they were asked to produce a list of *dramatis personae* and a chronology, and invited them to produce these lists as soon as possible. The parties submitted them that day.

151. During the Hearing, the following persons were examined:

On behalf of the Claimants:

Witnesses:

Mr. Shpëtim Arbana	
Mr. Francesco Becchetti	
Ms. Endirë Bushati	
Ms. Sonila Meço	

Experts:

Prof. Sergio Garribba	
Mr. Brent C. Kaczmarek	Navigant
Mr. Alberto Pasquale	
Mr. Arben Qeleshi	
Mr. Paul Rathbone	CEG
Mr. Kiran P. Sequeira	
Ms. Enyal Shuke	Shuke Law

On behalf of the Respondent:

Experts:

Mr. Lluís Borrell	Analysys Mason Limited
Mr. Paolo Marino	Pöyry Management Consulting
Mr. Gervase MacGregor	BDO LLP
Mr. Petrit Malaj	BDO LLP
Mr. Andrew Maclay	BDO LLP
Mr. Matthew McDevitt	BDO LLP
Mr. Jason Macdoombe	BDO LLP
Prof. Arben Rapiki	Albanian School of Magistrates, Tirana, Albania

152. On 11 October 2017, the Claimants requested an extension until 20 October 2017 to file their cost submissions. The Tribunal granted the extension.

153. The parties filed their submissions on costs on 20 October 2017 (respectively, "Claimants' Costs Submissions" and "Respondent's Costs Submissions").

154. On 31 October 2017, the Respondent submitted an amended statement of costs ("Respondent's Amended Costs Submissions").

155. On 17 November 2017, the Claimants informed the Tribunal of certain developments on the Kalivaç Project. On 19 November 2017, the Tribunal invited the Respondent to reply by 27 November 2017 and reminded the parties that they were not to make submissions without having been granted leave of the Tribunal. On 27 November 2017, the Respondent confirmed it had no comments on the Claimants' letter.

156. On 7 December 2018, pursuant to the parties' agreement at the Hearing that the Tribunal could consult the experts directly, the Tribunal sent a letter to the parties' quantum experts, Mr. Rathbone and Mr. MacGregor, requesting them to calculate damages for the Claimants based on numerous valuations of Agonset.

157. On 8 December 2018, the parties were notified of the Tribunal's correspondence with the experts and advised that they would be invited to comment on the experts' responses. However, such responses would be confined to the experts' calculations and the parties were not to comment on the question of valuation already fully addressed by the parties at the Hearing.

158. On 18 December 2018, the Tribunal wrote to the parties notifying the Respondent that, pursuant to ICSID Arbitration Rule 47, the Award would need to contain the decision on costs. The Respondent was invited to make an application for permission to make a further submission on costs as, in the Respondent's Cost Submission, the Respondent had purported to reserve its position to make further submissions on costs depending on the precise reasoning of the Award.

159. On 21 December 2018, the Respondent wrote to the Tribunal expressing concern with the fact that the Tribunal had not engaged in further discussion with the experts regarding the valuation of Agonset.it and Agonset Albania before requesting a calculation of damages.

160. On 27 December 2018, the Tribunal wrote to the parties advising that the valuation of Agonset formed part of the parties' submissions and had been fully articulated at the Hearing and in voluminous expert evidence and if the Tribunal decided to discuss valuation assumptions further with the experts the parties would be notified. Until and unless that happened, the Tribunal directed that the parties not make unsolicited submissions.

161. On 31 December 2018, the Respondent applied for leave to make further submissions on costs ("Application for Further Costs Submissions"). On 3 January 2019, the Tribunal wrote to the parties inviting the Claimants to confirm whether they consented to the Application for Further Costs Submissions by 9 January 2019.

162. On 3 January 2019, the parties' quantum experts respectively submitted their views on the calculation of damages as requested by the Tribunal.

163. On 4 January 2019, the Tribunal wrote to the parties asking them to make any comments on the calculations submitted by the quantum experts by 11 January 2019. The parties were reminded that they were only permitted to comment on the calculations and not on the underlying assumptions which were fully debated at the Hearing and in the parties' memorials.

164. On 9 January 2019, the Claimants objected to the Application for Further Costs Submissions on the basis that the Respondent had already been given the opportunity to make its costs submission in accordance with Article 6.1 of PO 8.

165. On 11 January 2019, the Tribunal ordered that the Respondent could make a further submission on costs by 17 January 2019 and the Claimants could make a reply submission by 23 January 2019.

166. On 11 January 2019, the Respondent confirmed it had no comments on the experts' calculations but reiterated its concerns regarding the valuation assumptions and reserved its rights with respect to same.

167. That same day, the Claimants confirmed they had no comments on the experts' calculations but asked that the Award reflect the date of its issuance with respect to damages.

168. On 17 January 2019, the Respondents filed its further submissions on costs ("Respondent's Further Costs Submissions").

169. On 23 January 2019, the Claimants filed their reply on the Respondent's Further Costs Submissions ("Claimants' Reply on Further Costs Submissions").

170. The proceeding was closed on 25 March 2019.

IV. FACTUAL BACKGROUND

A. THE KALIVAÇ CONCESSION AGREEMENT

171. In 1992, the Albanian communist party lost national elections and left power.[31] In 1993 and 1994, Francesco Becchetti met with various Albanian officials, including the Prime Minister and Foreign Minister at the time and administrators of the state electrical company, Korporata Elektroenergjitike Shqiptare ("KESH") to discuss the possibility of building hydroelectric plants in Albania with foreign investment.[32]

172. In order to attract foreign investment in infrastructure, in 1995 the Parliament passed a law permitting the government to grant concessions to private companies.[33] In the same year, Francesco Becchetti created BEG to carry out and operate large energy projects.[34]

173. On 16 May 1995, BEG and KESH signed a cooperation agreement[35] allowing BEG to conduct studies along the Vjosa River and gain access to the technical data prepared by the Albanian Government.[36] Those studies and data indicated that a site in Kalivaç, in Krahes, would be optimal for a hydroelectric power plant.[37] A number of other sites on the river were identified as being suitable for such power plants to be built.[38]

[31] First Becchetti Statement, para. 15.

[32] *Ibid*, paras. 24 to 27.

[33] First Becchetti Statement, para. 15; Law No. 7973 on Concession and Participation of Private Companies in Public Service and Infrastructure, 26 July 1995 (CL-32).

[34] First Becchetti Statement, para. 10.

[35] Cooperation Agreement between BEG and KESH, 16 May 1995 (C-178).

[36] First Becchetti Statement, para. 29.

[37] *Ibid*, para. 29.

[38] *Ibid*, para. 29.

174. On 28 September 1995, BEG submitted its prefeasibility study to the Authorised State Body ("ASB"),[39] and in November and December began conducting feasibility studies on site at Kalivaç.[40]

175. On 27 February 1996, BEG submitted its concession request to build a hydroelectric power plant at Kalivaç,[41] and on 8 April 1996, KESH provided a favourable recommendation to the Ministry of Minerals and Energy Resources.[42] On 3 June 1996, the Council of Ministers approved the request and invited BEG to commence negotiations.[43] The Claimants also assert that during these discussions the Albanian Government and KESH offered BEG a right of first negotiation concerning other hydroelectric projects on the Vjosa River.[44]

(1) Terms of the original Concession Agreement

176. On 24 May 1997, after nearly a year of negotiations, BEG and the ASB signed the Concession Agreement, "for the financing, engineering, construction, management and [transfer] at the Concession expiring date, of a Hydro-Power Plant in Albania according to a B.O.T. (Build Operate and Transfer) basis."[45] It contained the following key terms.

177. The Concession Period would run for 30 years from the beginning of the works,[46] subject to any extension for *force majeure* events,[47] or delay in the ASB performing its obligations and duties where it is at fault.[48] During this period, starting from the Plant start up, BEG

[39] Prefeasibility Study, Plan for the Hydroelectric Development for the Auction of the Vjosa River, August 1995 (C-179). The ASB is constituted by two Ministries, originally the ministry of Public Works, Land Planning and Tourism and the Ministry of Mining and Energy Resources, and subsequently the Ministry of Public Works, Transportation and Telecommunications and the Ministry of Economy, Trade and Energy: Counter-Memorial and Objections to Jurisdiction, para. 150, footnote 88.

[40] First Becchetti Statement, para. 30.

[41] BEG, "BOT" Concession Request for the Kalivaç Hydroelectric Plant on the Vjosa River, 26 February 1996 (C-180).

[42] First Becchetti Statement, paras. 31 to 32.

[43] Invitation from the Authorized State Body to BEG for negotiation of the Concession Agreement, 3 June 1996 (C-182).

[44] First Becchetti Statement, para. 31; Memorial, paras. 55, 67, 85.

[45] Concession Agreement, p. 2 (C-014).

[46] *Ibid*, Article 8. Works were recorded as commencing on 30 November 2003, meaning the concession period was scheduled to finish on 30 November 2033, as discussed further in para. 203 below.

[47] *Ibid*, Article 29.

[48] *Ibid*, Article 9.

would pay to Albania a concession fee of 10% of the Kalivaç Plant's annual production.[49] Otherwise, BEG was to be free to sell the plant's electricity on the open market (including the export market), and so during that 30-year period make a return on its investment.[50] At the end of the 30-year period BEG was obliged to turn the Plant over to Albania fully operational, with sufficient spare parts for a further 5 years of operation.[51]

178. The Concession Agreement imposed the following key obligations on BEG.

a. BEG warranted that it had the necessary technical, financial and managerial capabilities to perform the contract to international standards.[52]

b. BEG undertook to arrange all necessary financing and do everything necessary to build and manage the plant according to the specifications set out in the Concession Agreement[53] and to manage the plant when completed.[54]

c. BEG undertook to begin the works within 10 months of Parliamentary ratification; to complete design within 12 months of the yard opening; and to complete the plant within 48 months of the beginning of the works[55] (subject to extensions for delay in the ASB performing its obligations and duties under the Concession Agreement where the ASB is at fault[56] and *force majeure*, discussed further below).

179. The Concession Agreement provided that BEG was entitled to:

a. seek a "penalty equal to 80% of the Plant turnkey investment *ready for the start up*," fixed at USD 100,000,000, if Albanian authorities were to expropriate or confiscate the plant;[57]

[49] *Ibid*, Article 9.
[50] *Ibid*, Article 21, and see Memorial, para. 75; Counter-Memorial, paras. 157 to 158.
[51] *Ibid*, Article 8.
[52] *Ibid*, Preamble.
[53] *Ibid*, Articles 5 and 7.
[54] *Ibid*, Article 20.
[55] *Ibid*, Article 12.
[56] *Ibid*, Article 9.
[57] *Ibid*, Article 30.

b. seek to have privately held land necessary for the construction of the plant expropriated under the Albanian law on expropriation in force as at the signing of the Concession Agreement with the ASB's assistance and at BEG's expense;[58]

c. export all of the energy to which it was entitled under the Concession Agreement;[59] and

d. transfer its profits freely.[60]

180. The ASB provided the following exemptions and guarantees under the Concession Agreement.[61]

a. Exemption from customs duties on BEG's import and export of goods, a provision which would remain in force even if Albanian law changed.

b. Exemption from tax on profits for the first two years of operation (subject to extension for delay in the ASB performing its obligations and duties under the Concession Agreement where the ASB is at fault[62]), following which the tax rate would be frozen at 15%.

c. Exemption from VAT.

d. A guarantee that VAT would be refunded within 30 days of BEG's request for the refund.

181. The ASB also:

[58] *Ibid*, Article 10.
[59] *Ibid*, Article 21.
[60] *Ibid*, Article 26.
[61] *Ibid*, Article 25.
[62] *Ibid*, Article 9.

a. granted "stabilisation", i.e. that subsequent laws "will not modify, in any way, the duties accepted by the parties, as well as the content of the present Concession Agreement";[63]

b. agreed to provide any necessary assistance with any organisation and Albanian authority to allow BEG to undertake the project;[64] and

c. agreed to declare the plant a priority structure, letting it take precedence in the utilisation of infrastructure and retrieving materials necessary for works.[65]

182. The Concession Agreement also provided for adjustments to the schedule for completion of the plant in the event of *force majeure*, described as follows.[66]

> *To make an example, not limitative, are considered as Force Majeure events as natural catastrophes such as floods and earthquakes, exceptional political events such as wars and revolutions, and third Parties' interventions having a law force.*
>
> *In case that during the realization of the duties Force Majeure events occur, the Parties will have no right to ask each other refunds for possible delays or non-fulfilment in due time.*
>
> *As far as the scheduled time is concerned according to previ[ou]s art. 12, will be consequently modified in accordance to the needs deriving from the stop due to the Force Majeure event.*
>
> *The stop period and the postponing of the foreseen dates for mutual duties' fulfilment will have to be confirmed by integrative minute books to the present Concession Agreement agreed by the Parties.*

183. The Concession Agreement envisaged that an "Operating Company" would be established as a local subsidiary of the Concessionaire through which it would perform the Concession. The Concession Agreement promised that that Operating Company would, upon the appropriate legislation being executed, itself enjoy various tax exemptions under Albanian

[63] *Ibid*, Article 24.

[64] *Ibid*, Article 6.

[65] *Ibid*, Article 6.

[66] *Ibid*, Article 29.

law.[67] As noted, KGE was used by BEG as the Operating Company for the purposes of the project. Originally, however, Albaniabeg was the Operating Company. The legislation necessary to confer those exemptions on the Operating Company was passed in 2000.[68] It provided the Operating Company with statutory rights enforceable under Albanian law.

184. Article 14 of the Concession Agreement provided for termination of the agreement in the following terms.

> *The Authorized State Organ, according to art. 31, will have the right to start an annulment procedure of the Concession - through a previous warning to remove, by an adequate time, the irregularities that came out and in case the Concessionaire do not conform - beside a serious non-fulfilment of the duties established by the present Concession Agreement, also when the Concessionaire, due to neglicence* [sic] *and inexperience, compromises - in any phase - the running, the execution and the good results of the works themselves.*
>
> *Should the situations mentioned in the previous comma occur, the Authorized State Organ will previously ask the Concessionaire to show within 30 days its justifications, and, in case it decides not to accept them, it will be entitled to start the procedure for the rescission, informing the Concessionaire. If for any reason imputable to the Concessionaire, after 15 months from the signing of the present concession Agreement, the Concessionaire do not begin the works, the Authorized State Organ can declare annulled the Concession.*
>
> *Should the Authorized State Organ be late in the fulfilment of its duties, the Concessionaire may ask to annul the contract by adequate petition, and should it be accepted, the Concessionaire has right to the refund of the expenses supported; should the petition not be accepted, but being the Authorized State Organ still late, the Concessionaire is allowed to ask according to art. 31, for the annulment of the contract and the damage refund, by a previous petition containing the act of the Authorized State Organ being put in arrears.*

[67] *Ibid,* Article 25.

[68] Law No. 8708 on Some Exemptions and Granting Incentives for the Construction of Kalivaç Hydropower Plant on "BOT" Concession, 1 December 2000 (C-192).

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

(2) Implementation of the Concession Agreement and further Vjosa River projects

185. On 24 May 1997, on the day that BEG and the ASB executed the Concession Agreement, the Council of Ministers approved the agreement with Decision No. 222.[69] That decision also decided:

> *4. To authorize B.E.G. SpA to study, at its own expense, the possibility of building hydropower plants on the lower part of the River Vjosa, after the Kalivaç hydropower plant.*
>
> *If the study supports the construction of another hydropower plant with BOT concession, and if the Government grants its approval, B.E.G. SpA has the right to become the first negotiator.*

186. Decision No. 222 brought the Concession Agreement into force;[70] however, the provisions in the agreement concerning the duration of the concession period,[71] facilitation of expropriations,[72] stabilisation,[73] customs and fiscal exemptions,[74] and expropriation of the plant[75] required Parliamentary approval.[76] If Parliament failed to approve these provisions within 60 days of the signing of the Concession Agreement, BEG could either rescind the Concession Agreement or pursue the Concession Agreement without these provisions.[77]

[69] Decision No. 222 on the Approval of the Agreement for the Kalivaç Hydropower Plant with BOT Concession (C-183).

[70] Concession Agreement, Article 34 (C-014).

[71] *Ibid*, Article 8.

[72] *Ibid*, Article 10.

[73] *Ibid*, Article 24.

[74] *Ibid*, Article 25.

[75] *Ibid*, Article 30.

[76] *Ibid*, Article 34.

[77] *Ibid*.

187. The Parliament did not approve the relevant provisions until 2000, three years later.[78] The delay was due to political turmoil in Albania.[79] BEG did not exercise its right to rescind, nor its right to continue with the Concession Agreement absent the provisions that required parliamentary approval. It decided to wait, on the basis of assurances received from Albanian officials that parliamentary approval would be provided once the political situation was calmer.[80]

188. Towards the end of this period, in September 1999, BEG submitted concession requests for three other projects along the Vjosa River, at Dragot, Kaludh, and Karbunare.[81] In January 2000, the Albanian Institute of Hydrotechnical Studies and Planning carried out an analysis of the studies BEG had submitted on these proposed projects,[82] which recommended the concessions be approved.

189. When the political situation in Albania stabilised, in 2000, BEG and the then-relevant Albanian ministries[83] signed the First Addendum to the Concession Agreement.[84] This addendum removed the requirement that parliamentary approval occur within 60 days from the signing of the Concession Agreement and amended Article 13 of the Concession Agreement to allow BEG to build and operate the plant through a subsidiary company. The Parliament then approved the relevant provisions of the Concession Agreement in December of 2000.[85]

[78] Law No. 8708 on Some Exemptions and Granting Incentives for the Construction of Kalivaç Hydropower Plant on "BOT" Concession, 1 December 2000 (C-192).

[79] First Becchetti Statement, para. 42.

[80] First Becchetti Statement, para. 43.

[81] "BOT" Concession Application for the Dragot Hydro Power Plant on the River, 6 September 1999 (C-184); "BOT" Concession Application for the Karbunare Hydro Power Plant on the River, 6 September 1999 (C-185); "BOT" Concession Application for the Kaludh Hydro Power Plant on the River, 6 September 1999 (C-186).

[82] Albanian Ministry of Public Works, Institute of Hydrotechnical Studies and Planning, Analysis of Studies on the Dragot, Kaludh, and Karbunara Hydro Plants, January 2000 (C-189).

[83] The Ministry of Public Economy and Privatization and the Ministry of Public Works, which also became the ASB by the addendum.

[84] Which addendum entered into force as a decision of the Council of Ministers to supplement Decision 222 with Decision No. 590 (C-191).

[85] Law No. 8708 on Some Exemptions and Granting Incentives for the Construction of Kalivaç Hydropower Plant on "BOT" Concession, 1 December 2000 (C-192).

190. BEG had applied for the three further concessions on the Vjosa River with its then-partner Enel SpA ("Enel"), the Italian state energy company. BEG and Enel signed a "Preliminary Cooperation Agreement" dated 12 March 1999 and a "Final Cooperation Agreement" dated 2 February 2000.[86] Under those agreements, BEG was to contribute the Concession to a to-be-formed joint venture company that would develop the further projects.[87]

191. Enel decided not to fund the project, however, and this led to two disputes, one between BEG and Enel, and another dispute between Albaniabeg (the BEG subsidiary that was the then Operating Company under the Concession Agreement) and Enel. Both disputes were arbitrated. BEG was unsuccessful,[88] but Albaniabeg obtained an award for €25,188,500 in respect of lost revenue in 2004 and damages pursuant to a formula to compensate Albaniabeg for lost revenues that would have arisen from the sale of electricity in respect of 2005 to 2011.[89] Albaniabeg is seeking to enforce that judgment on the basis that it is worth €433,091,870.[90] In that arbitration, Albaniabeg asserted that but for Enel's wrongs the Kalivaç Project would have been completed in 2003.[91]

192. Construction started on the plant at Kalivaç on 30 November 2003.[92] The works were carried out by Albaniabeg until 2007, when a new entity was formed under the joint venture agreement between BEG and its new partner, Deutsche Bank, discussed in section C below.

[86] First Becchetti Statement, para. 47; Letter from BEG and Enelpower to the Albanian Ministry of the Public Economy and Privatizations, 2 February 2000 (C-190); BEG SpA v. Enelpower SpA (arbitral award), 25 November 2002, p. 5 (R-030).

[87] Memorial, paras. 92 and 96; Counter-Memorial, para. 184.

[88] *BEG SpA v. Enelpower SpA* (arbitral award), 25 November 2002 (R-030).

[89] *Albaniabeg Ambient Sh.p.k. v. ENEL S.p.A. & Anor* (Decision No. 2251 of the Tirana District Court), 24 March 2009 (R-031). The formula is at p. 23.

[90] *ABA Sh.p.k v. ENEL S.p.A and Enelpower S.p.A* [2016] IEHC 139 (Ireland High Court judgment), 8 March 2016 (R-040); *ABA Sh.p.k v. ENEL S.p.A and Enelpower S.p.A* (New York Supreme Court judgment), 15 October 2014 (R-036); *ABA Sh.p.k v. ENEL S.p.A and Enelpower S.p.A* (New York judgment), 10 March 2016 (R-041).

[91] *Albaniabeg Ambient Sh.p.k. v. ENEL S.p.A. & Anor* (Decision No. 2251 of the Tirana District Court), 24 March 2009, p. 20 (R-031).

[92] As acknowledged and agreed by the parties in the Second Addendum to the Concession Agreement, discussed further below.

B. ALBANIABEG'S WASTE MANAGEMENT CONCESSION

193. On 26 May 2005, Albaniabeg signed a concession agreement for the construction and operation of a Waste Management Concession in Albania.[93] Albaniabeg had been chosen despite a request made for the same concession by Koço Kokëdhima, an Albanian businessman who became a member of Parliament in 2013 and who, the Claimants assert, has ties to then Tirana Mayor (and later Prime Minister) Edi Rama.[94]

194. Shortly after this concession agreement was signed, Shekulli, a newspaper owned by Mr. Kokëdhima, purported to publish details of the concession agreement.[95] The Claimants assert that this report was false.[96] Mr. Kokëdhima also made public statements against Albaniabeg and disparaged the Italian nationality of the company's shareholders, statements which Albanian and Italian courts ultimately found to be defamatory.[97]

195. Erion Veliaj, the leader of a reform movement, became involved and organized protests against the project, along with other politicians, including Edi Rama.[98] These protests were in part also directed against the Prime Minister at the time, Fatos Nano. Prime Minister Nano was later succeeded as the leader of the Socialist Party by Edi Rama. The Claimant also asserts that Mr. Veliaj is considered Prime Minister Rama's protégé. At the time of the final hearing, Mr. Veliaj was Mayor of Tirana.[99]

196. Successive Albanian Governments postponed, but did not cancel, the concession agreement for the waste management project because of the protests. When Prime Minister Rama came to power he passed a ban on waste imports, at which point the Claimants assert that the project became impossible.[100]

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[93] First Becchetti Statement, para. 51.

[94] First Becchetti Statement, para. 51; Memorial, para. 107.

[95] First Becchetti Statement, para. 51.

[96] First Becchetti Statement, para. 51; Memorial, para. 106.

[97] Decision of the First Civil Chamber of Rome, 31 May 2012 (C-257); Decision of the Supreme Court of Albania, 1 March 2012 (C-255).

[98] First Becchetti Statement, para. 51; Memorial, paras. 106 to 108.

[99] *Ibid*.

[100] First Becchetti Statement, para. 51.

C. DEUTSCHE BANK JOINT VENTURE AND THE SECOND ADDENDUM

197. On 16 January 2007, BEG and Deutsche Bank AG signed a joint venture agreement for the Kalivaç Project ("JVA").[101] By the JVA, BEG undertook to incorporate a joint venture company to which it was to transfer the Concession,[102] and Hydro was formed for this purpose.[103] Because Deutsche Bank would only be involved in the Kalivaç Project and not the waste management facility, a new joint venture company, KGE, was ultimately created from Albaniabeg to construct and operate the Project.[104] KGE was and is 100% owned by Hydro. Under the JVA, BEG would own a 55% share in Hydro, and Deutsche Bank would own a 45% share.[105]

198. Also under the JVA, Deutsche Bank undertook to:[106]

a. make a capital contribution to Hydro and to provide a shareholders' loan; and

b. use its best efforts to find in the market project finance lenders and also use its commercial best efforts to find a suitable purchaser of energy produced by the Project, if that was a requirement of finance.

199. Finally, BEG undertook to continue performing or procuring other companies to perform the construction works of the Project until "Financial Close" and to use its commercial best efforts to identify an Engineering, Procurement and Construction Contractor ("EPC Contractor") in respect of the Project.[107]

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[101] *Ibid*, para. 50; *Deutsche Bank AG v. BEG S.p.A* (ICC Case No.17496/JHN/GFG), 18 April 2013, para. 25 ("1st ICC Award") (R-033); Redacted Joint Venture Agreement between BEG S.p.A. and Deutsche Bank AG, 16 January 2007 (R-0101).

[102] 1st ICC Award, para. 25 (R-033).

[103] Hydro was formed in 27 June 2007 (C-002).

[104] First Becchetti Statement, para. 52.

[105] *Ibid*.

[106] 1st ICC Award, para. 26 (R-033).

[107] 1st ICC Award, para. 27 (R-033).

200. Partly to facilitate the JVA between BEG and Deutsche Bank, a Second Addendum to the Concession Agreement was then agreed between BEG and the ASB[108] on 8 May 2007.[109] That addendum made the following key changes to the Concession Agreement.

(1) Terms of the Second Addendum

201. Article 13 (Concession Limit) had originally provided that the Concessionaire, BEG, was not entitled to transfer all or part of the Concession. Under the amended provision, by Article 13.1, BEG undertook to procure within 180 days of approval of the Second Addendum that the Concession would be held by a company ("Newco") controlled by BEG and in which Deutsche Bank would have at least 45% share capital. Newco was to have a minimum corporate capital of €15 million. Article 13.2 provided that once that transaction was completed, the Concessionaire was not to transfer the Concession Agreement to any third party. Activities relating to the construction and management of the Plant were to be carried out by the Concessionaire through the Operating Company. Article 13.3 provided that, before the Commercial Operation Date, Deutsche Bank's or BEG's equity interest should not be transferred to any third party without prior written consent of the ASB, which was not to be unreasonably withheld.

202. The Second Addendum added to Article 5 (Concessionaire Obligations) an obligation on the Concessionaire to provide the ASB, within 180 days of the date of effectiveness of the Second Addendum, with evidence of "the availability of the financial coverage for the Implementation of the Project, it being understood and agreed between the parties that non-fulfilment of this obligation will be considered as a serious breach of the Concession Agreement."

203. Article 8 (Concession Period) was amended to record that works had begun on 30 November 2003, and so, as noted, the concession period would come to an end[110] on 30 November 2033. The contractual deadline for completion became 16 July 2011 (i.e. 36

[108] Then constituted by the Ministry of Public Works, Transportation and Telecommunications and the Ministry of Economy, Trade and Energy.

[109] Second Addendum to the Concession Agreement, 8 May 2007 (C-015); Memorial, paras. 110 to 111; Counter-Memorial, para. 128.

[110] Absent any extension under Articles 9 or 29, as mentioned in paras. 177, 180 and 182 above.

months from the granting of the construction license, rather than the 48 months from the start of works as provided in the original Concession Agreement). Article 14 (Concession Termination) was amended to include provisions for penalties if that date was not met and Article 15 was amended to oblige the Concessionaire to establish a cash deposit up to a total of €4 million in respect of its potential liabilities under those penalties.

204. Article 9 (Concession Fee) was amended to increase the fee payable, from a flat 10% of production for the concession period to 10.5% in the first three years, starting from the Commercial Operation Date of the Plant, reverting to 10% in the balance of the concession period. The ASB had the option of either taking the electricity to which it was entitled or selling that electricity. If the ASB exercised the second option, the Concessionaire was to advance the present value of the expected production to the ASB.

205. Article 14 (Concession Termination) was amended, *inter alia*, to provide as follows.

> *In the event that the Concessionaire does not complete the construction works by the date falling 36 months from the date of obtainment of the construction license:*
>
> *(i) if the delay is attributable to the Concessionaire, the latter shall pay to the Authorised State Body penalties, both in cash and in kind, up to a maximum amount equal to 10% of the Estimated Project Costs; or*
>
> *(ii) if the delay is attributable to the Authorised State Body, the latter shall pay to the Concessionaire penalties, both in cash and in kind, up to a maximum amount equal to 10% of the Estimated Project Costs.*

206. That Article was also amended to provide for how the envisaged penalties were to be calculated.

207. Article 21 (Energy Transmission) was amended to provide that the Concessionaire was entitled to sell its share of the electricity generated "with the aim of obtaining Green Certificates or any equivalent incentives relating to renewable energy production." This change reflected changes in Italian and Albanian law since the Concession Agreement had

been signed. In 1999, Italy passed a decree[111] allowing producers of renewable energy, such as hydroelectric power, to obtain Green Certificates, a financial incentive, for the production of such energy. Albania created a similar incentive in 2000.[112]

208. In 2002, the countries' respective regulators signed a bilateral agreement to allow energy produced in Albania to be eligible for Green Certificates if transported to Italy.[113] In 2006, Italy and Albania signed a second agreement.[114] These agreements allowed energy produced in Albania and imported to Italy to qualify for Green Certificates. The Claimants assert that the availability of Green Certificates would allow the Project to obtain a significant mark-up on any energy it generated and sold.[115]

209. By the new Article 26 (Referring Laws), the Concession Agreement was made subject to Albanian law, save that Article 26 preserved the operation of Law 8708, which provided that "No legal act may infringe the agreement once the concession agreement enters into force."[116]

210. Finally, Annex D to the Second Addendum set out the works performed to date under the Concession Agreement, including detailed schedules of the costs of those works.[117] On the basis of those figures, a value of at least €16,617,000 was ascribed to the completed works in that annex.

[111] Legislative Decree No. 79 (Bersani Decree), 16 March 1999 (CL-034).

[112] Law No. 8679 on Amendments to Law No. 7962, 2 November 2000 (CL-037).

[113] Agreement between Gestore della Rete di Trasmissione Nazionale SpA and the Albanian Electricity Regulatory Authority, 14 January 2002 (CL-043).

[114] Gazzetta Ufficiale no. 177, "Accordo tra il Ministero delle attivita' produttive e il Ministero dell'ambiente e della tutela del territorio della Repubblica italiana e il Ministero dell'economia, del commercio e del-l'energia della Repubblica di Albania," Ministerio dello Sviluppo Economico, Comunicato, 1 August 2006 (CL-053).

[115] See discussion Day 2, T14-T28, Albaniabeg Day 1, pp. 36-37 (Annex A to the Claimants' Application to Exclude Counsel, 28 Jun 2017), Navigant Report 1 (Brent Kaczmarek and Kiran Sequira) Section IX on the value of Green Certificates.

[116] Law No. 8708 on Some Exemptions and Granting Incentives for the Construction of Kalivaç Hydropower Plant on "BOT" Concession, 1 December 2000 (C-192).

[117] Annex D to the Second Addendum (C-017).

(2) Decision No. 363 Approving the Second Addendum

211. On 6 June 2007, the Council of Ministers approved the Second Addendum with Decision No. 363.[118] Decision No. 363 also stated that "Points 2, 4, and 5 of decision No. 222 of May 24th, 1997, of the Council of Ministers, 'On the approval of the "BOT" type concession agreement for the Kalivac hydroelectric power plant', are invalidated." As set out in paragraph 185 above, point 4 had provided for BEG to have a right of first negotiation in certain circumstances.

(3) Expressions of interest in developing other plants

212. Despite this, before and after Decision No. 363 was made, BEG and Deutsche Bank expressed interest in developing further power plants. On 30 May 2007,[119] they wrote to the relevant Albanian officials expressing interest in developing three further plants on the Vjosa River. On 30 July 2007, they wrote to the same officials, reiterating that interest.[120] On 6 August 2007, BEG and Deutsche Bank submitted joint concession requests for three other hydroelectric power plant projects in three further locations.[121]

213. On 17 September 2007, the Minister of Economy, Trade and Energy replied to the 30 May letter sent by BEG and Deutsche Bank, informing them that the Albanian Government was considering the possibility of conducting a complete study of Vjosa River and would respond at the conclusion of that study.[122]

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[118] Decision No. 363 on the Approval of the Changes to the Concession Agreement of BOT Form for the Kalivaç Hydropower Plant between the Authorized State Organ, the Minister of Economy Trade and Energy, and the Minister of Public Works, Transports and Telecommunications and the Concessionaire BEG S.p.A., 6 June 2007 (C-016).

[119] Letter from BEG and Deutsche Bank to the Albanian Minister of Economy, Trade and Energy and the Albanian Minister of Public Works, Transportation and Telecommunications, with copy to the Prime Minister and the General Director of KESH, 30 May 2007 (C-201).

[120] Letter from BEG and Deutsche Bank to the Albanian Minister of Economy, Trade and Energy and the Albanian Minister of Public Works, Transportation and Telecommunications, with copy to the Prime Minister and the General Director of KESH, 30 July 2007 (C-202).

[121] Deutsche Bank presentation, "7 Hydro Power Projects in Albania: 450 MW – 1,787,000,000 KWh/y on the Vjosa river," October 2007, p. 4 (C-206).

[122] Letter from the Minister of Economy, Trade and Energy to BEG, 17 September 2007 (C-204).

214. In October 2007, Deutsche Bank representatives made a presentation to a number of Albanian officials, including then President Sali Berisha, to develop all six of the plants.[123]

D. THE KALIVAÇ PROJECT FROM 2007 TO 2013

(1) Work on the Project

215. Between 2007 and 2013, KGE signed a number of agreements with Energji, the contractor on the Project, to facilitate construction of the plant.[124] Before work ceased on the Project, no later than March 2013,[125] the following works were undertaken:

a. the left and right embankments were prepared to install the dam;

b. excavations were completed, totalling 2,500,000 cubic metres;

c. the aprons were prepared, narrowing the river passage to install the dam; and

d. materials to construct the dam were selected and transported on site.[126]

216. In 2009, a dispute arose between KGE and Energji over payment for works.[127] As a result of this dispute, from November 2009 until May 2012, very little work was undertaken on the project.[128] Work resumed in 2012, and then stopped in March 2013.[129] In June 2014, Hydro decided to cease work on the project permanently.[130]

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[123] Deutsche Bank presentation, "7 Hydro Power Projects in Albania: 450 MW – 1,787,000,000 KWh/y on the Vjosa river", October 2007 (C-206); First Becchetti Statement, para. 58.

[124] Spillway Agreement by and between KGE and Energji, 3 April 2013 (C-270); Bridge CA Agreement by and between KGE and Energji, 20 August 2012 (C-261); Bridge Guado Agreement by and between KGE and Energji, 3 September 2007 (C-203); Tunnel Agreement by and between KGE and Energji, 14 October 2012 (C-263); Right Bank Escarpment Agreement by and between KGE and Energji, 3 September 2012 (C-262); First Becchetti Statement, para. 76.

[125] As accepted by both parties and discussed further below. See 2nd ICC Arbitration, Hearing Transcript, T256 (C-598).

[126] First Becchetti Statement, para. 60.

[127] Becchetti cross-examination, Hearing Day 2, T14.15-T14.20.

[128] *Ibid*, T14.21-T15.10; T27.20-T28.21 referring to 2nd ICC Arbitration, Hearing Transcript, T183-T184 (C-598).

[129] 2nd ICC Arbitration, Hearing Transcript, Day 1, T256:7-11 (R-064).

[130] 2nd ICC Award, 8 January 2018, paras. 326, 339 and 374, in which the tribunal relates that "the Claimant acknowledged in the present proceedings to have permanently abandoned the project in June 2014".

(2) Application for permission to build a submarine cable

217. In order to ensure that energy produced could be transmitted to Italy, BEG was to build a transmission cable between Albania and Italy.[131] Such a cable was an important element of the Claimants' ability to obtain financing for the Project.[132] To this end, Energji commissioned a study from the Italian company Consult.ing SNC, a technical engineering firm, in 2008.[133] On 24 April 2009, Energji submitted a request for approval to the Minister of Economy, Trade and Energy.[134] Energji never received a response.[135]

218. Around the same time, permission was given to three of Energji's competitors to build transmission cables for other projects. In early 2008, Albania approved a transmission cable for Moncada Energy Group.[136] In November 2008, it approved an underwater cable to be built by Enel, which was constructing a coal plant.[137] In 2009, Italy's Marseglia Group obtained approval to build a transmission cable for its renewable energy power plants.[138] None of these companies ultimately carried out their projects.[139]

(3) Funding for the Project and disputes with Deutsche Bank

a. Shareholder loan and political insurance

219. Under the JVA with BEG, Deutsche Bank was obliged to provide a capital contribution to Hydro and to make a shareholder's loan to Hydro.[140] It provided approximately €33 million to the Project, constituted by €13.5 million of equity paid into Hydro (on 2 August 2007),[141]

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[131] First Becchetti Statement, para. 67.

[132] *Ibid*.

[133] *Ibid*, para. 68. The study was completed in December 2008: Consulting SNC Pre-feasibility study for Italy-Albania Transmission Cable, 18 December 2008 (C-219).

[134] Energji Request to Build Italy-Albania Transmission Cable, 24 April 2009, Prot. No. 24/09 (C-227).

[135] First Becchetti Statement, para. 68.

[136] "Albania," *Moncada Energy Group Website*, retrieved on 28 April 2016 (C-421).

[137] "Government Plans Huge Infrastructure Investment in Porto Romano," *Balkan Insight*, 14 July 2014 (C-301).

[138] "Marseglia firm from Italy wins project," *New Europe*, 31 January 2010 (C-238).

[139] First Becchetti Statement, para. 67.

[140] As discussed in paragraphs 197-198 above.

[141] 2nd ICC Award, 8 January 2018, paras. 24, 3628. and 41.

a "Development Premium" of €5 million (also on 2 August 2007)[142] and shareholder loan funding of approximately €14.5 million (from June 2008).[143]

220. Under the JVA, Deutsche Bank was also obliged to use its best endeavours to secure third party financing for the Project, in which it was never successful. This lack of success led to a series of disputes, which are described further below.

221. In 2007, the parties agreed that political risk insurance should be obtained for the Project[144] and negotiations began with the Italian export credit agency, SACE. In August and September 2008, and again in July 2009, SACE indicated that in order to provide cover it would need certain conditions to be satisfied.[145] SACE took the view that these were not satisfied and ultimately refused to provide cover. On 7 March 2011, SACE ended its review of the Project file after having received a threat of legal action from Hydro on 28 January 2011.[146]

b. Disputes with Deutsche Bank

222. In 2008, the relationship between the joint venture parties deteriorated. BEG had taken the view that Deutsche Bank was trying to avoid releasing funds under the shareholder loan, and on 10 October 2008, Hydro obtained a decision from the Court of First Instance of Rome, instructing Deutsche Bank to pay an amount of money corresponding to Hydro's request for a draw down on the loan.[147]

223. In 2010, Hydro brought an arbitration claim under Hydro's articles of association seeking a declaration that Deutsche Bank had assumed an obligation to provide funding to carry out the Kalivaç Project ("1st Rome Arbitration"). It sought specific performance of the alleged funding obligation and damages caused by the breach of that alleged obligation. On 17 November 2011, the Tribunal awarded Hydro €28.9 million, which was said to

[142] *Ibid*.

[143] *Ibid*, paras. 50 to 56. See also Becchetti cross-examination, Hearing Day 2, 34:20-35:2.

[144] *Ibid*, para. 420.

[145] *Ibid*, para. 69 and 71. See also Letter from Deutsche Bank to METE copied to KGE, 14 December 2011 (C-581), in which Deutsche Bank states it had invested more than €34 million in the Project to that date.

[146] *Ibid*, para. 558.

[147] *Ibid*, para. 54.

represent lost profits from at least three years' delay in the Plant becoming operational.[148] That sum was paid by Deutsche Bank.[149] No alternative financing had been obtained by this stage.

224. In response to that claim, Deutsche Bank brought an ICC claim against BEG ("1st ICC Arbitration"). Deutsche Bank's claim "expressed concern that BEG and Mr. Becchetti prevented the successful completion of the required activities to bring the Project to Financial Close".[150] Deutsche Bank alleged that "the relationship with SACE had become very difficult and asserted that this was in part due to Mr. Becchetti's interactions with SACE's representatives".[151] Deutsche Bank sought declarations that:

a. Deutsche Bank's obligation was limited to using its best efforts to find project finance lenders;

b. Deutsche Bank had complied with certain obligations under the JVA and a Shareholders' Agreement; and

c. BEG had breached its general duty under Italian law to act in good faith in the performance of its obligations under the Shareholders' Agreement.

225. In response, BEG alleged that Deutsche Bank had undertaken to finance the Project itself and that BEG had fully complied with its obligations. In a counterclaim, BEG claimed damages for losses said to have been caused by Deutsche Bank's failure to fund the Project. BEG maintained that:

> *the plant would already be in operation or operating within a few months. Had Deutsche Bank procured financing, the Project would have, without any doubt, progressed to the stage of revenue generation. Furthermore, the plant would have been connected to the grid by 31 December 2012.*[152]

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[148] *Hydro S.r.L v. Deutsche Bank AG*, Award, 17 November 2011 ("1st Rome Award"), p. 58 (R-032).
[149] Expert Report of Greig Taylor in *Albania v. Becchetti and De Renzis*, 7 April 2016, para. 4.6 (C-595).
[150] *Deutsche Bank AG v. BEG S.p.A*, ICC Case No.17496/JHN/GFG, 18 April 2013 ("1st ICC Award"), para. 87 (R-033).
[151] *Ibid*.
[152] *Ibid*, para. 176.

226. On 18 April 2013, in the 1st ICC Arbitration, the tribunal held that Deutsche Bank's obligations under the Shareholders' Agreement were limited to using commercial best efforts to find lenders in the market.[153] It also held that Deutsche Bank had fulfilled those obligations, and so dismissed BEG's counterclaim. Further, it held that BEG had breached a provision of the Shareholders' Agreement relating to authority for execution of documents and had also breached its general duty under Italian law to act in good faith in the performance of its obligations under the SHA, given the manner in which it conducted itself regarding the relationship between Deutsche Bank and SACE during the application process before SACE.

227. Although BEG was unsuccessful in its allegations concerning Deutsche Bank's obligations under the Shareholders' Agreement, this does not change the fact that on BEG's case, any delay in the Project between the end of 2009 and 2012 was attributable to lack of finance, and was not caused by any acts or omissions of Albania. Mr. Becchetti's evidence on cross-examination in the 2nd ICC Arbitration was to a similar effect.[154] He accepted that work ceased on 2 November 2009, due to a lack of finance, and did not recommence until May 2012.[155] It being pointed out that, in another related proceeding, the delays in construction of the Kalivaç Project between November 2009 and May 2012 were not attributed to Albania,[156] Mr. Becchetti responded as follows.[157]

> *That is right but there was no reason to say so because it is not Albania that is responsible, it is the financial crisis and especially the financial crisis that Albania was living through and in the international context of the crisis.*

228. In cross-examination in the present proceedings, Mr. Becchetti suggested that Albania contributed to the delay during this period because the difficulties in obtaining finance were exacerbated by Albania's refusal to grant a permit to construct the transmission cable.[158]

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[153] *Ibid*, para. 688.

[154] 2nd ICC Arbitration, Final Hearing, Day 1, 19 December 2016, T188.6-T188.15; T191 (C-598).

[155] 2nd ICC Arbitration, Final Hearing, Day 1, 19 December 2016, T186.18-T191.18 (C-598).

[156] 2nd ICC Arbitration, Final Hearing, Day 1, 19 December 2016, T191.9-T191.12 (C-598).

[157] 2nd ICC Arbitration, Final Hearing, Day 1, 19 December 2016, T191.13-T191.18 (C-598).

[158] Hearing, Day 2, T33.15-T33.20; T38.21-T39.9.

Mr. Becchetti asserted that, even if there were some delays in the construction of the cable, with the permit the project would have been "bankable".[159] This is because, after a delay of one to three years in construction (during which time energy could have been sold into Italy through Greece on the spot market), a financier could rely on 12 to 13 following years of profits from transmission into Italy via the submarine cable. These matters are addressed further in paragraphs 646 to 653 below.

229. In 2013, Hydro brought a further arbitration against Deutsche Bank ("2nd Rome Arbitration"), alleging *inter alia* that Deutsche Bank had breached its obligation to fund the Kalivaç Project and that this had caused Hydro significant losses. Hydro's largest claim concerned its alleged lost opportunity to exploit the Green Certificates regime.[160] Hydro alleged that Deutsche Bank's failure to provide financing meant the Project had not been completed by the cut-off date under the relevant Italian regime, 31 December 2012.

230. Deutsche Bank accepted that the Plant could no longer benefit from Green Certificates, because it had missed the cut-off, but denied that it caused that loss by not providing financing.

231. On 7 August 2013, in the 2nd Rome Arbitration, the tribunal held that that the Project would have been operational by the end of 2012 but for what it held was Deutsche Bank's breach. It ordered Deutsche Bank to pay approximately €396 million, comprised of the following sums (which excluded the amount already awarded in the 1st Rome Arbitration for three years' delay in the plant becoming operational[161]).

    a. €329,292,000 plus interest for "income flows" that Hydro would otherwise have enjoyed relating to the Green Certificates, "calculated until the end of 2008 and then carried forward to 31 December 2012", by reference to the Project's business plan.

[159] Hearing, Day 2, T40.1-T41.4.

[160] As described in paragraphs 439 to 440.

[161] 2nd Rome Award, LVII-LIX (R-035).

b. €15,992,000 in respect of "an additional cash flow" and damage from lost profits calculated by reference to the business plan, and with additional compensation for delay in receipt. The sum awarded was after having given credit for the €28.9 million awarded in respect of this in the First Rome Award.

c. €10,753,000 in respect of the loss of "an additional profit flow that is no longer attainable". This was compensation for delay in the generation of remaining cash flows in respect of the Project.

d. €40,000,000 for damage to Hydro's reputation.[162]

232. In June 2013, Deutsche Bank commenced an ICC Arbitration seeking recovery of any sums which it paid under either the 1st or 2nd Rome Arbitration.

233. In October 2013, the parties reached a settlement under which Deutsche Bank:

a. paid €135 million to Hydro and €10 million to KGE; and

b. transferred its 45% interest in Hydro to BEG, making BEG the sole owner of Hydro.[163]

234. Hydro received its payment on 30 October 2013.[164]

[162] *Hydro S.r.L v. Deutsche Bank AG*, Award, 7 August 2013 ("2nd Rome Award"), pp. LXV-LXVII (R-035).
[163] Expert Report of Greig Taylor in *Albania v. Becchetti and De Renzis*, 7 April 2016, para. 4.7 (C-595); Hearing Transcript, Day 2, T10:02.
[164] Unicredit Luxembourg S.A. Summary Statement for Hydro, 19 June 2015, Entry 1(C-105).

c. Albania's communications regarding funding obligations

235. On 22 April of 2009 (after the financial reporting obligations under the Second Addendum to the Concession Agreement had come into effect[165]), the METE wrote to Hydro and stated that:[166]

> *Following to our letter dated 20th of March, 2009, and our last inspections too, we hereby confirm that, no breach of the concession of any sort was carried out by the Concessionaire also with respect to any construction permits, environmental, financing process of the project and EPC Contractor.*

236. However, on 12 December 2011, in the course of various documents being submitted to the METE under the Concession Agreement, the METE raised the following concern with KGE:[167]

> *The Company has not submitted the document that proves that the Contract is fully financially covered, the disbursement of funds according to the obligation foreseen by Deut[s]che Bank AG, referring to the letter dated 17.01.2007.*

237. The METE asked KGE to submit the requested documents within 15 days.

238. On 14 December 2011, Deutsche Bank responded to the METE, asking it to "grant KGE a period of 90 days during which time you would refrain from taking any steps to cancel the concession, while we work with KGE and our Italian partner in the project to present to you a financing plan".[168]

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[165] Article 5 of the Concession Agreement provides that "the Concessionaire undertakes: to provide the Authorized State Body, within one year from the expiry of the term established in article 13.1 hereunder, with the evidence of the availability of the financial coverage for the Implementation of the Project." Article 13.1 provides that "the Concessionaire undertakes to procure within 180 days from the date of effectiveness of this Addendum, the Concession will be held by a company ('Newco')." The Second Addendum came into effect on 6 June 2007 (C-016). Thus, the delay has to be calculated as 180 + 1 year from 6 June 2007, ending on 6 December 2008.

[166] Letter from METE to Hydro, 22 April 2009, Prot. No. 3692 (C-578).

[167] Letter from METE to KGE, 12 December 2011, Prot. No. 4181/9 (C-580).

[168] Letter from Deutsche Bank to METE with KGE in copy, 14 December 2011 (C-581).

239. On 23 December 2011, the METE wrote to Deutsche Bank, copying Hydro, requesting "full compliance to your financial obligation and disbursement as soon as possible, not later than January 31st 2012."[169]

240. On 6 February 2013, the METE wrote to KGE, setting out what the METE considered to be a number of failures of KGE to meet its obligations under the Concession Agreement, including the financial reporting obligations the subject of the correspondence with Deutsche Bank.[170] On 14 February 2013, KGE responded, disputing a number of these allegations, stating that any delay in meeting any obligation was not its fault, and further stating that the METE (as provider of the concession as part of the ASB) was in breach of a number of its obligations.[171]

(4) Communications with the Albanian authorities about other aspects of the Project

241. During this period from 2007 to 2013, there was a series of communications with, and between, the Albanian authorities for the purposes of the Project.

a. Environmental permit

242. In 2008, KGE raised concerns with the METE regarding the time it was taking the relevant authorities to issue an environmental permit. On 21 April 2008, METE wrote to those authorities, expressing its concern regarding those delays and asking that the permit be issued immediately.[172] The permit was then issued on 5 May 2008.[173]

b. Expropriation

243. Also beginning in 2008, KGE corresponded with the METE concerning the expropriation of private lands necessary for the Project. On 13 June 2008, KGE wrote to the METE requesting the METE to activate the expropriation process under Article 10 of the Law No.

[169] Letter from METE to Deutsche Bank with KGE in copy, 23 December 2011, Prot. No. 9489 (C-582).
[170] Letter from METE to KGE, 6 February 2013, Prot. No. 1283 (C-584).
[171] Letter from KGE to METE, 14 February 2013, Prot. No. 08/13 (C-585).
[172] Letter from METE to the Ministry of Environment, Forests, and Water Administration, 21 April 2008 (C-208).
[173] Environmental Permit, 5 May 2008 (C-209).

8561 dated 22 December 1999,[174] and attaching certain documentation to that end.[175] On 8 July 2008, the METE responded, stating that certain documents required by the statute had not been included, and that when the missing documents were included the file should be presented again to the METE for another review in 15 days.[176] On 14 July 2008, however, the METE wrote to the Minister of Public Works, Transport, and Telecommunication and stated that "Concessionary Company Kalivac Green Energy Ltd has lodged with the METE the needed and necessary documentation as required by law No. 8561, dated 22.12.1999".[177]

244. On 21 July 2008[178] and again in late 2008[179] KGE requested more time to provide the requested documents. Ultimately, the METE gave KGE until the end of April 2009.[180] On 28 January 2009, KGE informed the METE that the delay was due to a different government department failing to respond to KGE's request for some of the necessary documentation.[181] On 11 August 2009, KGE and the METE executed an agreement on expropriation.[182] On 26 August 2009, KGE complained that

> *the Authorized State Body has not verified the reasons for the delay in expropriation procedures which are exclusively due to the fault of the Authorized State Body itself, which make for us impossible to begin cementing the curtain under the quota of 87m, for which we were and are prepared an in waiting with all the damage that this situation has caused us and will cause us, and we will be forced to seek immediate restitution.*[183]

245. Nevertheless, in the same letter, KGE stated that works were ahead of schedule.

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[174] Law No. 8561 on Expropriations and Temporary Takings of Private Property for a Public Interest, 22 December 1999 (CL-035).
[175] Letter from KGE to METE, 13 June 2008, Prot. No. 14/08 (C-211).
[176] Letter from METE to KGE, 8 July 2008, Prot. No. 5652/4 (C-214).
[177] Letter from METE to the Ministry of Public Works and Telecommunication, 14 July 2008, Prot. No. 5652/5 (C-215).
[178] See Letter from METE to KGE, 7 August 2008, Prot. No. 5652/10 (R-060).
[179] See Letter from METE to KGE, 23 January 2009, Prot. No. 224/1 (R-061).
[180] *Ibid.*
[181] Letter from KGE to METE, 28 January 2009 (C-221).
[182] Agreement on Expropriation Proceedings for Public Interest by and between METE and KGE, 11 August 2009 (C-230).
[183] Letter from KGE to METE, August 26, 2009, Prot. No. 51/09 (C-231).

246. On 20 May 2010, the METE sent KGE complaints raised by residents whose land was being expropriated.[184]

c. Flooding

247. On 26 August 2009, KGE informed the METE of at least 18 floods, stating:[185]

> *It should be noted that the time advantage in connection to the schedule has been performed during the excavations in an extreme season for excavations extremely regarding meteorological phenomena, which have provoked at least 18 floods, which under Article 28 of the Contract of the concession entitle us for the significant extension period, which we have the right to document and do not relate to significant delays, as you are claiming.*

248. On 7 June 2010, KGE wrote to National Agency of Natural Resources ("AKBN"), informing it of difficulties encountered on the Project due to heavy rainfall and inclement weather, including landslides, erosion and obstructions to works.[186] KGE attached six protocols to the letter regarding those difficulties. On 12 August 2010, KGE reiterated the matters it set out in its 7 June letter.[187]

249. On 8 September 2010, KGE again wrote to AKBN, and complained that:[188]

> *[...] if seasonal events are encountered, the work schedule will be modified. In the last two years there have been many of these events, which were not verified in the last 20 years, and yet, even to this day, we are not granted postponement. This is another flaw in cooperation on the part of the Concession Granter and it is continuing to cause great damage to the project, and consequently to us.*

250. On 3 March 2011, KGE reiterated its concerns in this regard, this time in a letter to the METE.[189]

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[184] Letter from the METE to KGE, 20 May 2010, Prot. No. 480/2 (C-241).
[185] Letter from KGE to METE, 26 August 2009, Prot. No. 51/09 (C-231).
[186] Letter from KGE to AKBN, 7 June 2010, Prot. No. 158/10 (C-242).
[187] Letter from KGE to AKBN, 12 August 2010, Prot. No. 167/10 (C-245).
[188] Letter from KGE to AKBN, 8 September 2010, Prot. No. 169/10 (C-246).
[189] Letter from KGE to the METE, 3 March 2011, Prot. No. 06/11 (C-247).

251. On 8 November 2012, the Inspection Directorate of the Regional Taxation Directorate wrote to the General Taxation Directorate to inquire what should be the tax treatment of a provisional bridge and two supports on the left and right side of the dam, which no longer existed because they were "flooded and destroyed as a result of force majeure."[190]

E. APPLICATION TO DEVELOP A WIND FARM

252. On 3 April 2009, Energji submitted a proposal to build a wind energy plant, or wind farm, not far from Kalivaç.[191] The proposal was to be carried out through a joint venture with Rener. Albania did not respond to Energji's proposal.

253. Albania had approved seven other wind farm projects in the previous year, including a project proposed by the Italian company Moncada Energy Group.[192]

F. THE END OF THE KALIVAÇ PROJECT

254. Construction work on the Kalivaç Project ceased in March 2013 and never resumed.[193] In June 2014, Hydro decided to cease work on the Project permanently.[194]

255. On 19 June 2014, KGE wrote to the Prime Minister, the Ministry of Energy and Industry and the Ministry of Transportation and Infrastructure.[195] In that letter, KGE sought confirmation that the Albanian Government continued to support the Kalivaç Project.[196] No reply was received.

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[190] Final Audit Report, 13 May 2015, Prot. No. 8159/14, p. 97 (C-353).
[191] Joint venture agreement between Energji Sh.p.k. and Rener Sh.p.k., 2 April 2009 (C-225).
[192] "Albania: Moncada plans 500 MW Wind Farm in Valona Region," *Wind Power Intelligence*, 10 November 2011 (C-252); "Renewable Energies Albania," *Greening the Energy Community*, 30 April 2009, p. 8 (C-229); First Becchetti Statement, para. 69.
[193] 2nd ICC Arbitration, Hearing Transcript, Day 1, 19 December 2017, p. 256 (C-598).
[194] 2nd ICC Award, 8 January 2018, paras. 326, 339 and 374, in which the tribunal states that "[Hydro] acknowledged in the present proceedings to have permanently abandoned the [Kalivaç Project] in June 2014".
[195] Letter from Aldo Ceccobelli to Prime Minister, the Ministry of Energy and Industry and the Ministry of Transportation and Infrastructure, 19 June 2014 (C-018).
[196] *Ibid*, p. 3.

256. The Claimants assert that this failure to respond, being immediately followed by orders to seize documents from KGE in the criminal proceedings discussed in section IV.J(11) below,[197] constitutes expropriation of the Kalivaç Project.[198]

257. In October 2014, Hydro started the 2nd ICC arbitration under Article 30 of the Concession Agreement, seeking declaratory relief and damages in relation to its treatment by the Albanian tax authorities.[199] In its Statement of Defence and Counterclaim, dated 14 April 2016, Albania sought, *inter alia*, a declaration that Hydro had breached the Concession Agreement, an Award terminating the agreement and damages.[200]

258. On 5 May 2017, the Ministry of Energy and Industry ordered that:[201]

a. a commission be established to take on consignment the assets on the project's site;

b. the commission prepare an inventory of those assets, the works carried out on the site and a report for the Chairman of the Ministry;

c. the inventory and documentation be transferred for custody and administration to KESH "until the conclusion of the new procedures for granting in concession"; and

d. KESH undertake measures for the custody and security of these assets.

259. On 29 May 2017, the Public Procurement Agency announced that it was opening the Kalivaç Project up to public tender.[202]

260. In October 2017, the Kalivaç Project was apparently awarded by Albania to a consortium formed by a Turkish company, Ayen Enerji, and an Albanian company, Fusha.[203]

[197] See, in particular, Prosecutor's Office at the First Instance Court of Tirana, Judgment on the Invoice Seizure for KGE, Case. No. 1564, Tirana, 23 June 2014 (C-096).
[198] Claimants' Closing presentation, slides 37-38.
[199] 2nd ICC Award, 8 January 2018, para. 216. This arbitration is referred to in paragraph 10 above.
[200] *Ibid*, para. 225.
[201] Order No. 180, 5 May 2017 (C-682).
[202] Public Announcement Bulletin No. 21 from the Public Procurement Agency, 29 May 2017 (C-638).
[203] Translations of various Albanian news reports provided by the Claimants on 17 November 2017.

261. On 8 January 2018, in the 2nd ICC Arbitration, the tribunal found that Hydro had "permanently abandoned the project in June 2014"[204] and had breached the Concession Agreement by:[205]

a. failing to fulfil its obligations to finance and complete the project by the deadlines provided in the Concession Agreement;

b. abandoning the project; and

c. failing to fulfil its obligation to provide a financial guarantee, as required by Article 15.3 of the Concession Agreement.

262. That tribunal also found that Albania had validly requested termination of the Concession Agreement in its Statement of Defence and Counterclaim and that termination was justified by Hydro's breaches. It declared the Concession Agreement terminated as at the date of the 2nd ICC Award,[206] being 8 January 2018.

263. It further found that Albania's actions taken to re-let the concession in 2017 (described in paragraphs 257-260 above) were legitimate steps taken to mitigate Albania's losses due to Hydro's breaches of the Concession Agreement.[207]

G. COMMENCEMENT OF DIGITAL BROADCASTING AND THE CREATION OF AGONSET

(1) The historical Albanian television market and broadcasting regulation

a. The development of a commercial market

264. Under the communist regime, Albania had a highly controlled media landscape.[208] There was a single television station and a single radio channel, both controlled by the Government operator, Radiotelevizioni Shqiptar ("RTSH"). The content offered by RTSH consisted largely of Government-sponsored announcements and political propaganda. As

[204] 2nd ICC Award, 8 January 2018, para. 374.

[205] *Ibid*, para. 345.

[206] *Ibid*, para. 353.

[207] *Ibid*, para. 391.

[208] I Londo, Albania, in S. Hrvatin & B. Petkoviç (Eds.), *Media Integrity Matters - Reclaiming Public Service Values In Media and Journalism*, Ljubljana, 2014, p. 52 (C-062).

a result, for decades, many Albanians watched Italian television channels in secret, via signal relay devices that carried the broadcasts from Italy.[209]

265. After the communist regime ended in 1992, RTSH continued to dominate broadcasting in Albania for much of the 1990s.[210] By the late 1990s, private television companies began to broadcast in Albania.[211] In late 1998, Albania passed the first "Law on Public and Private Radio and Television" ("1998 Broadcasting Law").[212] The 1998 Broadcasting Law created the National Council of Radio and Television ("NCRT"), a State regulatory authority whose members were elected by Albania's Parliament. The NCRT was charged with regulating the Albanian media sector, awarding licenses to broadcasters and implementing legislation enacted by Albania's Parliament.[213]

266. After the 1998 Broadcasting Law was passed, private media conglomerates emerged, controlled by a small group of high-profile businessmen.[214] One of these companies, Top Channel Sh.a. ("Top Channel") became one of the largest and most influential broadcasters in the country.[215] Around 2004, the owners of Top Channel launched DigitAlb Sh.a. ("DigitAlb"), the first company in Albania to start broadcasting on digital frequencies. Top Channel and DigitAlb are now part of the Top Media Group, which also holds interests in the radio, online and print media sectors in Albania.

267. DigitAlb broadcast from a satellite-based digital network, rather than a network based on broadcasting digital signals from terrestrial equipment. At the time DigitAlb was launched, Albania had no law covering digital broadcasting, meaning that DigitAlb operated without any license or regulation.[216] DigitAlb became the most successful of the digital

[209] Meço Statement, para. 20; First Bushati Statement, para. 10.

[210] First Bushati Statement, paras. 10-11.

[211] *Ibid*.

[212] Law No. 8410 on the Public and Private Radio and Television in the Republic of the Albania, 30 September 1998 (CL-033).

[213] *Ibid*, Article 6.

[214] First Bushati Statement, para. 13.

[215] *Ibid*, paras. 13 and 14.

[216] *Ibid*, para. 14.

broadcasters in Albania.[217] Two other digital channels began operating during this period, Tring TV Sh.a. ("Tring") and Supersport.[218]

b. The start of the change to digital broadcasting

268. On 12 June 2006, Albania signed the European Union Stabilization and Association Agreement and officially became a candidate country for European Union Membership.[219] Albania also ratified the ITU International Symposium on the Digital Switchover Regional Agreement GE06 of 16 June 2006 (the "GE06 Agreement"),[220] which was implemented by Law No. 9851 of 26 December 2007. The GE06 Agreement required moving to an "all-digital" broadcast network by 17 June 2015.[221]

269. In order to provide a regulatory framework for the introduction of digital broadcasting, in 2007 Albania promulgated the first "Law on Digital Broadcasting" (the "2007 Broadcasting Law"), which provided (among other things) that the digital switchover in Albania should be completed by 31 December 2012.[222]

270. The 2007 Broadcasting Law, however, was never implemented.[223] The NCRT attempted to organize bidding processes in 2008 and 2009 to award digital licenses under the 2007 Broadcasting Law, but no broadcast operators submitted applications.[224] The NCRT issued *ad hoc* licenses to DigitAlb and Tring.[225] These *ad hoc* licenses were not envisaged or regulated under the 2007 Broadcasting Law.

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[217] I Londo, Albania, in S. Hrvatin & B. Petkoviç (Eds.), *Media Integrity Matters - Reclaiming Public Service Values In Media and Journalism*, Ljubljana, 2014, p. 73 (C-062)

[218] I Londo, "The process of switchover to digital broadcasting," Albanian Media Institute, 2015, p. 8 (R-070).

[219] Albania-EU Stabilization and Association Agreement, 12 June 2006 (C-194).

[220] ITU International Symposium on the Digital Switchover Regional Agreement GE06 of 16 June 2006 (CL-051)

[221] Law No. 9851 on Ratifying the Final Acts of the Regional Radiocommunications Conference, 26 December 2007 (CL-061).

[222] Law No. 9742 on Digital Broadcasting in the Republic of Albania, 28 May 2007, Article 15 (CL-057).

[223] I Londo, "The process of switchover to digital broadcasting," Albanian Media Institute, 2015, p. 10 (R-070).

[224] First Bushati Statement, para. 18.

[225] *Ibid.*

271. Albania then began to develop a new legal and regulatory framework for audio-visual media.[226] In May 2012, the Council of Ministers issued Decision No. 292 announcing a "Strategy of Switchover from Analogue to Digital Broadcasting" (the "Switchover Strategy").[227] The Switchover Strategy outlined a series of political and technical measures for achieving a transition from analogue to digital broadcasting in Albania,[228] and how the digital frequencies to which Albania was entitled under the GE06 Agreement would be allocated.

272. Under the strategy, two multiplex licenses would be reserved for Albania's national broadcaster and five would be allotted to private national broadcasters.[229] The strategy stated that the appropriate way to award digital licenses was by way of a closed "beauty contest" to which "national historic operators" and operators with experience in digital broadcasting would be invited by the media regulator.[230] Such an approach was considered preferable to an open competition, in recognition of the significant investments that the established operators of digital stations had made.[231]

(2) Establishment of Agonset

273. In 2006, Mr. Becchetti launched AgonFree, a free daily newspaper that was published until 2013.[232] AgonFree printed and distributed approximately 20,000 copies per day on average to meet demand, with circulation occasionally reaching 100,000 copies. Mr. Becchetti started AgonFree in order to get a foothold in, and assess, the Albanian media landscape.[233]

274. A few years after launching AgonFree, Mr. Becchetti began planning to launch a television station in Albania. In 2009, he and his colleague, Shpëtim Arbana, met with the then-head

[226] *Ibid*, para. 19.

[227] Decision of the Council of Ministers No. 292 on a Strategy of Switchover from Analogue to Digital Broadcasting, 2 May 2012 (CL-080).

[228] *Ibid*, p. 3031.

[229] First Bushati Statement, para. 20.

[230] Decision of the Council of Ministers No. 292 on a Strategy of Switchover from Analogue to Digital Broadcasting, 2 May 2012, pp. 3041-3043 (CL-080).

[231] *Ibid*, p. 3042.

[232] First Becchetti Statement, para. 87.

[233] *Ibid*.

of the NCRT, Mesila Doda, to discuss the media market in Albania and the legal requirements for broadcasters.[234]

275. Mr. Becchetti's strategy for the television channel was twofold. First, it would broadcast independent content in Albania. Second, it would produce programs in Albania for broadcast in Italy, taking advantage of the low production costs in Albania and the high advertising revenues in Italy. Mr. Becchetti expected the acceptance of such programs in Italy to be facilitated by the close geographic and cultural ties between the two countries.[235]

276. In 2011 and 2012, Mr. Becchetti consulted with various advisors about the Italian and Albanian media markets, including the costs of the broadcast and editing equipment. He made some rough internal calculations about how Agonset might perform.[236] After an initial start-up period, he set a target of achieving a 1% share of the Italian market within two years of operation, increasing to a 4% share over the following four years, on the basis of various assumptions about costs.[237] On Mr. Becchetti's analysis, each percentage point of the Italian market was worth approximately €30 million.[238] Although Mr. Becchetti did not consider this analysis to be a detailed valuation of the intended business, he believed that the delocalized production model had the potential to make significant profits.[239]

277. During 2012 and 2013, Mr. Becchetti took the necessary steps to create Agonset and begin broadcasting in Albania. Agonset was incorporated on 3 May 2012.[240] Mr. Becchetti was Agonset's Artistic Owner and served as Chairman of the Administration Board which oversaw the organization.[241] Mr. De Renzis became Agonset's Administrator in December 2012 and oversaw the company's day-to-day operations, reporting directly to

[234] *Ibid*, para. 90.
[235] *Ibid*, para. 92; Becchetti cross-examination, Hearing Day 2, T137.8-T137.12.
[236] *Ibid*, para. 93.
[237] *Ibid*.
[238] *Ibid*, para. 92; Becchetti cross-examination, Hearing Day 2, T136.7-T136.13.
[239] *Ibid*, para. 93; Becchetti cross-examination, Hearing Day 2, T136.7-T136.13.
[240] Agonset Sh.p k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 1 (C-409).
[241] Agonset Sh.p k. Management Structure (C-426).

Mr. Becchetti.[242] Mr. Becchetti, Mr. De Renzis, and Ms. Grigolon together indirectly own 80% of the shareholding in Agonset.[243]

278. In the course of developing Agonset, in late 2012, Mr. Becchetti spoke with Endirë Bushati, who was then President of the NCRT, to discuss the requirements under the existing broadcasting regime to launch a television channel in Albania on a digital platform. Ms. Bushati stated that digital transmissions were unregulated and that the licensing procedure would be resolved under the new Law No. 97/2013 on Audiovisual Media in the Republic of Albania of 4 March 2013 (the "2013 Media Law").[244] She later confirmed this advice in writing to Agonset's lawyers.

279. Beginning in 2012, Agonset leased office and production facilities of almost 20,000 sq ft in central Tirana and it invested over €6.2 million in technical equipment.[245] The premises were refitted as fully-equipped studios. As of April 2014, Agonset's Albanian production facilities were assessed by an independent real estate appraiser as being worth over €2.1 million for the studio alone.[246]

280. Agonset also hired several prominent and experienced professionals, including Sonila Meço (a leading news anchor in Albania), Andeta Radi (the former Editor-in-Chief of Top Channel), Alessio Vinci (a longtime CNN anchor and bureau chief who led a major TV program in Italy for several years), Adi Krasta, Samir Kodra, and Gentian Zenelaj (leading Albanian journalists), and network director Maurizio Palladino (an experienced Italian creative director).[247]

(3) The 2013 Media Law

281. On 4 March 2013, Albania promulgated the current 2013 Media Law, which came into force on 5 April 2013.[248] The 2013 Media Law changed the deadline for the digital

[242] Agonset Sh.p k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 2 (C-409).
[243] *Ibid*; First Becchetti Statement, paras. 5-6.
[244] First Becchetti Statement, para. 96; First Busheti Statement, para. 22.
[245] Agonset Sh.p k. List of Inventory (C-425).
[246] Agonset Studio Value Assessment Report, April 2014 (C-295).
[247] First Becchetti Statement, para. 101; Witness Statement of S. Meço, para. 18.
[248] Law No. 97/2013 on Audiovisual Media in the Republic of Albania, 4 March 2013 (CL-084) ("2013 Media Law").

switchover from 31 December 2012 (the deadline under the 2007 Broadcasting Law) to 17 June 2015 (the deadline under the GE06 Agreement) and set out the procedure for the allocation of digital licenses.

282. The 2013 Media Law also replaced the NCRT with a new body, the AMA, initially composed of the members of the NCRT. Ms. Bushati remained as President of the AMA until November 2014. The AMA was to be responsible for, *inter alia*, issuing digital broadcasting licenses and authorizations, preparing instructions and regulations on usage of public broadcaster infrastructure, and the mediation of disagreements between operators.[249] Like the decisions of the NCRT, the earlier regulator, the AMA's decisions are subject to judicial review and the oversight of the Albanian courts.[250]

283. As outlined in the Switchover Strategy, the Albanian Government's intention was to effect a complete transition from analogue to digital broadcasting.[251] Analogue licenses could no longer be issued after the entry into force of the 2013 Media Law, and existing licenses for television broadcasting would be replaced by digital "audiovisual" licenses under the 2013 Media Law within six months of its entry into force.[252] Any operators who occupied digital frequencies without a license had to stop broadcasting within 30 days from the end of the transitional licensing procedure, and at the latest within six months from the entry into force of the 2013 Media Law, that is by 5 October 2013.[253] The 2013 Media Law required the AMA to seize the equipment of any operator broadcasting unlawfully after this date.[254]

284. The 2013 Media Law envisaged that commercial digital licenses would be awarded in two stages.

    a. First, during the transitional period (which was to end on 17 June 2015), licenses could be awarded by way of a closed "beauty contest" in which "national historic

[249] I Londo, "The process of switchover to digital broadcasting," Albanian Media Institute, 2015, p. 13 (R-070); 2013 Media Law, Articles 19 and 23(1) (CL-84).

[250] See for example 2013 Media Law, Articles 53(15), 63(7), 80(3) and 133(12) (CL-084).

[251] Decision of the Council of Ministers No. 292 on a Strategy of Switchover from Analogue to Digital Broadcasting, 2 May 2012, pp. 3040 (CL-080)

[252] 2013 Media Law, Articles 136(3) and 138 (CL-84).

[253] *Ibid*, Article 140(1).

[254] *Ibid*, Articles 80 and 140(2).

private operators" and "existing operators experienced in digital broadcasting" would be invited to participate.[255] This closed "beauty contest" was to be announced within three months and completed within six months of the Law's coming into force, that is by 5 October 2013.[256]

b. Later licenses would be awarded by way of an "open competition, thus guaranteeing equal, objective and non-discriminatory treatment."[257] The AMA was empowered to decide which operator would be granted the digital license, taking into account eight factors including "the nature, expertise and experience of the applicant" and the applicants' "financial means".[258]

285. National digital multiplex licenses were to be valid for up to 15 years,[259] and holders of digital licenses were obliged to grant other providers access to at least 40% of the capacity on their digital networks on a fair and non-discriminatory basis.[260] In the event of any dispute as to the terms of access, the relevant parties are entitled to appeal to AMA to resolve it. The relevant parties also have the statutory right to appeal AMA's decisions to the Albanian courts.[261]

(4) The Launch of Agonset

286. Agon Channel Albania was officially launched on 5 April 2013, on the Tring satellite digital platform. Shortly thereafter, Agonset obtained approval from the AMA under the 2013 Media Law to provide a satellite audiovisual program service, which allowed Agonset to broadcast its programming on licensed networks.[262]

[255] *Ibid*, Article 139.
[256] *Ibid*, Articles 138(4) and 139(1)(b).
[257] *Ibid*, Article 70.
[258] *Ibid*, Article 71(2).
[259] *Ibid*, Article 74(1)(a).
[260] *Ibid*, Article 63(1).
[261] *Ibid*, Article 63(7).
[262] AMA Resolution No. 08, 22 May 2013 (C-272); 2013 Media Law, Article 54(4) (CL-84).

287. Agonset later expanded its reach by purchasing an analogue, terrestrial local license from the existing operator Telesport[263] and concluding a contract to be included in the cable platform ABCom.[264] Although under Article 55 of the 2013 Media Law licenses are not transferable, the AMA has the discretion to approve a transfer.

288. Agonset applied to the AMA on 26 September 2013 to approve the transfer and to alter the terms of Telesport's license from a license limited to sporting themes to general programming. On 13 October 2013, the AMA exercised its discretion in Agonset's favour by granting the change of use application and approving the license for a five-year period.[265]

289. Agonset was then able to transmit across three broadcasting media (satellite digital, terrestrial analogue, and cable) while Albania transitioned to a fully digital system.[266]

H. ALLOCATION OF DIGITAL LICENSES AND THE DEVELOPMENT OF AGONSET

(1) Introduction of the 2013 beauty contest regulation

290. Following public consultations, the AMA passed Resolution No. 10 of 2 July 2013[267] (the "Contest Regulation"), which set out the rules for the closed "beauty contest" under article 139 of the 2013 Media Law. That regulation started the digital licensing process by inviting "national historic private operators"[268] and existing operators with "experience in the digital broadcasting"[269] to participate in a beauty contest for the award of three digital licenses.

291. According to the Contest Regulation, "[t]he decision to grant or refuse an audiovisual national broadcasting license is taken by AMA [...] not later than 60 days from the date of

[263] Contract between Agonset and Telesport, 21 September 2013 (C-276).

[264] Contract between Agonset and ABCom, 23 December 2014 (C-334).

[265] AMA Decision No. 16, 11 October 2013 (C-277).

[266] First Becchetti Statement, paras. 97 and 105.

[267] Entitled "Regulation on the licensing of digital networks and their programs, through *beauty contest* procedure" (CL-088).

[268] *Ibid*, Article 4.

[269] *Ibid*.

application."[270] The Contest Regulation also stated that: "If at the end of the licensing process according to the procedure beauty contest [it] results that there are still unlicensed digital networks and free capacity in them, within 30 days AMA organizes [sic] an open competition in accordance with Chapter VII and VIII of [the 2013 Media Law]".[271]

292. Each license would permit the broadcast of the broadcaster's own services and the construction of a digital terrestrial network.[272] In addition, the Contest Regulation provided that holders of a digital license were "obliged to provide access on fair, reasonable and non-discriminatory conditions" to 40% of the capacity of their digital network to other program operators, through commercial agreements, under the AMA's supervision.[273]

293. The AMA invited the operators of Top Channel, TV Klan, and Vizion Plus (as "historical national broadcasters"[274]) and DigitAlb and Tring (as companies "experienced in digital broadcasting"[275]) to compete in the beauty contest.[276] Agonset was not invited to participate because it was neither a historical national broadcaster nor experienced in digital broadcasting.[277]

294. At the time, DigitAlb was occupying 5 networks, and none of the operators was paying licensing fees.[278] Following the process envisioned by the 2013 Media Law and the Contest Regulation, each commercial company would have only one network, and would be subject to licensing fees and other regulation.[279]

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[270] *Ibid*, Article 23(1).

[271] *Ibid*, Article 23(5).

[272] *Ibid*, Article 8(1.1).

[273] *Ibid*, Article 7.

[274] 2013 Media Law, Article 139 (CL-084).

[275] *Ibid*.

[276] First Bushati Statement, para. 29.

[277] Bushati cross-examination, Hearing, Day 3, T121.13-T121.18. The AMA later discovered that two of these operators (TV Klan and Top Channel), however, did not meet one of the 2013 Media Law's licensing requirements. National operators were required to make their broadcasts available to at least 80% of Albania's territory: 2013 Media Law, Article 55. TV Klan and Top Channel covered only roughly 38.8% of the territory with a good signal: First Bushati Statement, para. 36.

[278] Bushati cross examination, Hearing, Day 3, T124.8-T124.21; First Bushati Statement, para. 14; Second Bushati Statement, para. 11.

[279] *Ibid*, T124.14-T124.21; See Second Bushati Statement, para. 11 and 2013 Media Law Articles 19(1)(i) and 62(7).

(2) Challenges to the validity of the Contest Regulation

295. An additional licensing requirement under the Contest Regulation was that applicants demonstrate asset capital of at least ALL 1 billion (approximately €7.5 million).[280] This requirement was also contained in the 2007 Broadcasting Law,[281] with which DigitAlb and Tring had complied when obtaining Satellite Platform Digital Licenses under that law.[282]

296. In July 2013, DigitAlb, Top Channel and TV Klan nevertheless challenged as *ultra vires* the AMA's powers under the 2013 Media Law.[283] On 30 or 31 July 2013, the Tirana District Court suspended the regulation licensing procedure pending a final decision.[284] On 8 October 2014, the Administrative Court of Appeals found that the financial conditions imposed were invalid.[285] The AMA appealed the decision to the Albanian Supreme Court shortly after it was made, while Ms. Bushati remained president.[286] However, that appeal was discontinued by the AMA after she was replaced and the AMA reconstituted,[287] as described in paragraphs 301 to 302 below.

297. The *Tirana* District Court's July 2013 suspension of the regulation licensing procedure prevented the AMA from issuing any licenses to broadcasters.[288] As a result of this suspension, the AMA also could not apply Article 23(5) of the Contest Regulation, which provided that in the event that digital networks remain unlicensed or there is unused capacity on those networks at the end of the closed beauty contest, it should organize,

[280] Article 16; Bushati cross examination, Hearing, Day 3, T122.11-T122.15.

[281] 2007 Broadcasting Law, Annex 1(2) (CL-57).

[282] First Bushati Statement, para. 30.

[283] First Bushati Statement, para. 30; I Londo, "The process of switchover to digital broadcasting," Albanian Media Institute, 2015, p. 24 (R-070).

[284] Judgment of the Albanian Administrative Appeals Court, 8 October 2014 (CL-097); First Bushati Statement, para. 30; I Londo, "The process of switchover to digital broadcasting," Albanian Media Institute, 2015, p. 24 (R-070).

[285] First Bushati Statement, para. 30; I Londo, "The process of switchover to digital broadcasting," Albanian Media Institute, 2015, p. 25-26 (R-070). In the interim, there was a series of proceedings that ultimately determined that the dispute was appropriately heard by the Administrative Courts; and see Bushati cross-examination, Hearing, Day 3, T137.1-T137.11.

[286] Bushati cross-examination, Hearing, Day 3, T136.11-T137.18; First Bushati Statement, para. 30.

[287] Second Bushati Statement, paras. 20 to 21.

[288] First Bushati Statement, para. 31.

within 30 days, an open contest for the award of the available licenses under chapters VII and VIII of the Media Law.[289]

(3) Change of national government and of the composition of the AMA

298. In national parliamentary elections on 23 June 2013, the Socialist Party and the Social Movement for Integration defeated the incumbent Democratic Party. As a result, Mr. Edi Rama replaced Mr. Sali Berisha as Prime Minister. In the same elections, Mr. Koço Kokëdhima (the businessman mentioned in paragraphs 193 to 194 above) was elected as a member of parliament for a seat in Vlora. Mr. Rama took office on 15 September 2013.[290]

299. The procedure for the appointment of the members of the AMA is intended to balance the competing political forces in Albania. The AMA is composed of seven members: a chair (the President), and six members (of whom one is elected by the other AMA members to serve as deputy chair).[291] The 2013 Media Law provides that the Parliamentary Committee for Education and Means of Public Information (the "Parliamentary Committee") should elect the ordinary AMA members (excluding the President) to serve a term of five years.[292]

300. The Media Law requires the participation of both political parties in this process and also provides that the Parliamentary Committee should take "account of maintaining the balance of three candidates supported by the majority in Parliament and three supported by the Opposition."[293] The Parliamentary Committee identifies four candidates for Chairperson,[294] and the opposition members are given an opportunity to eliminate two.[295] The two remaining candidates are then put to the entire Albanian Parliament, choosing between them by simple majority vote.[296] The political party in power at the time therefore appoints half the members and the President has the deciding vote.

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[289] *Ibid*.

[290] B Likmeta, "Edi Rama Sworn in as Albania PM," *Balkan Insight*, 16 September 2013 (C-275).

[291] Second Bushati Statement, para. 21; 2013 Media Law, Article 8(1) (CL-84).

[292] Second Bushati Statement, para. 21; 2013 Media Law, Article 9(1) (CL-84).

[293] 2013 Media Law, Article 9(4) (CL-84).

[294] *Ibid*, Article 10(3)(a).

[295] *Ibid*, Article 10(3)(c).

[296] *Ibid*, Article 10(3)(d).

301. Ms. Bushati had been elected by the Parliament on 6 November 2009 (when the previous government was in power) under the 2007 Broadcasting Law.[297] On 4 November 2014, the Parliament elected Mr. Gentian Sala as President of the AMA, replacing Ms. Bushati.[298] The procedure just described was not followed, however, with the opposition party not being given the opportunity to participate in the identification of candidates to be put to the Parliament as a whole.[299] Mr. Sala was a former senior executive at DigitAlb.[300] His election followed a series of attempts by DigitAlb, Top Channel and TV Klan throughout 2014 to remove Ms. Bushati as President of the AMA.[301]

302. At around the same time, the government members of the Parliamentary Committee appointed two members of AMA to positions which had been vacant since 2012, despite the opposition members of the Committee abstaining.[302] Again, therefore this did not comply with the 2013 Media Law's requirement that the opposition members be involved, and does not appear to have met the requirement that the Committee take account of maintaining a balance of three AMA members supported by each side.

303. There were also connections between Top Channel and the Rama Government. At the time of the final hearing, the former Vice General Manager of Top Channel, Skerdi Denova, served in the office of Tirana Mayor Erion Veliaj (elected to that position in 2015).[303] Veliaj had been appointed Minister for Youth and Social Welfare in the Rama Government in September 2013.[304] Engjell Agaçi, a lawyer who had represented Top Channel in a defamation dispute Mr. Becchetti had brought against Top Channel in Rome,[305] was Secretary General of Prime Minister Rama's Cabinet at the time of the Final Hearing.[306]

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[297] Bushati cross-examination, Hearing, Day 3, T112.19-T112.21; Second Bushati Statement, para. 10.

[298] First Bushati Statement, para. 37; Second Bushati Statement, para. 22; Meço Statement, para. 11.

[299] First Bushati Statement, para. 37; Second Bushati Statement, para. 22; Bushati re-examination, Hearing, Day 3, T145.15-T145.24.

[300] First Bushati Statement, para. 9.

[301] *Ibid*, para. 32-38.

[302] Second Bushati Statement, para. 23.

[303] Meço Statement, para. 11.

[304] *Ibid*, para. 30.

[305] First Becchetti Statement, para. 123.

[306] Meço Statement, para. 11.

Monica Stafa, a Top Channel host, was Head of the AMA Complaints Council at the time of the Final Hearing.[307]

(4) Development of Agonset in 2014 and 2015

a. Agon Channel Albania

304. In 2014, Agon Channel in Albania broadcast 24 hours a day, seven days a week, and offered programming for all age groups. It also offered a diverse range of programming across a spectrum of subject areas, including news, entertainment shows, documentaries, movies, television series, sports events, and products and service advertising. Its programming, and hosts, received awards from media organisations in 2014 and 2015.[308]

305. Agon Channel's coverage of the Berisha and Rama administrations, and of Agon Channel's competitors' compliance with regulations, was often critical. During the 2013 election, it compared Prime Minister Berisha's promises during previous elections with what he had accomplished in office.[309] It obtained an exclusive interview with then-Prime Minister Berisha, and pressed him to agree that, unlike previous losing incumbent Prime Ministers who blamed voter fraud for their losses, he would resign if he lost the election.[310]

306. On 15 and 28 March 2014, Agon Channel reported that, in the AMA's view, TV Klan and Top Channel were failing to respect the terms of their licenses and reported the AMA's attempts to enforce licensing restrictions.[311]

307. In September 2014, Agon Channel, along with other outlets, covered the high-profile wedding of Minister Erion Veliaj.[312] On or about 5 September 2014, the Minister became

[307] *Ibid*.

[308] *Ibid*, para. 24; First Becchetti Statement, paras. 103 to 104.

[309] Meço Statement, para. 30.

[310] *Ibid*.

[311] *Ibid*; First Bushati Statement, para. 36.

[312] Meço Statement, para. 30.

aware of the coverage in the lead up to his wedding. On that day he wrote to Agon Channel's News Director, Ms. Meço, in the following terms.[313]

> *I see Agon's camera crew in Gjirokaster. I don't understand why are you doing this to me, I thought you stopped this silly thing the last time!*
>
> *I don't want this! I'm absolute about that! You are forcing me to be your enemy! Tell* [Francesco Becchetti] *that the entire government is going to be his enemy for no reason! It's private damn it, respect it, I'm sick of this discussion with all of you!*

308. Minister Veliaj did not agree to meet with Mr. Becchetti to discuss the matter further, and did not respond to the Parliamentary Commission for Education and Public Information's request for clarification regarding the matter.[314]

309. On 18 February 2015, Agon Channel covered the mass emigration of Albanians due to Albania's poor economy.[315]

310. On 25 May 2015, Agon Channel revealed a large-scale identity fraud scheme that allowed the same person to vote up to twenty times in the 2015 municipal elections. In this election, Prime Minister Rama's Socialist Party gained important positions; Minister Veliaj was one of the candidates elected to office following this election, as Mayor of Tirana.[316]

b. Agon Italy

311. To pursue the delocalised production business strategy, Mr. Becchetti incorporated Agonset.it in Italy in March 2014 and Agonset.uk in April 2014.[317] Agonset.it acquired the exclusive rights to content developed by Agonset in exchange for a cost sharing mechanism.[318] Under this arrangement, Agon Channel Italy began broadcasting teasers in

[313] Meço Statement, paras. 30 and 39-47; Text messages from Minister Veliaj to Ms. Meço, 5 September 2014 (C-310).

[314] Meço Statement, paras. 39-47.

[315] *Ibid*, para. 30.

[316] *Ibid*.

[317] Agonset.it's excerpt from the Rome Registry of Companies, 25 January 2016 (C-406); Agonset.uk Certificate of Incorporation, 6 November 2014 (C-323). Agonset.uk owns 20% of Agonset.it: First Becchetti Statement, para. 106.

[318] Contract between Agonset Sh.p.K. and Agonset.it, 19 May 2014 (C-296).

Italy in October and November 2014 and launched full programming on Italy's terrestrial Channel 33 in December 2014.[319] Programs were transmitted from the production centre in Tirana to a broadcasting centre in Italy, first through satellite and then through fibre optic cable.[320]

312. Agon Channel Italy followed a similar broadcast model as Agon Channel Albania, employing high-profile talent and producing innovative programming.[321] In the first few months of operation, it attracted €700,000 of advertising.[322] There were, however, a number of staffing changes at the end of 2014 and the beginning of 2015.[323]

(5) The 2015 Contest Regulation and awarding of licenses

313. On 30 October 2014, Agonset wrote to the AMA asking it to hold a fair and transparent competition and permit Agonset to participate.[324]

314. On 16 April 2015, the AMA issued a new Contest Regulation.

315. In April 2015, the AMA invited five Albanian operators (TV Klan, Top Channel, Tring, Digitalb, and Digitalb's 100% subsidiary Supersport) to bid for five digital national licenses under the 2015 Contest Regulation. These operators did not, however, meet the requirements prescribed under the Media Law. In March 2014, the AMA had determined that Top Channel and TV Klan did not meet the 80% national coverage requirement under Article 55 of the Media Law.[325] Further, none of these operators complied with Article 62 of the Media Law, which then imposed certain ownership restrictions intended to ensure

[319] First Becchetti Statement, paras. 106 to 107.
[320] *Ibid*, para. 107.
[321] *Ibid*, paras. 108-109.
[322] Agency Contract between PRS S r.l. and Agonset.it S r.l., 16 September 2014 (with subsequent invoices) (C-317).
[323] Becchetti cross-examination, Hearing, Day 2, T162.7-T162.14.
[324] Letter from Agonset to the AMA, Prot. No. 94/14, 30 October 2014 (C-063).
[325] First Bushati Statement, para. 36.

media plurality.[326] Prime Minister Rama's Socialist Party had sought to repeal those requirements, but this effort was abandoned following international criticism.[327]

316. On 19 May 2015, Agonset again wrote to AMA, seeking an answer to its letter of 30 October 2014.[328] The AMA requested a copy of the letter in Albanian,[329] which Agonset provided.[330] Shortly thereafter Albania issued a warrant for the arrest of Messrs. Becchetti and De Renzis, as discussed in paragraphs 393 to 398 below.[331]

317. On 15 June 2015, AMA issued a press release, explaining that due to various factors it was impossible for Albania to meet the deadline for the digital switchover.[332] Those factors included the slow digitalization of the public broadcaster's two networks (itself in part caused by protracted legal disputes) and the AMA's lack of quorum and thus inability to make decisions.[333] The AMA had lacked quorum because two members appointed by the opposition party, Sami Neza and Suela Musta, had refused to participate in meetings pending the outcome of legal challenges to the appointment of members of the AMA.[334]

318. On 1 February 2016, the AMA convened to make a decision on granting digital licenses under the 2015 Contest Regulation. The AMA concluded that:[335]

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[326] *Ibid*, paras. 40 and 42. One aspect of this requirement was later found to be invalid by the Constitutional Court of Albania: Constitutional Court Decision No. 56, 27 July 2016 (R-097).

[327] *Ibid*, para. 41.

[328] Letter from Agonset to the AMA, 19 May 2015, Prot. No. 81/15 (C-355).

[329] Letter from the AMA to Agonset, 25 May 2015, Prot. No. 919/1 (C-358).

[330] Letter from Agonset to the AMA, 1 June 2015, Prot. No. 41/15 (C-359).

[331] The only substantive response to Agonset's letter of October 2014 was sent by Mr. Sala on 11 February 2016: Letter from Mr. Sala, AMA to Ms. Hicka, General State Advocate, dated 10 February 2016 (R-076). In that letter, Mr. Sala states (among other things) that the 2015 beauty contest was limited to "national historical private operators" and "existing operators, with experience in digital broadcasting". However, the letter was sent after Albania had issued warrants for the arrest of Messrs. Becchetti and De Renzis; Agonset had been shut down (as discussed in paragraphs 429-434 below); and ICSID proceedings had been commenced by the claimants. The letter was also sent, not to Agonset, but to Ms. Hicka, the General State Advocate.

[332] The AMA, "On disregarding the terms of the digitization process," 15 June 2016 (R-079); I Londo, "Postponement of the digital switchover deadline and lack of quorum of the media regulator," Albanian Media Institute, September 2015 (R-078).

[333] 2013 Media Law, Article 14 (CL-084).

[334] The AMA, "On disregarding the terms of the digitization process," 15 June 2016 (R-079).

[335] AMA Decision No. 34, 1 February 2016 (R-093). See also AMA Decision No. 35, 1 February 2016 (R-094) and AMA Decision No. 32, 1 February 2016 (R-095).

a. Super Sport should not receive a license because it did not comply with the 2013 Media Law's requirements regarding cross-media ownership in Article 62.

b. TV Klan and Top Channel complied with the requirements necessary to be awarded a license. In the case of Top Channel, it explicitly assessed its ownership with regard to Article 61 of the 2013 Media Law and considered those requirements were not breached.

319. The AMA nevertheless awarded no licenses, again determining that it did not have quorum to do so because Sami Neza and Suela Musta refused to participate.[336] On this occasion, they refused to participate on the basis that the first digital licenses should have been awarded before the deadline for the digital switchover (17 June 2015).[337] As no licenses had been awarded by that date, they argued that AMA should proceed to the second licensing stage, an open competition.

320. DigitAlb, TV Klan and Top Channel challenged the AMA's decision not to award the licenses before the Administrative Court of First Instance. On 3 July 2016, the Court upheld that challenge and exercised its statutory powers to alter the AMA's decision, granting the three applicants 15-year licenses.[338] The State Attorney did not appeal the decision.[339]

I. THE TAX AUTHORITIES' TREATMENT OF THE CLAIMANTS AND AGONSET

(1) KGE's VAT refunds

321. Under Article 24 of the Concession Agreement, a number of tax and customs exemptions were granted by Albania and were confirmed by the Albanian Parliament in Law No. 8708.[340] In particular, Albania was required to refund VAT paid by KGE within 30 days of a request. After making a request, KGE could obtain a refund either through direct refunds or by setting off the VAT refund amounts owed to it against its other tax

[336] *Ibid*.

[337] Albanian Media Institute Newsletter, February 2016 (R-080).

[338] *DigitalB, TV Klan & Top Channel v. AMA* (Decision No. 1044 of the Tirana Administrative Court of First Instance), 7 March 2016 (R-152).

[339] First Bushati Statement, para. 43.

[340] See paragraphs 180 and 209 above.

obligations.[341] Set-offs could be obtained by submitting a request for set-off,[342] which the tax authorities would then confirm.[343]

322. On 25 July 2008, KGE first applied for a VAT refund,[344] however it received no response. On 10 October 2008, it made a second application, raising the cumulative credit claimed to ALL 499,567,390 (€3,910,960 at the time).[345] Three days later, the authorities recognised the cumulative credit arising from the two requests[346] but provided only approximately ALL 40,000,000 in refunds in the course of the following year.[347] KGE only received a full refund for the amounts requested in July and October 2008, in the form of set-offs against tax liabilities, on 19 September 2011.[348]

323. On 13 April 2011, KGE made a further VAT refund application for the amount of ALL 94,427,236 (€655,127 at the time).[349] On 1 September 2011, the authorities recognised the amount was owing.[350] On 12 September 2013, KGE obtained a full refund of that amount, mainly through set-offs.[351]

324. On 7 February 2012, KGE made its final VAT refund request for ALL 45,393,878 (€317,837 at the time),[352] which corresponded to a VAT credit incurred in the period between March and December 2011. The authorities did not respond to this request, and commenced the audit discussed in section IV.I(2) below.

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[341] Law No. 9920 on Tax Procedures in the Republic of Albania, 19 May 2008, Article 75(1) (CL-065).

[342] See for example Request for set-off dated 6 July 2010 and reimbursement order from General Taxation Directorate to KGE, 19 July 2010, Prot. No. 38291/1 (C-427.11).

[343] *Ibid.*

[344] KGE Request for Reimbursement, 25 July 2008, Prot. No. 21946 (C-427.1).

[345] KGE Request for Reimbursement 10 October 2008, Prot. No. 31040 (C-427.2). See also Table of Detailed VAT credit balance, refunds and compensation 2008-2015, as well as underlying requests and refund orders (C-427).

[346] Audit Report from General Taxation Directorate to KGE, 13 October 2008, Prot. No. 27086/3 (C-427.3).

[347] Table of detailed VAT credit balance, refunds and compensation 2008-2015, as well as underlying requests and refund orders, C-427, see lines in between C-427.2 and C-427.4.

[348] *Ibid*, lines between C-427.39 and C-427.40.

[349] KGE Request for Reimbursement, 13 April 2011 (C-427.30).

[350] Final Audit Report, 1 September 2011, Prot. No. 15320/3 (C-251).

[351] Table of Detailed VAT credit balance, refunds and compensation 2008-2015, as well as underlying requests and refund orders, C-427, lines below C-427.66.

[352] Request for set-off from KGE to Tax Directorate of Large Taxpayers, 7 February 2012, Prot. No. 04/12 (C-427.46).

325. In 2009 and 2010, KGE repeatedly complained about these delays to the METE, the Ministry of Finance and the tax authorities.[353] On 20 March 2009, the METE responded as follows.

> *Concerning the VAT reimbursement issue, the Ministry of Economy, Trade and Energy (METE), under the authority of the State Authorized Body (OSHA) has addressed, the Ministry of Finance with note no. 10098/2 dated 13.01.2008 to solve this concern (Attached the letter). Being aware of the ongoing delays, we want to inform you that METE will continue its effort to find a quick solution to the reimbursement of VAT issue.*[354]

(2) Tax Audit 8159 of KGE

a. Process

326. On 11 July 2012, Albania commenced a tax audit of KGE (Audit No. 8159).[355] Its purpose was to investigate the following matters.

> *a. Inspection relating to the applicability of law no. 7928 of 27.04.1995 as amended, and the Directives of the Ministry of Finance "On Value Added Tax".*
>
> *b. Inspection relating to the application of law no. 9920 of 19.05.2008 "On Tax Procedures in the Republic of Albania and directives pursuant to this law."*
>
> *c. Inspection relating to the application of the requirements of law no. 8438 of 28.12.1998 "On Income Tax" and Directives of the Ministry of Finance "On Income Tax".*
>
> *d. Inspection relating to the application of the requirements of law no. 9136 of 11.02.2003 and Directives of the Ministry of Finance "On collecting mandatory social security and health contributions".*

[353] Letter from KGE to the General Directorate of Taxation, 23 February 2009, Prot. No. 10/09 (C-222); Letter from KGE to the METE, 26 August 2009, Prot. No. 51/09 (C-231); Letter from KGE to the METE, 21 September 2009, Prot. No. 59/09 (C-232); Letter from KGE to the Ministry of Finance, 2 February 2010, Prot. No. 02/10 (C-239).

[354] Letter from METE to Hydro and KGE, March 20, 2009, Prot. No. 10098/3 (C-223).

[355] Final Audit Report, 13 May 2015, Prot. No. 8159/14, p. 8 (C-353).

> *e. Inspection relating to the application of law no. 8977 of 12.12.2002 "On the Tax System in the Republic of Albania".*
>
> *f. Inspection relating to the application of the requirements of law no. 9228 of 29.04.2004 as amended by law no. 9477 of 09.02.2006 "On accounting and financial reports" and Directives of the Ministry of Finance pursuant to them.*
>
> *g. Specification of the amount of reimbursable VAT, pursuant to the requirements [of law] no. 7928 of 27.04.1995 "On VAT" as amended, and of the Directives of the Ministry of Finance pursuant to it, as regards the confirmation of the Revenue Processing and Management Directorate's letter prot. no. 2148/1 of 16.02.2012, relating to the company's letter no. 04/12 of 07.02.2012, filed by us as no. 2148 no. 07.02.2012*

327. Audit No. 8159 was a re-audit of some periods that had previously been confirmed by the tax authorities and an audit for the first time of the request for VAT refunds made in February 2012. The audit took three years, concluding on 13 May 2015.[356] According to the original audit notification, the time limit for work on the audit was 200 hours.[357] A series of increases to this limit were subsequently approved.[358]

328. So long as the audit was open, KGE remained unable to ascertain its VAT credit and, as a consequence, set-off such credit with Energji.

329. On 9 April 2015, the authorities provided a draft of the report to KGE[359] and on 28 April 2015 KGE provided comments on that draft.[360]

b. Findings: alleged alteration of invoices and other documents

330. The Audit Report found that there were differences between documents that had been produced in the arbitration between KGE and Energji[361] and those that KGE had submitted to the tax authorities to claim reimbursement of VAT. The Audit Report alleged that those

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[356] *Ibid.*

[357] *Ibid*, p. 7.

[358] See, for example, *ibid*, p.10.

[359] Republic of Albania, Ministry of Finance, Inspection Report, Prot. No. 8159/11, Tirana, 9 April 2015 (C-019).

[360] Observations dated 28 April 2015 with Prot No. 19/15 (R-067).

[361] *Energji v. KGE*, Award, 20 August 2013 (R-065).

changes to documents were made to claim a VAT credit illegitimately. A VAT credit can only be claimed within 12 tax periods from when it arose. The problem allegedly identified by Audit No. 8159 was that the dates on four invoices had been erased so as to present a claim for a VAT credit outside the 12-month period within which KGE would have been entitled to such a credit.

331. Audit No. 8159 found that:[362]

a. invoice No. 36 of 20 October 2010 relates in fact to a work certificate No. 15 dated 24 April 2009 (allegedly outside the permissible period for a claim);

b. invoice No. 37 of 29 October 2010 relates in fact to a works certificate No. 14 of 27 February 2009 (again allegedly outside the permissible period);

c. both invoice No. 43 of 28 March 2011 and invoice No. 47 of 6 December 2011 actually pertain to works carried out in 2009 according to five situation reports (allegedly more than 12 tax periods before the invoice) and Audit No. 8159 concluded that the date had been removed from invoice No. 47 and that relevant situation reports had been "corrected".

332. The Audit concluded that these alleged actions amounted to fiscal evasion, contrary to Article 116 of Law No. 9920 of 19 May 2008 on Tax Procedures.

c. Findings: alleged failure to comply with the "tax representative rule"

333. Audit No. 8159 also concluded that KGE had obtained services from a number of taxable persons not resident in Albania,[363] and that the service providers had not nominated a tax representative in Albania when they were required to do so. Audit No. 8159 therefore concluded that KGE was liable to a penalty.

[362] Final Audit Report, 13 May 2015, Prot. No. 8159/14, p. 40 and 47 (C-353); see also documents provided by the Regional General Tax Directorate – Large Taxpayers' Unit containing relevant situation reports (R-066).

[363] For example, Lombardi SA, ERM Italia SpA, Hydro and AV SET Proucioni Spa: Final Audit Report, 13 May 2015, Prot. No. 8159/14, p. 21 to 33 (C-353).

d. KGE's appeal

334. On 11 June 2015, KGE lodged an appeal against Audit No. 8159 with the tax authorities.[364] The appeal did not challenge the allegation that dates on invoices and other documents had been altered.

335. The appeal was rejected on 15 September 2015 on the basis that KGE had failed to pay, or provide a bank guarantee for the amount of, the tax allegedly owed, as allegedly required as a condition precedent to appealing by Article 107 of Law No. 9920 of 19 May 2008 on Tax Procedures.[365] KGE did not appeal this decision to dismiss its appeal to the tax authorities to the Administrative Court.

336. On 22 September 2015, the tax authorities froze KGE's accounts and imposed a lien on them on 8 October 2015.[366]

(3) Energji's tax set-off with KGE

337. On 14 June 2010, KGE and Energji signed a set-off agreement according to which KGE would assign ALL 87.3 million (approximately €629,000) of its approved ALL 387.5 million (approximately €2.8 million) VAT credit to Energji, allowing Energji to set off its own tax liabilities with the VAT credit owing to KGE.[367] On 11 June 2010, the Albanian tax authorities approved this arrangement concerning the credit the subject of the agreement, subject to that agreement being produced to the authorities.[368]

338. On 3 March 2011, Energji set off large amounts of VAT in this manner for the first time.[369] On 17 March 2011, the Albanian tax authorities reimbursed Energji for sums it had paid to the authorities in recognition of the credit to which it was entitled under the agreement.[370]

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[364] Appeal dated 11 June 2015 with Prot. No. 24/15 (C-368).

[365] Letter from the Ministry of Finance to KGE, 15 September 2015, Prot. No. 19778/6 (C-387).

[366] Prosecutor's Office at the First Instance Court of Tirana, Order to Execute Security Measures for KGE, Order Prot. No. 11531, 22 September 2015 (C-168); General Taxation Directorate, Notice to KGE of Imposition of Mortgage and Security Lien, Prot. No. 12614, 8 October 2015 (C-095).

[367] Set-off Agreement between KGE and Energji, 14 June 2010 (C-244).

[368] Letter from General Tax Directorate to Energji, 11 June 2010, Prot. No. 9857/2 (C-243).

[369] Request for set-off dated 3 March 2011 with Prot. No 12/11 and reimbursement order from General Taxation Directorate to KGE dated 17 March 2011 with Prot. No 4887/1 (C-427.27).

[370] *Ibid.*

Energji continued to set off its tax liability with tax credits obtained from KGE and the Albanian tax authorities recognized these set-offs. Most of the VAT refunds that KGE obtained were not direct refunds but set-offs either from KGE's own tax obligations or from Energji's tax obligations.[371] These set-offs were the subject of separate agreements between KGE and Energji, and separate approvals by the authorities.[372]

339. For so long as Audit No. 8159 remained open, however, KGE could not get its VAT credits approved by the authorities, as KGE and Energji had to suspend their requests for set-off of the VAT credit against their own tax obligations and wait for the final amount of the tax credit to be confirmed by the tax authorities.[373] On 26 July 2012, KGE complained about this situation to the tax authorities.[374]

340. Energji accumulated significant tax liabilities and on 17 August 2012 the tax authorities froze Energji's bank accounts in respect of Energji's debt of ALL 52,684,742 (approximately €392,000).[375] On 11 January 2013, they imposed a lien on Energji's movable and immovable property.[376]

341. On 12 August 2014, the General Customs Directorate informed Energji that it would initiate bankruptcy proceedings if Energji did not pay all of its outstanding tax liabilities.[377] On 22 August 2014, Energji wrote to the Regional Taxation Directorate, asserting that the Directorate did not have the right, under the Law, to claim that Energji's tax liability was

[371] Table of Detailed VAT credit balance, refunds and compensation 2008-2015, as well as underlying requests and refund orders (C-427).

[372] See letter from General Taxation Directorate dated 27 December 2012 (C-427.43) providing for 19.860.164 Lek of KGE's VAT credit to be used to compensate Energji's dividend tax for 2009 pursuant to an agreement dated 23 December 2011 between KGE and Energji (R-068). See similarly General Taxation Directorate letter dated 26 January 2012 (C-427.45).

[373] First Becchetti Statement, para. 72.

[374] Letter from KGE to the Large Taxpayer's Unit, 26 July 2012, Prot. No. 29/12 (C-259).

[375] Blocking Order No. 16613, 17 August 2012 (C-260).

[376] Restrictive Measures, 11 January 2013, Prot. No. 505 (C-267).

[377] Letter from the General Customs Directorate to Energji, 12 August 2014, Prot. No. 12784 (C-304).

"uncollectible".[378] On 7 November 2014, the Regional Taxation Directorate nevertheless commenced bankruptcy proceedings.[379]

(4) Customs exemptions

342. In Article 24 of the Concession Agreement, customs exemptions were granted by Albania.[380] Article 4 of Law No. 8708 confirmed this and provided that KGE "is exempt from import duties, and any kind of tax that has to do with import and export of goods and services".[381] Customs exemptions could be obtained by KGE submitting a request for authorisation for customs exemption,[382] which the customs authorities would then authorise.[383]

343. On 29 June 2012, KGE submitted a request for authorisation for customs exemption for certain equipment it was importing for the Project.[384] However, when the equipment arrived, the customs authorities did not release it.[385] On 5 July 2012, the General Directorate of Customs sought clarification from the Ministry of Finance regarding whether KGE was exempt from VAT on imports.[386] On 19 July 2012, the METE confirmed that KGE was exempt from customs taxes and duties.[387] On 23 July 2012, the General Directorate of Customs sought further clarification from the Ministry of Finance and the METE.[388]

[378] Letter from Energji to the Regional Taxation Directorate, 22 August 2014, Prot. No. 29/12 (C-305).

[379] Regional Tax Directorate, Ministry of Finance, Summons, Application for Insolvency Proceedings, Prot. No. 16586, 7 November 2014 (C-094).

[380] Concession Agreement, Article 24 (C-025).

[381] Law No. 8708 on Some Exemptions and Granting Incentives for the Construction of Kalivaç Hydropower Plant on "BOT" Concession, 1 December 2000 (C-192).

[382] See for example Letter from KGE to General Directorate of Customs, 17 December 2009, Prot. No. 917 (C-234). See similarly, Letter from KGE to METE, 21 December 2009, Prot. No. 9855 (C-235).

[383] See for example Letter from General Directorate of Customs to KGE, 27 January 2010, Prot. No. 826 (C-237).

[384] Letter from KGE to General Directorate of Customs, 29 June 2012, Prot. No. 23/12 (C-020).

[385] First Becchetti Statement, para. 65.

[386] Letter from General Directorate of Customs to Ministry of Finance, 5 July 2012, Prot. No. 10569/1 (C-21).

[387] Letter from METE to General Directorate of Customs, 19 July 2012, Prot. No. 6207 (C-22).

[388] Letter from General Directorate of Customs to Ministry of Finance and METE, 23 July 2012, Prot. No. 10569/13 (C-23).

344. Over 24 July 2012 to 15 August 2012, correspondence was exchanged between KGE and the customs authorities regarding whether the customs exemption covered the VAT on the imported equipment.[389] On 2 November 2012, KGE paid €33,725.15 for the release of the equipment despite maintaining that no customs duties, including VAT on imports, were owed.[390]

(5) 2013 Audit of Agonset

345. On 11 December 2013, the General Taxation Directorate announced an audit of Agonset.[391] The audit program provided with the notification of the audit stipulated the following tax categories and periods would be covered.[392]

a. June 2012 to November 2013 for VAT.

b. The year 2012 for income tax.

c. May 2012 to November 2013 for Social Insurance and others.

346. On 19 December 2013, the tax inspectors requested an extension of the mandatory 72-man-hour limit on audit periods,[393] which was granted on 20 December 2013.[394]

347. On 26 February 2014, a final report was issued that imposed a fine of approximately ALL 3,429,626 (equal to €24,039 at the time) in regard to tax on profits and income tax, penalties

[389] Letter from KGE to General Directorate of Customs, 24 July 2012, Prot. No. 27/12 (C-24); Letter from General Directorate of Customs to KGE, 26 July 2012, Prot. No. 12047 (C-26); Letter from KGE to General Directorate of Customs, 1 August 2012, Prot. No. 34/12 (C-27); Letter from General Directorate of Customs to KGE, 3 August 2012, Prot. No. 12017/3 (C-28); Letter from KGE to General Directorate of Customs, 6 August 2012, Prot. No. 38/12 (C-30); Letter from General Directorate of Customs to KGE, 10 August 2012, Prot. No. 12925 (C-31); Letter from KGE to General Directorate of Customs, 15 August 2012, Prot. No. 39/12 (C-32).

[390] Letter from KGE to Minister of Finance, 2 November 2012, Prot. No. 52/12 (C-34); Customs Payment Bank Transfer, 2 November 2012 (C-264).

[391] Notification of Tax Audit from the Tax Inspection Directorate of the Ministry of Finance to Agonset, Prot. No. 53a, Tirana, 11 December 2013 (C-048).

[392] *Ibid*, p. 4.

[393] Albanian Taxation Inspection Team's Request for Time Extension of the Tax Audit from Tax Inspection Directorate of the Ministry of Finance, 19 December 2013 (C-049).

[394] Notification of Time Extension of the Tax Audit, Prot. No. 53321, 20 December 2013 (C-050).

and interest.[395] Of this amount, ALL 75,352 (equal to around €528 at the time) corresponded to arrears and penalties for tax on profits.

348. Because challenging the audit would have been more costly than complying with its findings, Agonset paid this tax liability, even though it believed this liability to have been incorrectly assessed.[396]

(6) Investigation of Cable System and 400 KV

349. In February 2014, Cable System and 400 KV, two companies that had made loans to Agonset several months earlier,[397] were notified that they would be investigated by the tax authorities.[398] The stated objective of these audits was the "verification of the transactions of the loan that you have made in the name of the company 'AGONSET' Sh.p.k."[399] and the notices set out the steps to be taken to further this goal.

350. The Claimants and their companies cooperated with this investigation.[400] Agonset was funded through a series of intercompany loans, the majority of which ultimately came from the settlement with Deutsche Bank described in paragraphs 232 to 234 above.[401]

(7) The Claimants' initial response

351. The Claimants were concerned about what might have motivated the investigations, however, and so commissioned an independent expert report on the funding of Agonset

[395] Letter from the Income Tax Inspection Directorate to Agonset, 27 February 2014 (C-283); Final audit report, 26 February 2014 (C-282).

[396] First Becchetti Statement, para. 119.

[397] See loan agreements by and between Agonset, KGE, Energji, and 400 KV, 7 November 2013 to 9 June 2014 (C-298).

[398] Directorate of Tax Control, Notification of Tax Control for the Execution of the Tax Control Inspection on Cable System, Prot. No. 7293, Tirana, 5 February 2014 (C-052); Directorate of Tax Control, Notification of Tax Control for the Execution of the Tax Control Inspection on 400 KV, Prot. No. 7292, Tirana, 5 February 2014 (C-053); Inspector of Tax Control, Request for Detailed Information From Cable System, 10 February 2014 (C-054); Inspector of Tax Control, Request for Detailed Information From 400 KV, 10 February 2014 (C-055).

[399] Directorate of Tax Control, Notification of Tax Control for the Execution of the Tax Control Inspection on Cable System, Prot. No. 7293, Tirana, 5 February 2014 (C-052); Directorate of Tax Control, Notification of Tax Control for the Execution of the Tax Control Inspection on 400 KV, Prot. No. 7292, Tirana, 5 February 2014 (C-053).

[400] First Becchetti Statement, paras. 125 to 126.

[401] *Ibid*, para. 125.

from Grieg Taylor of FTI Consulting.[402] On 1 May 2014 the report was issued, which detailed the amount, timing, and source of all cash inflows into eight of the Claimants' companies in Albania, including KGE, Energji, Cable System, Agonset, Albaniabeg, and 400 KV.[403]

352. The report was sent to the Albanian President, Prime Minister, Speaker of Parliament, Minister of Finance, Attorney General, Governor of the Central Bank, and the leaders of the parliamentary groups of the main political parties.[404]

353. Also in response to the investigation, Mr. Becchetti arranged to meet with the Secretary General of Prime Minister Rama's cabinet, Mr. Agaçi, at a restaurant in Tirana, in late 2013 or early 2014.[405] Mr. Becchetti asked why Prime Minister Rama's Government was pursuing money laundering investigations and actions against KGE, Energji, Agonset, Cable System, and 400 KV.[406] Mr. Agaçi declined to respond to this question and told Messrs. Becchetti and Arbana that they should speak to Enkelejd Joti, the General Manager of Top Channel.[407]

354. When asked why Mr. Becchetti should speak to Mr. Joti, who was not a public sector official, but the General Manager of a private television channel, Mr. Agaçi said "It is not a good idea to oppose the State."[408]

355. Mr. Becchetti asked Mr. Agaçi to tell Prime Minister Rama that the investigation was unnecessary and unacceptable, and Mr. Agaçi said he would speak with Prime Minister Rama.[409]

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[402] *Ibid*, para. 125.

[403] FTI Report on cash inflows recorded on bank statements of KGE, Energji, Cable System, Agonset, Albaniabeg Ambiant Sh.p.K, 400 KV and UJE SH.A, 1 May 2014 (C-072).

[404] Letter from Mr. Francesco Becchetti to the Albanian government, parliament, and various administrations circulating the FTI Report, 2 May 2014 (C-073).

[405] First Becchetti Statement, para. 123; Arbana Statement, para. 9.

[406] First Becchetti Statement, para. 123; Arbana Statement, para. 10.

[407] First Becchetti Statement, para. 123; Arbana Statement, para. 10.

[408] First Becchetti Statement, para. 123; Arbana Statement, para. 10.

[409] First Becchetti Statement, para. 124; Arbana Statement, paras. 10 and 13.

(8) Audit 3525 of Energji

356. On 10 March 2014, Albania opened Audit No. 3525 into Energji.[410] The following month, the tax authorities claimed that Energji had refused to provide it with documentation and imposed a ALL 1 million fine on Energji and Mr. De Renzis for allegedly obstructing the tax audit.[411] On 18 May 2015 the Tirana Administrative Court of First Instance overturned the fine.[412]

357. On 6 August 2014, Audit No. 3525 concluded, finding that Energji owed ALL 95,860,398 (€675,517 at the time) in tax liabilities, fines and interest.[413] In order to challenge this audit, Energji obtained a guarantee from Banka Veneto on 5 September 2014.[414]

358. On 8 January 2015, the Income Tax Appeal Directorate struck down 60% of these fines, on the basis that the audit had failed to recognise that the subject invoices had not yet been paid, meaning no payment had occurred that would be subject to withholding tax.[415]

359. On 31 March 2015, the tax authorities ordered Banka Veneto to pay to them the amounts in the frozen bank accounts[416] to satisfy other tax liabilities owed by Energji.[417]

360. The Regional Tax Headquarters, Large Taxpayers Unit in Tirana audited Banka Veneto. It found that issuing the guarantee to Energji was in breach of Law No. 9920. The bank was fined ALL 24,297,492 and determined that no transactions could be performed with

[410] Notification of tax inspection, 10 March 2014, Prot. No. 3525 (C-286).

[411] Fiscal Liabilities Assessment Report, 13 June 2014, Prot. No. 3525/13 (C-299).

[412] Decision No. 2703 of the Tirana Administrative Court of First Instance, 18 May 2015, p. 9 (C-354).

[413] General Tax Directorate, Tax Audit Report, 6 August 2014 (C-038).

[414] Letter from Banka Veneto to Tax Appeals Directorate and General Taxation Directorate, 5 September 2014, Prot. No. 18761 (C-309). Under Article 107 of Law 9920, a taxpayer must post a guarantee equal to the value of the penalties alleged if it wishes to contest those penalties: Law 9920 dated 19 May 2008 as amended by Law 164/2014, 4 December 2014.

[415] Income Tax Appeal Directorate, Decision of Income Tax Appeal Directorate, Tirana, 8 January 2015, Prot. No. 24149 (C-040).

[416] Frozen by Blocking Order No. 16613, 17 August 2012 (C-260), referred to in paragraphs 340 and 341 above.

[417] *Ibid*; Letter from the General Tax Directorate to Veneto Bank, 15 April 2015, Prot. No. 3924/8 (C-339). The Claimants alleged, in paragraph 283 of the Memorial, that the authorities collected the whole of the guarantee to satisfy these other liabilities. This is not supported by the text of the letter from Banka Veneto, which states that the guarantee had expired, and, in a separate paragraph, that the Bank had been ordered to pay the tax authorities "the frozen amount up to today". The Respondent pointed this out in paragraph 324 of the Counter-Memorial, and the Claimants did not address the issue in either the Reply or submissions at the Final Hearing.

Energji's accounts while freezing orders remained in place.[418] On 10 April 2015, the bank therefore refused Energji's request to extend the guarantee.[419]

361. On 10 June 2015, the Administrative Court of First Instance rejected Energji's appeal as to the balance of the liabilities determined to be owing by Audit No. 3525 on the basis that Energji had not satisfied a condition of bringing that appeal, namely either paying the full amount alleged to be owing or providing a bank guarantee for that amount.[420]

(9) Refusal of Agonset's Application for VAT Exemptions

362. Albania applies a value added tax to goods, including imported goods. Its VAT program is regulated under Law No. 7928 as amended by Law No. 125/2012 dated 20 December 2012.[421] Before its amendment by Law No. 125/2012, Law No. 7928 provided a VAT deferral scheme, allowing investors to postpone the payment of VAT on some imported equipment. Law No. 125/2012 amended Law No. 7928 to permit complete VAT exemptions for some of this equipment, subject to conditions.

363. Law No. 7928 as amended was supplemented by Decision of the Council of Ministers No. 180 dated 13 February 2013 ("Decision No. 180"), which came into force on 2 April 2013. This implementing decree repeated the text of Law No. 125/2012 but narrowed the Law's application to some specified equipment, listed in an annex:

> *2. Importing machinery and equipment performed by the taxpayers specified in point 1 of this decision is exempted from VAT only in cases when such machinery and equipment are imported in order to carry out investment contracts and importation is carried out by taxpayers themselves without subcontracting. The list of machinery and equipment that are directly related to the investment is set forth in the annex 1, which is attached to this decision.*

[418] Letter from Daniele Scavaortz, General Director of Veneto Bank, to Energji, Prot. No. 7907, 10 April 2015 (C-075).

[419] *Ibid.*

[420] Administrative Court of First Instance Decision 3132, 10 June 2015 (C-364).

[421] Law No. 7928 on Value Added Tax dated 27 April 1995, as amended by Law No. 125/2012, 20 December 2012 (CL-081).

[...]

5. [...] The [exemption] *procedure is valid only for the goods listed in the Annex 1 attached to this decision.*[422]

364. In early December 2013, Agonset requested deferrals and exemptions from the General Customs Directorate and the Tirana Customs Department, namely a VAT exemption on imported equipment already subject to VAT payment deferral and exemptions on equipment yet to be imported.[423] On 4 December 2013, the Tirana Customs Department denied authorisation on the basis that the television equipment imported by Agonset was not listed in Decision No. 180.[424]

365. On 25 July 2014, in Decision No. 4460, Tirana Administrative Court of First Instance upheld Agonset's appeal of that denial. It did so on the basis that Decision No. 180 could not narrow the scope of Law No. 7928, and the Law did not limit the types of goods to which the relevant exemptions applied. As Agonset had complied with the Law's requirements, it was entitled to the exemptions sought.[425]

366. The attorney general of Albania and the customs authority filed an appeal against this decision. The General Customs Directorate issued nine administrative decisions between February and August 2014 to collect VAT from Agonset, including on goods the Tirana Administrative Court had found were exempt. Agonset filed appeals against some of these administrative decisions, which appeals were at the time of the hearing also still pending.[426]

367. On 3 June 2015, the Tirana Customs Department sought to obtain a forced recovery of Agonset's outstanding VAT under the nine decisions with Decision No. 238. Agonset contested Decision No. 238 before the Tirana Administrative Court of First Instance, which

[422] Decision of the Council of Minister No. 180, February 13, 2013 (CL-083).

[423] Letter from Agonset to the General Customs Directorate, 26 December 2013, Prot. No. 140/13 (C-279).

[424] See Verdict of the Republic of Albania, Administrative Court of First Instance, Tirana, Verdict No. 4460, 25 July 2014, pp. 32 and 46 (C-056).

[425] Verdict of the Republic of Albania, Administrative Court of First Instance, Tirana, Verdict No. 4460, 25 July 2014, pp. 33 to 34 and 46 (C-056).

[426] Letter from Mr. de Renzis to Mrs. Elisa Spiropali, Director General of Customs, Prot. No. 63/14, 1 September 2014 (C-061); Letter from Mr. De Renzis to Mrs. Elisa Spiropali, Director General of Customs, Prot. No. 61/14, Tirana, 26 August 2014 (C-058).

rejected the lawsuit as the merits were pending in a different proceeding. The court also considered that, as the Administrative Court's Decision No. 4460 was not final pending appeal, the customs authorities could seek VAT collection in the meantime.[427]

(10) Cable System audit

368. On 14 May 2014, the tax authorities commenced an audit of Cable System.[428] The audit included an inspection of VAT, social security and income tax, and tax on profit, back to 2009.

369. In its final report, the General Taxation Directorate informed Cable System that it was going to report all bank transactions for the audited period to the General Directorate for the Prevention of Money Laundering.[429]

(11) Further audits of KGE and Energji

370. On 18 May 2015, five days after closing Audit No. 8159, Albanian tax authorities opened additional audits against KGE[430] and Energji. The new audit of Energji was initiated despite the Albanian tax authorities having frozen Energji's bank accounts in August 2012 and initiated bankruptcy proceedings against it in November 2014.[431]

371. Energji's audit covered a verification of the company's income tax, VAT, and health and social tax compliance, as well as compliance with accounting procedures, without even any indication of which time periods were to be reviewed.[432] KGE's audit encompassed VAT tax, income tax, profit tax, and health and social tax compliance and "Identification of the business activity".[433]

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[427] Decision No. 5405 of the Tirana Administrative Court of First Instance, 27 October 2015 (C-394).

[428] General Taxation Directorate, Final Audit Report, 13 October 2014, Prot. No. 29601/8-9, p. 2 (C-321).

[429] *Ibid*, p. 44.

[430] Notification of Regional Tax Office the Unit of Large Taxpayers to KGE and Shpëtim Arbana, Prot. No. 5928, 18 May 2015 (C-077).

[431] See paragraphs 340 and 341 above.

[432] Notification of Regional Tax Office the Unit of Large Taxpayers to Energji and Mauro De Renzis, Prot. No. 5927, 18 May 2015 (C-076).

[433] Notification of Regional Tax Office the Unit of Large Taxpayers to KGE and Shpëtim Arbana, Prot. No. 5928, 18 May 2015 (C-077).

372. However, these tax audits were subsequently suspended on the request of the tax authorities.[434] Due to the document sequestrations discussed in section IV.J(2) below, these companies no longer had in their possession the originals of the documents needed to carry out these tax audits. The tax authorities intended to continue the audits once the original documents were made available to them.[435]

J. THE CRIMINAL INVESTIGATION

(1) The first allegations of money laundering

373. Also in February 2014, on the 17th, the Economic and Financial Crime Section of the Police General Directory in Tirana sent the Tirana Prosecution Office information ("February 2014 Information") that raised allegations that Mr. De Renzis was laundering money.[436] The February 2014 Information led to the Prosecution opening Criminal Proceeding No. 1564 a few days later, on 24 February 2014.[437]

374. The allegations were based on the investigators' mistaken belief that Mr. De Renzis was not only the Administrator of various companies in the Becchetti Group of companies, but also the sole investor.[438] The investigators had obtained all of the materials from the tax authorities' audit of Agonset.[439] On the basis of their mistaken understanding of Mr. De Renzis' role, the loans between various companies appeared to the investigators to be intended to disguise the source of funds that Mr. De Renzis controlled.[440]

(2) Orders for document production

375. On 7 March 2014, the Prosecution wrote to the Albanian General Directorate for Taxation requesting detailed information on nearly all of the Claimants' companies in Albania,

[434] Letter from General Tax Directorate to Regional Tax Directorate, 1 July 2015, Prot. No. 19305/2 (C-373).

[435] *Ibid.*

[436] Albanian State Police General Directory, Economic and Financial Crime Section, "Information on Reporting a Criminal Offence to the Prosecutor," 17 February 2014 (C-281).

[437] See letter of Prosecutor's Office at the Tirana District Court dated 20 January 2016, which provides brief background to the criminal proceedings and the role of the prosecutor's office (R-009).

[438] Albanian State Police General Directory, Economic and Financial Crime Section, "Information on Reporting a Criminal Offence to the Prosecutor," 17 February 2014, pp. 11 to 12 (C-281).

[439] *Ibid*, pp. 9 and 12.

[440] *Ibid*, p. 12.

Cable System, 400 KV, Fuqi, Investime te Rinovueshme, and Agonset,[441] all of which had been named in the February 2014 Information. The Albanian prosecution obtained the companies' tax registration numbers, general tax history information, financial statements, control acts, books of sale and purchase, balance sheets, internal administrative decisions, analytical statements of income and expenses, and annual financial situations.[442]

376. The Prosecution then issued a series of sequestration and seizure orders in Criminal Proceeding No. 1564.

a. On 21 April 2014, the Prosecution issued a sequestration order over the building plans and other technical documents relating to the Kalivaç Project held by KGE.[443] The order recited that "According to the files administered during the investigation on this case, it appears that [Enerji and KGE] have performed among them financial transactions that create doubts in relation to the source of these transactions" and was apparently based in particular on the fact that "in 1997 the investment value was foreseen to be equal to 100.000.000 US dollars, and in the Addendum to the contract approved in 2007, the works value was foreseen to 129.000.000 Euro."[444] The sequestration order was not sent to KGE until 12 September 2014.

b. On 23 June 2014, the Prosecution ordered the seizure of 69 invoices issued on the Kalivaç Project from KGE and Energji.[445] This was the first time that any of the Claimants had been informed of the existence of Criminal Proceeding No. 1564. Again, the basis for the sequestration order was said to be an allegation of money laundering: "[…] it appears that the commercial companies 'Kalivaç Green Energy', 'Cable System' sh.p.k., '400 KV', 'Energji' Sh.p.k., 'Agonset', carried

[441] Letter from the Albanian General Directorate of Taxation Regional to the Prosecutor's Office of the District Court of Tirana, 11 April 2014, Prot. No. 17483 (C-292).

[442] *Ibid.*

[443] Judiciary District Prosecution of Tirana, Decision on Document Sequestration for KGE, Case. No. 1564, Tirana, 12 September 2014 (C-070).

[444] *Ibid.*

[445] Prosecutor's Office at the First Instance Court of Tirana, Judgment on the Invoice Seizure for KGE, Case. No. 1564, Tirana, 23 June 2014 (C-096); Prosecutor's Office at the First Instance Court of Tirana, Judgment on the Invoice Seizure for Energji, Case. No. 1564, Tirana, 23 June 2014 (C-097).

out suspicious financial transactions between them, which create doubts about the source of funding."[446]

c. On 26 June 2014, the Prosecution seized "all fiscal buying and selling invoices, that are related to the construction of the Hydropower Plant of Kalivaç, as well as the contracts stipulated between this company and the contractor and its subcontractors" for KGE and Energji.[447]

d. Also on 26 June 2014, the Prosecution sent a seizure notice to Cable System for identical reasons and for the same Project, except that this time the allegation was with respect to Cable System, 400 KV, and Energji.[448]

e. On 26 August 2014, the Prosecution seized "all the fiscal acquisition invoices (accompanied with the works progress situations), from all the subcontractors that have carried out works at the Hydropower Plant of Kalivaç" from 400 KV, Cable System, Fuqi, and Investime te Rinovueshme. This time, however, the charge was that only Cable System, 400 KV, Energji and Fuqi had performed suspicious financial transactions.[449]

f. On 19 December 2014, Albanian authorities seized "all the original situation reports generated during the construction of the Kalivaç Hydroelectric Plant" from

[446] Prosecutor's Office at the First Instance Court of Tirana, Judgment on the Invoice Seizure for KGE, Case. No. 1564, Tirana, 23 June 2014 (C-096); Prosecutor's Office at the First Instance Court of Tirana, Judgment on the Invoice Seizure for Energji, Case. No. 1564, Tirana, 23 June 2014 (C-097).

[447] Judiciary District Prosecution of Tirana, Decision on Document Sequestration for KGE, Case. No. 1564, Tirana, 26 June 2014, Prot. No. 9499/1 (C-066); Judiciary District Prosecution of Tirana, Decision on Document Sequestration for Energji, Case. No. 1564, Tirana, 26 June 2014, Prot. No. 9499/1 (C-067); Judiciary District Prosecution of Tirana, Minutes on the Material Evidence of Sequestration, Case. No. 1564, Tirana, 7 July 2014 (C-068).

[448] Judiciary District Prosecution of Tirana, Minutes on the Material Evidence of Sequestration, Case. No. 1564, Tirana, 7 July 2014 (C-068).

[449] Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation for 400 KV Sh.p.k., 26 August 2014 (C-043); Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation for Cable System Sh.p.k., 26 August 2014 (C-044); Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation for Fuqi Sh.p.k., 26 August 2014 (C-306); Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation for Investime Te Rinovueshme Sh.p k., 26 August 2014 (C-307).

KGE. The basis for this seizure was stated to be "suspicious financial transactions" between KGE and Energji.[450]

g. On 19 January 2015, the Prosecution confiscated "all the certificates of the taking delivery of works and the contract(s) concluded between Energji sh.p.k. and Kalivac Green Energy sh.p.k." from KGE on the suspicion that "suspicious financial transactions" were carried out between KGE and Energji.[451]

h. On 27 April 2015, the Prosecutor issued an order to examine documents relating to certain of KGE's revenues, on the basis of "suspicious financial transactions" between KGE, Cable System, 400 KV, and Energji.[452]

377. As the originals of these documents were removed, the tax audits of KGE and Energji that started in May 2015 (discussed in paragraphs 370-372 above) were suspended.

(3) International letters rogatory

378. The Prosecution also sent a number of letters rogatory to foreign governments requesting assistance with the criminal investigation.

379. The Italian authorities responded by asking that the Prosecution's requests be "more specific, in time, people, documents and a list of banking institutions to which these documents will be required."[453] Ultimately, the Italian authorities provided information to Albania.[454]

380. In July 2014, Albania's Ministry of Justice began sending requests for judicial assistance to its counterpart in Luxembourg. With the help of the authorities in Luxembourg, Albania

[450] Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation, 23 December 2014 (C-099).

[451] Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation, 20 January 2015 (C-100).

[452] Prosecutor's Office at the First Instance Court of Tirana, Order for Sequestration of Documentation from KGE, 27 April 2015, Prot. No. 6165 (C-340).

[453] Letter from the Albanian Embassy to the Albanian Ministry of Foreign Affairs, 11 March 2015, forwarded on 18 March 2015 (C-150).

[454] Summaries of Delivery of Materials in the Criminal Procedure No. 1564/14, 18 November 2015, 25 November 2015, and 9 December 2015, points 7 to 8 (C-149).

obtained over 500 pages of banking documents regarding KGE.[455] After it obtained general banking documents, it sought information regarding specific transactions. For example, on 23 April 2015, in response to Albania's request, authorities in Luxembourg provided information with respect to three specific transactions, as well as an Excel spreadsheet including all bank credit and debit bank activity for KGE's UniCredit Luxembourg S.A. account.[456]

(4) Prosecution of Mr. Becchetti for incident at Tirana Airport

381. On 1 July 2014, Mr. Becchetti underwent a security check at the Tirana Airport, conducted by safety employee Older Hysa.[457] There are varying descriptions about what occurred during this security check. Mr. Hysa made a complaint that Mr. Becchetti hit him with his head and captured him by his neck.[458] Mr. Becchetti says that Mr. Hysa subjected him to an inappropriate security check and made offensive comments, however he did not hit Mr. Hysa.[459]

382. Security footage,[460] which recorded vision but not sound, shows Mr. Becchetti being searched after passing through a metal detector. In the course of the search Mr. Becchetti removes something from his pocket and removes his belt. While Mr. Becchetti is putting his belt back on and retrieving his jacket and luggage, he appears to speak to, and gesture towards, the security officer who searched him. Once Mr. Becchetti has his belt and jacket on, he appears to place his face very close to that of the security officer who searched him and then shove that officer in the chest.

[455] Summaries of Delivery of Materials in the Criminal Procedure No. 1564/14, 18 November 2015, 25 November 2015, and 9 December 2015, p. 4 and 11, points 7 and 8 (C-149).

[456] Letter from Unicredit to judicial police of Luxembourg, 23 April 2015 (C-098).

[457] First Becchetti Statement, para. 129; Commissariat of Border Police of Rinas Tirana, Minutes – Statement About Obtaining Data From Persons Under Investigation, 1 July 2014 (C-064).

[458] Commissariat of Border Police of Rinas Tirana, Minutes – Statement About Obtaining Data From Persons Under Investigation, 1 July 2014 (C-064).

[459] First Becchetti Statement, para. 129; Commissariat of Border Police of Rinas Tirana, Minutes – Statement About Obtaining Data From Persons Under Investigation, 1 July 2014 (C-064).

[460] Security camera footage of Mr. Becchetti's Tirana airport incident, 1 July 2014 (R-001).

383. After the incident, Mr. Becchetti was questioned by the Police, in the presence of his lawyer Thedhori Sallaku.[461] During the questioning, Mr. Becchetti informed the Police that he resided in Italy, but also had a residence in Albania.[462]

384. On 16 September 2014, the Public Prosecutor issued an invitation to Mr. Becchetti at his residence in Albania to attend the Public Prosecution's office.[463] The Public Prosecutor did not issue the invitation to Mr. Becchetti's residence in Italy.[464] Only issuing the invitation to Mr. Becchetti's Albanian address was not compliant with the Albanian Code of Criminal Procedure.[465]

385. After undertaking further steps in the investigation, on 3 November 2015, the Public Prosecution charged Mr. Becchetti with the penal act of opposition of an employee while implementing a state duty.[466] On 2 December 2014, Mr. Sallaku, acting for Mr. Becchetti, applied to the Court of Tribunal District Tirana to cease the penal case on the basis of invalid procedural acts taken by the Public Prosecutor.[467] On 26 December 2014, the Court granted Mr. Sollaku's application to cease the penal case brought against Mr. Becchetti in relation to the incident at the Tirana airport.[468]

(5) Expert investigations of work undertaken at Kalivaç

386. On 10 September 2014, the Prosecution issued orders to perform an accounting expert investigation and a technical expert investigation to "determine the volume of works performed realistically, in the [hydro-power plant] of Kalivaç" and to determine "the type and volume of works acquired by company 'Energy' LLC and of its subcontractors and also the type and volume of works invoiced from company 'Energy' towards 'Kalivaç

[461] First Becchetti Statement, para. 129; Commissariat of Border Police of Rinas Tirana, Minutes – Statement About Obtaining Data From Persons Under Investigation, 1 July 2014 (C-064).

[462] Commissariat of Border Police of Rinas Tirana, Minutes – Statement About Obtaining Data From Persons Under Investigation, 1 July 2014 (C-064).

[463] Court of Tribunal District Tirana, Act No. 3512, Sentence No. 3298, 26 December 2014, p. 12 (C-65).

[464] First Becchetti Statement, para. 130.

[465] See Court of Tribunal District Tirana, Act No. 3512, Sentence No. 3298, 26 December 2014, p. 12 (C-65) and Appeals Court of Tirana, Act No. 1762, Decision No. 1498, 5 October 2015 (C-148).

[466] Court of Tribunal District Tirana, Act No. 3512, Sentence No. 3298, 26 December 2014, p. 14 (C-65).

[467] *Ibid*, p. 11.

[468] *Ibid*, p. 14. See also Appeals Court of Tirana, Act No. 1762, Decision No. 1498, 5 October 2015 (C-148).

Green Energy' for the works on the hydro-power plant of Kalivaç." On the face of these orders, KGE, Energji, and Cable System were accused of engaging in suspicious financial transactions.[469]

387. The AKBN was engaged to conduct the engineering audit. That agency had, in the course of the Project, produced a series of reports on the progress of works.[470] One of the engineers who had participated in some of the AKBN's prior investigations, Fetah Dervishi, was named to conduct the AKBN's report for the Prosecution, but soon resigned.[471] Albania later brought criminal charges against Mr. Dervishi and another colleague who had participated in the prior investigation, Sokol Koçi.[472]

388. In April and May of 2015, a final accounting expert report and a final technical expert report were issued.

389. The accounting expert report included the following findings.

a. Funds were transferred from KGE to Energji as a result of a 20 August 2013 arbitration award issued under the aegis of the Albanian Commercial Arbitration and Mediation Center ("Medart") in a dispute between KGE and Energji (the "Medart Award").[473] This arbitration was brought by Energji against KGE for delayed work and delayed payment.

b. Energji was charging KGE significantly more than it was paying its subcontractor for works.[474]

[469] Prosecutor's Office for the District of Tirana, Decision on Performing the Accounting Expertise, 10 September 2014 (C-311).

[470] See, for example, AKBN Monitoring Report, No. Prot. 1256, 27 July 2010 (C-107).

[471] Prosecutor's Office for the District of Tirana, Decision for the Assignment and Replacement of the Experts, 3 October 2014 (C-320); Letter from Fetah Dervishi to Prosecutor's Office for the District of Tirana, October 2014 (C-322).

[472] Letter from Prosecution Office of the District Court of Tirana, 20 January 2016 (R-009).

[473] Additional Accounting Expertise Report of the Penal Proceeding 1564 Year 2014, 19 May 2015 (C-356).

[474] District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1547, 5 June 2015, p. 19 (C-103 bis).

c. Energji had sufficient liquidity to pay its tax liabilities.[475]

390. In the engineering report, the AKBN engineers noted that they were not able to measure the full works actually carried out "because of inability to enter in some zones that present a risk."[476] They did not state in the expert report that the work invoiced had not been done.

391. On 23 September 2015, Agonset asked the Prosecutor to state precisely the role it was alleged to have played in the alleged money laundering.[477] The Prosecutor declined to do so.[478]

(6) Interrogation of Claimants' associates

392. Between 29 December 2014 and 30 April 2015, the Prosecution questioned a number of the Claimants' employees and family members.[479] It did not question Mr. Becchetti, Mr. De Renzis or Ms. Condomitti.

(7) Issue of arrest warrants

393. On 5 June 2015, the District Court of Tirana issued Acts Nos. 1545, 1546, and 1547,[480] ordering the immediate arrest of Mr. Becchetti, Mr. De Renzis, and Erjona Troplini, a business associate of Messrs. Becchetti and De Renzis (the "Arrest Warrants").

[475] Additional Accounting Expertise Report of the Penal Proceeding 1564 Year 2014, 19 May 2015, p. 4 (C-356).
[476] AKBN, Expertise Act for the Prosecution of the Judicial District of Tirana, 7 April 2014, p. 100 (C-291).
[477] Letter from counsel for Agonset Sh.p.k. to Prosecution, 23 September 2015 (C-388).
[478] Letter from Prosecution to Agonset Sh.p.k., 2 October 2015 (C-391).
[479] Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to A. Ceccobelli, 27 April 2015 (C-341); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to A. Kondi, 27 April 2015 (C-342); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to E. Meta, 27 April 2015 (C-343); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to E. Troplini, 27 April 2015 (C-344); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to H. Shehu, 27 April 2015 (C-345); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to M. Sula, 27 April 2015 (C-346); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to S. Arbana, 27 April 2015 (C-347); Prosecutor's Office at the First Instance Court of Tirana, Summons for Questioning to V. Kamberi, 27 April 2015 (C-348).
[480] District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1546, 5 June 2015 (C-102 bis); District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1547, 5 June 2015 (C-103 bis); District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1545, 5 June 2015 (C-360).

394. On 6 June 2015, the accused requested copies of the Arrest Warrants. The Prosecution denied this request on 31 July 2015.

395. The Arrest Warrants contained the following factual allegations.

a. "[…] through the companies 'Kalivaç Green Energy' shpk; 'Cable System' shpk; '400 KV' shpk; 'Energji' shpk; 'Fuqi' shpk; 'Investime te Rinovueshme' shpk and 'Agonset' shpk. suspicious financial transactions with no economically logical basis were made."[481]

b. Funds were transferred to KGE "from abroad, an indication that they are the product of illegal criminal activities."[482]

c. Invoices totalling €3,410,940 were issued for work not done, namely "the preparation of material selected and embankment for the construction of the dam" on the Kalivaç Project in 2009.[483]

d. A letter from KGE to Energji dated 11 June 2007 was forged, as KGE had only been registered on 9 July 2007, and so had no legal personality before that date.[484]

e. The arbitration between KGE and Energji that resulted, on 20 August 2013, in an award of €15 million to Energji, was "carried out with regard to a fictitious (false) dispute which was based on forged documentation created by way of an agreement between" KGE and Energji.[485] The purpose of this conspiracy was to conceal the true source of the funds paid out subject to the award.[486]

f. Energji had failed to pay a tax debt of ALL 770,423,159.[487]

[481] See, for example, District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1546, 5 June 2015, pp. 18 and 31 (C-102 bis).
[482] *Ibid*.
[483] *Ibid*, p. 20.
[484] *Ibid*, p. 26.
[485] *Ibid*, p. 26.
[486] *Ibid*, pp. 26-27.
[487] *Ibid*, p. 26.

396. On the basis of those factual allegations, the Arrest Warrants set out the following criminal charges.

a. Document forgery, concerning the work done on the Kalivaç Project.

b. Money laundering.

c. Tax evasion.

397. The Arrest Warrants ordered the arrest of the concerned individuals because of the "danger" they posed and the "nature of the suspect[s]":[488]

> *In light of the above, the Court—given the danger posed by "document forgery, in cooperation with others and more than once" and "laundering products of an offence or criminal activity" set forth under arts. 186/2 and 287 of the Criminal Code, the circumstances and the mechanism of their execution, the consequences arising from them and the nature of the suspect in question—concludes that a restrictive measure must be enacted against those under investigation.*

398. Mr. Becchetti and Mr. De Renzis challenged the Arrest Warrants in Albanian courts.[489] Their appeals have been rejected at each level and they are now without any recourse before Albanian criminal courts.[490] On 19 October 2015, Mr. Becchetti submitted an application to the European Court of Human Rights. The application was notified to Albania on 20 January 2016.[491]

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[488] *Ibid*, p. 31.

[489] See for example Decision of the Tirana Court of Appeals, 5 August 2015 (C-125); Appeal submission of Francesco Becchetti against Act No. 1546 for hearing on 5 August 2015 (C-381); Appeal submission of Mauro De Renzis against Act No. 1547 for hearing on 5 August 2015 (C-382).

[490] Decision of the Tirana Court of Appeals, 5 August 2015 (C-125); Screenshot of Supreme Court Registry showing rejection of Mr. Becchetti's appeal, 3 December 2015 (C-170); Screenshot of Supreme Court Registry showing rejection of Mr. De Renzis' appeal, 3 December 2015 (C-171); Decision No. 00-2015-2986 of the Albanian Supreme Court, 3 December 2015 (C-400); Decision No. 00-2015-2975 of the Albanian Supreme Court, 3 December 2015 (C-398); Decision No. 00-2015-2985 of the Albanian Supreme Court, 3 December 2015 (C-399).

[491] Application Form for Francesco Becchetti and Others, European Court of Human Rights, 19 October 2015 (C-154); Letter from the European Court of Human Rights, 20 January 2016 (C-155).

(8) The Criminal Notifications

399. On 16 July 2015, the Prosecution served Mr. Becchetti and Mr. De Renzis with a "Measure of Acquisition of Subject as Accused and Notification of Prosecution" (the "Notifications"), formally bringing the criminal charges found in the Arrest Warrants. The Notifications included the following two new charges.

a. Fraud with Abuse of Responsibility in Concert: Albania alleged that Mr. Becchetti "abused the powers recognised by the Bylaws of the company and transferred the money to the company 'Energji' on the basis of false documents."[492]

b. Creation of Fraudulent Schemes in Relation to Value Added Tax: In particular, the Prosecution alleged that KGE "unjustly profited from the reimbursement by the Office of Potential Taxpayers, and unjustly deposited VAT in its own accounts for work which was not performed."[493]

400. In addition to Messrs. Becchetti and De Renzis, Ms. Condomitti was also served with a Notification and charged with money laundering.[494] Albanian law did not permit her pre-trial detention because she is over 70 years old.[495]

401. On 30 July 2015, Albania formally named 400 KV, KGE, Energji, and Agonset as defendants in Criminal Proceeding No. 1564.[496]

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[492] Prosecutor's Office at the First Instance Court of Tirana, Measure Submitted for Notification of Prosecution, No. 10912, 16 July 2015, p. 4-30 (C-116).

[493] See Prosecutor's Office at the First Instance Court of Tirana, Measure Submitted for Notification of Prosecution, No. 10912, 16 July 2015, p. 32 (C-116).

[494] Prosecutor's Office at the First Instance Court of Tirana, Measure Submitted for Notification of Prosecution, No. 10911, 16 July 2015 (C-104).

[495] Albanian Code of Criminal Procedure (CL-001), Article 230(2). Ms. Condomitti was 73 when the arrest warrants were issued. Passport of Liliana Condomitti (C-7).

[496] Prosecutors Office at the First Instance Court of Tirana, Summons to 400 KV, 30 July 2015 (C-119); Prosecutors Office at the First Instance Court of Tirana, Summons to KGE, 30 July 2015 (C-120); Prosecutors Office at the First Instance Court of Tirana, Summons to Energji, 30 July 2015 (C-121); Prosecutors Office at the First Instance Court of Tirana, Summons to Agonset, 30 July 2015 (C-122). See also Prosecutors Office at the First Instance Court of Tirana, Decision for Considering the Person as Defendant and Notification of Accusation for KGE Sh.p.k., 7 July 2015 (C-375); Prosecutors Office at the First Instance Court of Tirana, Decision for Considering the Person as Defendant and Notification of Accusation for 400 KV Sh.p.k., 7 July 2015 (C-376); Prosecutors Office at the First Instance Court of Tirana, Decision for Considering the Person as Defendant and Notification of Accusation for Agonset Sh.p k., 7 July 2015 (C-377).

402. On 12 August 2015, it was reported that an order was issued to Albanian police to stop Agon Channel employees at the border and subject them to searches when leaving the country.[497] The concerned individuals, who were characterized as "very dangerous people," included news journalists, editors, and analysts as well as cameramen, operators, and hairdressers.[498]

(9) The extradition requests

403. On 21 July 2015, Albania sent two Requests for Extradition to the Home Office of the United Kingdom for Messrs. Becchetti and De Renzis (the "Extradition Requests"). On the basis of these Extradition Requests, Messrs. Becchetti and De Renzis were forced to submit to an arrest by appointment in London on 26 October 2015. Pending a decision on the Extradition Requests, Messrs. Becchetti and De Renzis were required to surrender their travel documents and were subjected to a nightly curfew.

(10) INTERPOL Red Notices

404. After the Arrest Warrants were issued, INTERPOL issued "Red Notices" at Albania's request in relation to Messrs. Becchetti and De Renzis.[499] A Red Notice is a request to INTERPOL's member countries to detain or arrest a person pending extradition proceedings.[500] On 17 June 2015, Mr. Becchetti lodged a complaint concerning the Red Notices with INTERPOL, and on 28 September 2015 Mr. De Renzis also did so.[501]

405. The complaints requested the data held by INTERPOL against them at Albania's request be deleted, so rescinding the Red Notices. The essence of the complaints was that: 1) the Red Notices were not issued for a proper purpose; 2) Albania could not legitimately pursue their extraditions; 3) the matter was of a political character; 4) they had been deprived of due process; and 5) there was an insufficient evidentiary basis for the Red Notices.[502]

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[497] "Berisha defends the journalists of Agon Channel," *Lapsi*, 12 August 2015 (C-126); Meço, Statement, para. 53.

[498] "Berisha defends the journalists of Agon Channel," *Lapsi*, 12 August 2015 (C-126).

[499] Commission for the Control of INTERPOL's Files, Decision of the Commission, 23-26 January 2017, para. 7 (C-604).

[500] *Ibid*, para. 12.

[501] *Ibid*, paras. 1 and 2.

[502] *Ibid*, para. 10.

406. On 31 August 2016, the Commission for the Control of INTERPOL's Files ("INTERPOL Commission") invited Albania to provide further information on Messrs. Becchetti's and De Renzis' arguments regarding: 1) the lack of a proper purpose for Albania's request and the inappropriateness of extradition;[503] 2) the political character of the charges and the lack of due process;[504] and 3) the lack of an evidentiary basis for the charges, in particular asking Albania to provide further details of the precise actions taken by the accused that resulted in the charges against them.[505]

407. Apart from providing the Arrest Warrants in response to the third query, Albania did not respond to the request for further information, nor to reminders sent on 18 November 2016 and 8 December 2016.[506] In its Decision of 23-26 January 2017, the INTERPOL Commission points out that although the Arrest Warrants state that there is evidence establishing the guilt of Messrs. Becchetti and De Renzis they do not specify what Messrs. Becchetti and De Renzis did personally to aid in the commission of the crimes charged.[507]

408. The Decision recorded that INTERPOL's rules:[508]

a. require that it only undertake activities for a purpose that is consistent with its aims;

b. stipulate that INTERPOL is strictly forbidden from undertaking any activities of a political character;

c. require it to undertake its activities with regard to due process and the basic rights of the people subject to those activities; and

d. require a sufficient evidentiary basis if a Red Notice is to be issued.

409. The INTERPOL Commission found that retaining the data concerning Messrs. Becchetti and De Renzis in its files, and so maintaining the Red Notices, did not conform with

[503] *Ibid*, para. 19.
[504] *Ibid*, para. 24.
[505] *Ibid*, para. 26.
[506] *Ibid*, paras. 19, 24, 27 and 28.
[507] *Ibid*, para. 27.
[508] *Ibid*, paras. 11-15.

INTERPOL's rules. The INTERPOL Commission reached this conclusion on the basis of Albania's failure to respond to the Commission's multiple requests for a response to its queries.[509] On 4 April 2017, the INTERPOL Commission informed Messrs. Becchetti and De Renzis that the data complained of had been deleted, and they were no longer subject to Red Notices.[510]

(11) Seizure orders

410. On 5 June 2015 (the day the Arrest Warrants were issued), the Albanian Court of the Judicial District of Tirana issued Act No. 768 "Decision on Preventative Sequestration of Properties" (the "Seizure Decision").[511] This Decision sought to sequester the holdings of Ms. Condomitti, Mr. De Renzis, and Ms. Troplini in a number of companies, including Agonset. The Decision omitted Mr. Becchetti, who, according to the Tirana Commercial Register, had no indirect holdings in Agonset because Costruzioni's sale of its shares to Agonset.uk had not yet been registered.[512]

411. At the Prosecution's request, the Court ordered:[513]

> *[...] the sequestration of the mobile articles (bank accounts, etc.) and immobile articles that the citizens under investigation Liliana Condomitti, Mauro De Renzis, Erjona Troplini, own proportionally to their shares in the company "Energji" ltd., the company "400" KW, the company "Fuqi" ltd., "Cable System" ltd. and the company "Agon Set" ltd., up to the amount of euro 39,001,863 (thirty-nine million and one thousand and eight hundred and sixty three) and 770,423,159 (seven hundred and seventy million and four hundred and twenty three thousand and one hundred and fifty-nine) lek that the company "Energji" ltd. has appropriated and transferred to the other companies as a result of the criminal offense.*

[509] *Ibid*, para. 28.

[510] Letter from the Commission for the Control of INTERPOL's Files to Quinn Emanuel, 4 April 2017 (C-604).

[511] Decision on Preventive Sequestration of Properties, No. 768, 5 June 2015 and Prosecutor's Office at the First Instance Court of Tirana, Order to Execute the Decision on Determining the Security Measures, 9 June 2015 (C-110).

[512] See paragraph 16 above.

[513] Decision on Preventive Sequestration of Properties, No. 768, 5 June 2015 and Prosecutor's Office at the First Instance Court of Tirana, Order to Execute the Decision on Determining the Security Measures, 9 June 2015, p. 22 (C-110).

412. The basis for the decision was that the Prosecution had concluded that:[514]

> *sufficient data* [exists] *to attribute to the citizens under investigation Francesco Becchetti, Mauro De Renzis, Erjona Troplini and Liliana Condomitti, elements that show the commitment of the criminal acts: "Evasion of taxes and fees," "Falsification of documents" and "Laundering of proceeds of the criminal offence or the criminal activity," provided for respectively in Articles 181, 186 and 287 of the Criminal Code.*

413. The Court went on to state that "'Energji' ltd. [had] reinvested [the money obtained for work that was allegedly not done and in an allegedly false arbitration] in other companies, such as: '400 KV' ltd., 'Cable system' ltd., and 'Costruzioni' ltd."[515]

414. The Claimants were not served with the Seizure Decision.[516]

(12) Execution of the Seizure Decision

415. On 8 June 2015, the Prosecution ordered the execution of the Seizure Decision and appointed the AASCP and the judicial police to carry out the order (the "Seizure Execution Decision").[517]

416. On the same day, and before it had notified the AASCP that the agency was responsible for executing the Decision, the Prosecution sent a letter to the banks at which 400 KV, Fuqi, Cable System, and Agonset held accounts and ordered the freezing of these companies' bank accounts.[518] At this time, the Claimants, as well as the employees of Agonset, had not been informed that the AASCP was purportedly running Agonset,[519] 400

[514] *Ibid*, p. 35.

[515] *Ibid*, p. 35.

[516] First Becchetti Statement, para. 145; Meço Statement, paras. 48 to 50.

[517] Decision on Preventive Sequestration of Properties, No. 768, 5 June 2015 and Prosecutor's Office at the First Instance Court of Tirana, Order to Execute the Decision on Determining the Security Measures, 9 June 2015 (C-110).

[518] Prosecutor's Office at the First Instance Court of Tirana, Order to Execute Security Measures, 8 June 2015 (C-113).

[519] The Respondent disputes the Claimants' assertion that the AASCP had an obligation to run Agonset: Counter-Memorial, paras. 533-536.

KV, Fuqi, and Cable System, or that these companies' accounts had been frozen.[520] They became aware one week later.

417. On 10 June 2015, the AASCP wrote to Albania's commercial registry to block Ms. Condomitti's, Mr. De Renzis' and Ms. Troplini's shareholdings in the relevant companies.[521] On the same day, the seizure of these shareholdings was recorded on Agonset's excerpt from the Albanian Registry of Companies. The note in the excerpt also stated that: "[The AASCP] are tasked with the execution of this decision and the management of the assets that will be seized."[522]

418. On 10 and 11 June 2015, the AASCP also ordered the freezing of the bank accounts[523] and transportation vehicles[524] of Ms. Condomitti, Mr. De Renzis and Ms. Troplini, and also of Energji, 400 KV, Fuqi, Cable System and Agonset.

419. On 17 June 2015, the AASCP went to Agonset and sequestered hundreds of technical items.[525] It also borrowed an accounting inventory from Agonset employees.[526]

420. On 19 June 2015, Albania sequestered the property of Energji, Cable System, 400 KV and Fuqi.[527]

421. On 26 June 2015, Ms. Condomitti appealed the Seizure Decision.[528] Her appeal, however, was denied by the Tirana Court of Appeal and the Albanian Supreme Court.[529] On 13 July

[520] First Becchetti Statement, para. 145.

[521] Letter from the AASCP to the National Registration Center, 10 June 2015, Prot. No. 376 (C-365).

[522] Agonset Sh.p k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, pp.17 and 18 (C-409).

[523] Letter from the AASCP to Banks, 10 June 2015, Prot. No. 377 (C-366).

[524] Letter from the AASCP to Road Transport Services General Directorate, 11 June 2015, Prot. No. 379 (C-367).

[525] Meço Statement, para. 50; Prosecutor's Office at the First Instance Court of Tirana, The Record for the Identification, Sequestration and Placement under the Administration of the Agency for the Administration of Sequestered and Confiscated Property, 17 June 2015 (C-115).

[526] Meço Statement, para. 50.

[527] Prosecutor's Office at the First Instance Court of Tirana, The Record for the Identification, Sequestration and Placement under the Administration of the Agency for the Administration of Sequestered and Confiscated Property of Energji, Cable System, 400 KV, and Fuqi Sh.p.k., 19 June 2015 (C-147).

[528] Appeal to the Court of Appeals of Tirana submitted on behalf of L. Condomitti, 26 June 2015 (C-123).

[529] Decision No. 1032 of the Tirana Court of Appeal, 14 July 2015 (C-378); Decision No. 00-2015-2987 of the Albanian Supreme Court, 3 December 2015 (C-401).

2015, both Ms. Condomitti and Agonset challenged the Seizure Execution Decision.[530] This appeal was also unsuccessful before the Court of Appeal and the Supreme Court.[531]

(13) Responses to the Seizure Decision

422. On 9 June 2015, Prime Minister Rama stated on Facebook and Twitter, "Blocking the source of the dirty money that feeds Agon Channel a success!"[532]

423. On or around 12 June 2015, Prime Minister Rama stated the following in an interview on television channel Vizion Plus.[533]

> *[T]here is no greater shame than making the "lawyer" of this channel for the sake of free speech, when this channel turns off and on with the help of dirty money. [...] It does not exist a principle where the freedom of speech is fed by the dirty money in the form of a commercial television. In that case we need to be careful, there is no mercy.*

424. On 17 June 2015, Prime Minister Rama appeared on TV Klan's "Opinion" program and said as follows.[534]

> *I have said "it as a success", because that kind of investor has caused to this state and to these people incalculable damages, with manipulated trials and in the meanwhile is holding in hostage the Albanian government with the concessions, for which he has not applied none of the conditions.*

[530] Appeal to the Court of Appeals of Tirana submitted on behalf of L. Condomitti and Agonset Sh.p k., 15 July 2015 (C-379).

[531] Decision No. 00-2015-2987 of the Albanian Supreme Court, 3 December 2015 (C-401).

[532] Tweet of E. Rama, Twitter, 9 June 2015 (C-128); Facebook Post of E. Rama, Twitter, 9 June 2015 (C-363).

[533] English language transcript and original video of Vizion Plus interview with Prime Minister E. Rama, uploaded on 12 June 2015 (C-370).

[534] English language transcript and original video of Opinion interview with Prime Minister E. Rama, 17 June 2015, p. 3 (C-129).

425. Prime Minister Rama called Mr. Becchetti and the Claimants a "scandalous phenomena against which we have declared a war, and we will fight up to the end",[535] and made the following comments regarding the judiciary.[536]

> *[...] what we have done with the electric power is nothing in front of what we will do with the judicial system. We will shake the foundations of the judicial system, in a manner that all the extravagant and canaille, that have used the vests of judge to become part of the crime, cannot even imagine*

426. On 21 June 2015, Elsa Ballauri, the President of the Albanian Human Rights Group, criticized Prime Minister Rama's statements and made the following comments.[537]

> *It is clear that the situation has gone beyond normality, I would say that it is dangerous in some aspects. First, the Prime Minister cannot afford to release a similar verdict he has not the competence, the position to make such statements, but the same Premier is in a very contradictory position: on one hand he should have waited for the verdict of justice, on the other hand our courts are shameless and unreliable*
>
> […]
>
> *[I]ts [sic] not just a matter of opinion. This is the question of Albania, in the sense that even if the courts are corrupted it does not mean that they are also unable, unjust to issue sentences, but the courts are in the hands of the rulers. The court executes the provisions of the Government, what the leader of the moment says and that's what does not work in the Albanian justice. The court is "captured" by the policy as it continues to be also in this case, not only the court, but the whole judicial system. So we are faced with a rather risky fact, according to me.*

[535] *Ibid*.

[536] *Ibid*, p. 14.

[537] E. Ballauri, Excerpt from *Agon News 2015 Electoral Coverage*, 21 June 2015 (C-372).

427. On or about 2 July 2015, the Chairman of the Parliamentary Commission for Education and Public Information Media criticised Prime Minster Rama's statements as an improper intervention in the criminal process.[538]

428. On and around 8 August 2015, in a speech in Parliament and open letters to the media, former Prime Minister Berisha criticised "propagandistic media attacks that Rama has done to businessman Becchetti and his mother" and the "incomparable attack of the denigrating media campaign toward the Italian investor that attempted to invest in Albania."[539]

(14) Closure of Agonset

429. After the Seizure Decision was executed, neither Agonset nor the AASCP on its behalf payed its liabilities. This led to an ALL 43,768,412 tax lien,[540] lawsuits from former Agonset employees for unpaid salaries,[541] demand letters from other creditors,[542] and an eviction notice from Agonset's landlord.[543]

430. On 29 September 2015, the AASCP wrote to the Prosecution and the Judge who had issued the Seizure Decision, stating it was unable to administer the relevant companies' assets because of the decision's "unclear formulation".[544]

> *In framework of the preventative seizure, due to the unclear formulation of the court's Decision, according to us, has made the implementation of this decision impossible.*
>
> *Our uncertainty regarding the decision lies in the fact that the decision provides for the seizure of the quotas and assets on behalf*

[538] G. Pollo's speech at a parliamentary session, uploaded 2 July 2015 (C-374).

[539] S Berisha, "A Long Note on the Defence of Becchetti and his Mother," *Tema*, 8 August 2015 (C-090).

[540] Notice from the General Taxation Directorate to Agonset, Prot. No. 50196, 20 July 2015 (C-157).

[541] Letter from Modus Legal Services to Agonset, 29 August 2015, Prot. No. 154/15, and attached Power of Attorney, 26 August 2015, Prot. No. 3283 (C-160); Letter from Modus Legal Services to Agonset, 29 August 2015, Prot. No. 153/15, and attached Power of Attorney, 25 August 2015, Prot. No. 3287 (C-161); Letter from Studio Legale CMM e Associati to Agonset, 25 September 2015, Prot. No. 164/15 (C-162).

[542] Letter of invoice liquidation from the National Chamber of Private Judicial Bailiffs to the AASCP, 25 September 2015, Prot. No. 550 (C-165); Letter from Agon Channel to Rai Way, 1 October 2015, Prot. No. 151/15 (C-166); Letter from Rai Com to Agonset, 5 November 2015, Prot. No. 191/15 (C-167).

[543] Notarial Notice from the Notary Chamber of Tirana, 23 September 2015, Prot. No. 163/15 (C-163); Lawsuit against Agonset, Act No. 12464, 7 October 2015 (C-164).

[544] Letter from AASCP to Prosecutor, 29 September 2015, Prot. No. 554 (C-151).

> *of natural persons who are part of other legal entities, with separate legal personality.*
>
> *From the above we request from you to determine the exact quotas and assets in the name of these persons in order for us to be clearer concerning the administration.*

431. On 14 October 2014, the Prosecution responded as follows.[545]

> *In response to your note prot. no. 554 of 29 September 2015, you are hereby notified that the Court Decision includes the shares owned by the citizens under investigation Liliana Condomitti, Mauro de Renzis, Erjona Troplini in the companies subject of the seizure decision, at the moment of carrying out the criminal offence. [...]*
>
> *Therefore based on the above mentioned percentages, it appears that Liliana Condomitti owns 39,8% of the shares of the "Agon Set" company and Mauro de Renzis 32% of this company's shares meaning that both citizens under investigation Liliana Condimitti and Mauro de Renzis own 71,8% of the Agon Set company shares. (When making calculations, extracts from the National Registration Centre should once more be obtained for any possible change carried out). [...]*
>
> *As above, also based on the decision No. 964 of 30 July 2015, we request to take all necessary measures for the execution of the Court decision.*

432. Throughout this time, Agon Channel Albania continued to broadcast. Although its employees had not been paid in months, the majority continued to work for free.[546]

433. When Agonset sought to pay employees at bank accounts outside of Albania through Agonset.it, the employees received a message from their banks saying that these transfers were refused due to "bank policy."[547]

[545] Letter from Prosecutor to AASCP, 14 October 2015, Prot. No. 14407 (C-393).

[546] Meço Statement, para. 58.

[547] Email from STB Bank to Alda Kola, 1 October 2015 (C-390).

434. On 10 October 2015, the power at Agonset's studios was cut.[548] Agon Channel Albania ceased broadcasting on the same day.[549] Agon Channel Italy continued to broadcast "re-runs" until 16 November 2015.[550]

435. On 14 October 2015, the Parliamentary Commission for Communication and Means of Public Information (the "Parliamentary Commission") voted unanimously to request an explanation from the AASCP[551] and on 21 October 2015 the Chairman of the Commission wrote to the AASCP in the following terms.[552]

> *The parliamentary Commission for Education and Means of Public Information has received information concerning the serious situation created at the AGON CHANNEL television company, which being under your administration has been obliged to close down its activity. [...]*
>
> *As claimed in the information obtained, it appears that it is precisely the [AASCP]'s failure to meet these legal obligations, and its freezing of the bank accounts and activity of TV AGON CHANNEL, which have made it impossible for the latter to pay its dues to the OSHEE [Electricity Distribution Operator], its employees, taxes, duties and other liabilities for the supplies necessary to carry out its activity.*
>
> *Also, the claim continues that contrary to its legal obligation, the [AASCP] has not undertaken any measure to cover necessary expenses for safeguarding and administering the sequestrated assets, funds which should be met out of the funds secured by its administrators, in any kind of legal capacity or source.*

436. On 16 February 2016, the AASCP responded to a further query from the Parliamentary Commission.[553] It claimed that it could not administer Agonset because it could not

[548] Notification from OSHEE regarding interruption of energy supply, 2 October 2015, Prot. No. 2250 (C-392).

[549] Meço Statement, para. 56; "Berisha backs Agon Channel: Rama shut it down arbitrarily," *Civitas.al*, 10 October 2015 (C-131).

[550] "Agon Channel, end of broadcasts. Gone is the Albanian dream," *Affaritaliani*, 16 November 2015 (C-127).

[551] Letter from the Albanian Parliamentary Commission for Education and Public Information Media, 21 October 2015 (C-114).

[552] *Ibid.*

[553] Letter from the AASCP to the Parliamentary Commission for Communication and Means for Public Information, Prot. No. 114/2, 16 February 2016 (C-407).

exercise control over the indirect shareholdings of Mr. De Renzis and Ms. Condomitti via Costruzioni and Investime, which were not named in the Seizure Decision.[554]

> *The AASCP, pursuant to the provisions of law 10192/2009 and the law "On commercial companies" cannot exercise the activity of administration, still less take decisions in the name of the owners of shares in Agonset sh.p.k. because 80% of these shares are owned by the companies Costruzioni s.r.l. and Investime te Rinovueshme sh.p.k. which are not the object of decision no. 768 dated 05.06.2015 of the Tirana Judicial District Court, and 20% are owned by Fuqi sh.p.k. whose owners are Hysni Kamberi and Arvin Kamberi who are not included in this decision* […]
>
> *The AASCP, even if it had been tasked by the court with the administration of AGONSET sh.p.k., in the problematic financial circumstances in which this company finds itself from its foundation until now, would have been unable to carry on its activity, since the large losses and liabilities reflected in its financial statements could not be covered by funds from the budget.*

437. On 25 April 2016, a Tirana Court ordered Agonset be evicted from its premises.[555]

V. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

A. THE CLAIMANTS

438. In their Memorial and Reply on the Merits and Counter-Memorial on Jurisdiction the Claimants sought an award:

> *a. Declaring that Albania has breached its obligations under the Italy-Albania Treaty;*
>
> *b. Ordering Albania to pay monetary damages in an amount that would wipe out all the consequences of its illegal acts and re-establish the situation that would have existed if those acts had not been committed, in an amount to be determined;*

[554] *Ibid*.

[555] Notification on Tirana court website regarding eviction of Agonset, 25 April 2016 (C-419).

c. *Ordering Albania to bear the costs of this proceeding and to reimburse the Claimants' costs and expenses, including attorneys' fees, in an amount to be determined in a later phase of this proceeding by such means as the Tribunal may direct;*

d. *Ordering Albania to pay interest on all sums awarded based on a commercial rate, compounded annually, until full payment is received; and*

e. *Ordering any such other relief as the Tribunal may consider just and appropriate in the circumstances.*

439. In their Memorial, the Claimants sought damages in the amount of at least €1,038,007,000, constituted as follows.[556]

a. *Losses due to the expropriation of the Kalivaç Project, calculated as of June 2014:* ***EUR 111,433,000*** *owing to the expropriation of the Kalivaç Project itself and* ***EUR 1,940,000*** *in losses incurred by Energji;*

b. *A penalty for expropriation of the Kalivaç Project, pursuant to article 29 of the amended Concession Agreement:* ***EUR 103,200,000****;*

c. *Damages due to the inability of the Kalivaç Project to obtain Green Certificates because of delays caused to the Project by Albania, calculated as of January 2012, the date on which the plant would have begun to obtain Green Certificates but for Albania's breaches:* ***EUR 223,780,000****;*

d. *Damages arising from Albania's refusal to allow Hydro to exercise its right of first negotiation on the Poçem concession, calculated as of September 2015:* ***EUR 12,484,000****;*

e. *Damages to the Claimants resulting from Albania's discriminatory refusal of the proposal to build a wind farm as of April 2009:* ***EUR 31,988,000****;*

f. *Damages to the Claimants' investment in Agonset, calculated as of March 31, 2018:* ***EUR 394,116,000****;*

[556] Memorial, para. 662. References omitted, emphasis in the original.

g. Damages to the Claimants resulting from the criminal and extradition proceedings as well as Albania's failure to comply with the Tribunal's Provisional Measures Order;

h. Pre-award interest, compounded annually, for the Claimants' renewable energies investments, of ***EUR 149,065,000*** *at the Albanian cost of debt or* ***EUR 116,542,000*** *at a rate of LIBOR plus 4%; and*

i. Moral damages resulting from Albania's harassment and abusive criminal proceedings against the Claimants: ***EUR 10,000,000*** *(****EUR 5,000,000*** *for Mr. Becchetti and* ***EUR 1,000,000*** *for each of the remaining Claimants).*

440. At the final hearing, the Claimants stated they no longer pressed item b, a sum representing a penalty under the amended Concession Agreement for expropriation of the Kalivaç Project,[557] and advanced the following claims.

a. Expropriation of the Kalivaç Project contrary to Article 5 of the BIT and failure to accord the Claimants fair and equitable treatment in relation to the project in breach of Article 2(2) of the BIT.[558]

b. Costruzioni had a legitimate expectation that the Kalivaç Project would not be expropriated, and so the expropriation constituted a failure to accord Costruzioni fair and equitable treatment under Article 2(2) of the BIT. Costruzioni thereby lost its share of the profits that Energji would have made in completing the project.[559]

c. In failing to consider Energji's application to build a transmission cable between Albania and Italy,[560] Albania failed to accord fair and equitable treatment to, and discriminated against, Costruzioni, in breach of Article 2(2) of the BIT.[561] Costruzioni thereby lost the value of its share of that potential asset.

[557] Hearing, Day 1, T85.1-T86.8; T87.6-T87.15; T120.12-T121.1.

[558] Claimants' closing presentation, slides 34-45.

[559] *Ibid*, slide 62.

[560] See section IV.D(2) above.

[561] Claimants' closing presentation, slides 66-72.

d. In failing to respect Hydro's asserted right of first negotiation for a concession agreement to build a power plant at Poçem, contrary to Hydro's legitimate expectations, Albania failed to accord Hydro fair and equitable treatment in breach of Article 2(2) of the BIT. Albania also discriminated against Hydro in favour of a Turkish consortium, in breach of Article 3 of the BIT. Hydro thereby lost the value of that potential investment.[562]

e. Albania discriminated against Costruzioni and Liliana Condomitti in breach of Articles 2 and 3 of the BIT by refusing to consider Energji's request to build a wind farm.[563] Those Claimants thereby lost their share of the value of that potential asset.

f. Albania's failure to approve Energji's application to build a transmission cable and contributing to delays in the Kalivaç Project were contrary to Hydro's legitimate expectations and led to Hydro not being able to meet the deadline for obtaining the Green Certificates.[564]

g. Claims relating to Agonset:

   i. Albania's criminal and tax measures to seize the Claimants' assets and freeze their accounts in relation to Agonset were unlawful and constituted expropriation contrary to Article 5 of the BIT.[565]

   ii. Those criminal and tax measures, as well as Agonset's exclusion from the digital licensing process, were arbitrary, unjust, discriminatory and unfair, constituting a failure to provide fair and equitable treatment, in breach of Article 2(2) of the BIT, and constituting a breach of Article 3 of the BIT.[566]

441. In their closing presentation, the Claimants summarised their claims and the amount sought in relation to each as follows.

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[562] *Ibid*, slides 73-76.

[563] *Ibid*, slides 77-81. See also section IV.E above.

[564] Claimants' closing presentation, slides 82-86. See paras. 207 and 208 above.

[565] Claimants' closing presentation, slides 92-116.

[566] *Ibid*, slides 117-131.

Summary of Claimants' Claims: Who? What? And How Much?

Investment	Claimants	Claim	Quantum*
The Kalivaç Project	Hydro (owns 100% of KGE, which holds the concession)	Expropriation/FET/Discrimination	EUR 114,771,000
Energji's Lost Profits	Costruzioni (owns 80% of Energji)	FET	EUR 2,188,000
Submarine Transmission Cable	Costruzioni owns 80% of Cable System	FET/Discrimination	EUR 18,489,000
Lost Negotiation Rights for the Poçem Concession	Hydro (owns 100% of KGE, which holds the rights)	FET	EUR 6,601,000
Radrika Wind Farm	Costruzioni (72%) (through Rener) De Renzis (10%) (through Rener)	FET/Discrimination	EUR 23,762,000 EUR 21,385,000 EUR 2,376,000
Green Certificates	Hydro (owns 100% of KGE, which holds the concession)	FET	EUR 141,608,000
Agonset	De Renzis (32%) (through Investime) Grigolon (8%) (through Investime) Becchetti (36%) (through Agonset.uk) Hydro (through Agonset.it)	Expropriation/FET/Discrimination	EUR 304,503,000 EUR 120,730,000 EUR 30,182,000 EUR 149,728,000 EUR 3,863,000
Moral damages	All Claimants	Moral Damage/Individual Pain and Suffering	EUR 10,000,000
	TOTAL		EUR 621,922,000

Summary of Claimants' Claims: Who? What? And How Much?

Claimants	Investments	Claim	Quantum
Hydro S.r.l.	The Kalivaç Project Lost Negotiation Rights for the Poçem Concession Green Certificates Agonset Moral Damages	Expropriation/FET/Discrimination/ Moral Damage	EUR 114,771,000 EUR 6,601,000 EUR 141,608,000 EUR 3,863,000 EUR 1,000,000
Costruzioni S.r.l.	Energji's Lost Profits Submarine Transmission Cable Radrika Wind Farm Moral Damages	FET/Discrimination/Moral Damage	EUR 2,188,000 EUR 18,489,000 EUR 21,385,000 EUR 1,000,000
Francesco Becchetti	Agonset Moral Damages	Expropriation/FET/Discrimination/ Moral Damage/Individual Pain and Suffering	EUR 149,728,000 EUR 5,000,000
Mauro De Renzis	Radrika Wind Farm Agonset Moral Damages	Expropriation/FET/Discrimination/ Moral Damage/Individual Pain and Suffering	EUR 2,376,000 EUR 120,730,000 EUR 1,000,000
Stefania Grigolon	Agonset Moral Damages	Expropriation/FET/Discrimination/ Moral Damage/Individual Pain and Suffering	EUR 30,182,000 EUR 1,000,000
Liliana Condomitti	Moral Damages	Moral Damage/Individual Pain and Suffering	EUR 1,000,000
TOTAL			EUR 621,922,000

B. THE RESPONDENT

442. In its Rejoinder on the Merits,[567] the Respondent invited the Tribunal, if it determined that it had jurisdiction over one or more of the Claimants and/or their claims, to dismiss each and every such claim advanced by each such Claimant, and award the Respondent its costs of the proceedings. The Respondent maintained this position at the final hearing.[568]

VI. JURISDICTION

443. In its Counter-Memorial and Objections to Jurisdiction, the Respondent summarised its objections to the Tribunal's jurisdiction and the admissibility of the Claimants' claims as follows.[569]

> *(a) There is no valid arbitration agreement; the offer of arbitration in the Italy-Albania Bilateral Investment Treaty ("**BIT**") does not extend to multiple claimants.*
>
> *(b) Assets held indirectly by a Claimant are not "Investments" made by an "Investor" under the BIT.*
>
> *(c) The arbitration was not validly commenced.*
>
> *(d) The BIT does not protect the mere passive holding of assets.*
>
> *(e) The claims are an abuse of right / involve no qualifying investment because of the circumstances in which the alleged "investments" were acquired.*
>
> *(f) A number of the claims brought by the Claimants are in respect of alleged "investments" not made in Albania at all.*
>
> *(g) A number of the claims brought by the Claimants are: (i) on analysis claims which ought to have been addressed in the first instance to the ICC tribunal; and/or (ii) claims already submitted to the Albanian courts.*

[567] Rejoinder on the Merits, p. 221.

[568] Closing Note of the Respondent, p. 1, fn. 1.

[569] Counter-Memorial on the Merits and Objections to Jurisdiction, para. 6.

(h) Various "projects" about which the Claimants complain do not constitute an "investment".

444. With the exception of the claim for penalties under the Concession Agreement they withdrew at the final hearing, the Claimants continued to assert that the Tribunal had jurisdiction to hearing their claims and that all of those claims were admissible.

A. WHETHER THERE IS AN AGREEMENT TO ARBITRATE

(1) The Parties' Positions

a. The Respondent's Position

445. The Respondent asserts that the BIT does not allow for multiple claimants to claim in relation to multiple disputes. It does so primarily on the basis that, on its analysis, the language of the BIT indicates only one investor is envisaged, bringing a single dispute. The Respondent also asserts that this interpretation is supported by the following statement in *Tulip Real Estate*:[570]

> *[…] consent is the cornerstone of all international treaty commitments and that here the provisions of the BIT qualify the state sovereignty of Turkey. Here, Article 8 is a specific and qualified derogation to Turkey's sovereign immunity and the Tribunal accepts that in its interpretation and application there is* ***an inertia against too expansive a construction of the reach of the BIT****.*

446. On the Respondent's reading of the BIT, where the drafters intended to refer to investors generally, the plural is used.[571] Where, however, the BIT is referring to the specific circumstance of a claim being made, such as Article 8,[572] the singular is used. Article 8 reads as follows.

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[570] *Tulip Real Estate Investment and Development Netherlands BV v. Turkey* (ICSID Case No. ARB/11/28), Decision in Bifurcated Jurisdictional Issues, 5 March 2013, para. 44 (RL-0035) (emphasis added by the Respondent).

[571] Reply on Jurisdiction, para. 9, referring to Articles 2 to 4 and 5(2); and see Counter-Memorial and Objections to Jurisdiction, para. 15.

[572] The Respondent also relies on: Article 7, which refers to the singular "investor" in the context of a particular investor having been given an insurance guarantee on which payments have been made (Reply on Jurisdiction, para. 9(b)); and Article 5(3), which also refers to "the investor" in the context of a particular disagreement arising between an investor and a Contracting Party and being resolved according to Article 8's procedures (Reply on Jurisdiction, para. 9(c)).

1. *Any dispute relating to investments arising between an investor and the other Contracting Party, including disputes over compensation for expropriation, nationalization, requisition, and similar measures, should be resolved amicably wherever possible.*

2. *If such disputes cannot be resolved amicably within 6 months of the date of the request sent in writing, the concerned investor may, at its discretion, refer them:*

   a) *to the competent court, and to the successive levels of jurisdiction, of the Contracting Party in whose territory the investment was made;*

   b) *to an Arbitration Tribunal established on a case by case basis. Arbitration will be conducted according to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as set forth in UN General Assembly Resolution No. 31/98 of December 15, 1976, or according to a subsequent UN Regulation agreed by the Contracting Parties.*

      There will be three Arbitrators and, if not citizens of the Contracting Parties, must be citizens of a Country that has diplomatic relations with the Contracting Parties.

      If necessary, the President of the Arbitration Institute of the Stockholm Chamber of Commerce, or another President of an Arbitration Institute chosen by common agreement, will be asked to appoint the arbitrators in accordance with the aforementioned Regulation. The place of arbitration will be Stockholm, unless otherwise agreed to by the parties in dispute.

      The reconciliation procedures recommended by this same UN Commission may also be followed.

   c) *to the International Center for Settlement of Investment Disputes (ICSID) for the application of the arbitration and reconciliation procedures set forth in the Washington Convention on Settlement of*

Investment Disputes between States and Nationals of Other States of March 18, 1965 as soon as the Contracting Parties have both validly ratified it, or the rules of the additional "mechanisms" for the settlement of arbitration at the aforementioned International Center.

Pursuant to Article 25 of the Washington Convention of March 18, 1965 and as of the date on which it becomes applicable for both Contracting Parties, companies legally holding the nationality of one Contracting Party involved in the dispute, but with the majority of capital owned by investors of the other Contracting Party or of another Third Party, shall be considered as holding the latter's nationality;

d) the recognition and enforcement of the arbitration ruling in the territory of the Contracting Parties will be governed by the respective national legislation in accordance with the International Conventions to which they are a party. The arbitration awards shall be binding and final;

e) A Contracting Party that is a party to a dispute may not, at any stage of the proceedings resulting from investment disputes, claim immunity from jurisdiction in its defense because the investor has received compensation from insurance policies entered into to partially or totally cover losses or damages suffered.

447. The Respondent emphasises the references to "an investor", in Article 8(1), "the concerned investor […] at its discretion" in the chapeau to Article 8(2) and "the investor" in Article 8(2)(e).[573] According to the Respondent, this contrast between the language used in the general and specific cases reflects a conscious drafting choice which can only be explained by an intention to limit the Republic of Albania's consent to arbitrate to claims brought, in each case, by a single investor.[574]

[573] Counter-Memorial and Objections to Jurisdiction, paras. 12-14;

[574] Counter-Memorial and Objections to Jurisdiction, para. 15; Reply on Jurisdiction, paras. 11-12.

448. The Respondent also asserts that the language of the BIT and the Convention similarly limits consent to the arbitration of a single dispute, relying on the following text.[575]

a. Article 8(1) of the BIT refers to "dispute" in the singular.

b. One of the options is to refer a dispute to an arbitration board under UNCITRAL Rules established on a case by case basis.

c. The provision regarding ICSID arbitration, Article 8(2)(c), refers to "the dispute".

d. Neither the UNCITRAL Rules 1976 nor the ICSID Convention (referred to in Articles 8(2)(b) and (c) respectively) provide for consolidation of disputes. They instead envisage that, absent consent, disputes will be resolved in separate proceedings.

e. The requirement that there be a single dispute is also present in the ICSID Convention: see Article 25(1). Further, Article 25(2) ICSID Convention also refers to "dispute" in the singular.

449. The Claimants, on the Respondent's case, are impermissibly attempting to bring multiple disputes because their claims "involve different alleged investments, allege different types of wrongdoing at different times and arise (allegedly) as a result of different State measures by different alleged emanations of the State" and because "not every Claimant [...] relies on the same provisions of the BIT."[576]

450. Given that consolidation would not be permitted if the claims were brought separately, the Respondent further asserts that it is prejudiced as:

a. it has lost the opportunity to select an arbitrator particularly suited to each of these different disputes; [577]

[575] Counter-Memorial and Objections to Jurisdiction, para. 17; Reply on Jurisdiction, paras. 27-31.

[576] Reply on Jurisdiction, para. 30.

[577] Counter-Memorial and Objections to Jurisdiction, para. 38; Reply on Jurisdiction, para. 32(b)(i).

b. the Claimants are impermissibly seeking a forensic advantage by seeking "to muddy the waters and make proper analysis as difficult as possible",[578] including by attempting to "pollute the Tribunals' [*sic*] consideration of issues in respect of one dispute (for example, that relating to the Kalivac project) with prejudicial allusions to what is relied upon in respect of *other* unrelated disputes (such as Agonset)."[579]

451. Finally, the Respondent asserts that the decisions in which tribunals have permitted multiple claimants to bring their claims in one arbitration on which the Claimants rely[580] ought not be followed and are, in any event, distinguishable from the present case. The Respondent urges the Tribunal instead to follow a recent decision in which a distinguished PCA tribunal held that it did not have jurisdiction in respect of claims against Turkmenistan by a number of claimants in respect of a variety of investments that the multiple claimants sought to advance as one arbitration.[581]

452. As to whether the *Abaclat* and *Ambiente* decisions should be followed, the Respondent contends that both had very strong dissents,[582] one of which focused on the need to give effect to the use of "investor" in the singular.[583] The reasoning of each majority in those cases differs from the other,[584] that reasoning has been criticised,[585] and neither has yet been followed.[586] Further, none of these cases has yet resulted in a final award, and so none has been subject to the scrutiny of an annulment panel.[587]

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[578] Reply on Jurisdiction, para. 32(b)(ii).

[579] *Ibid*, para. 32(b)(iii).

[580] *Ambiente Ufficio S.P.A. and others v. Argentine Republic*, (ICSID Case No. ARB/08/09), Decision on Jurisdiction and Admissibility, 8 February 2013 (CL-112) ("*Ambiente"*); *Giovanni Alemanni and others v. Argentine Republic*, (ICSID Case No. ARB/07/8), Decision on Jurisdiction and Admissibility, 17 November 2014 (CL-114) ("*Alemanni"*); *Abaclat and others v. Argentine Republic*, (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 (CL-111) ("*Abaclat"*); *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 (CL-182) ("*Guaracachi"*).

[581] Case Report by Luke Eric Peterson, Investment Arbitration Reporter, 23 June 2015 (RL-103) ("*PCA decision"*).

[582] Reply on Jurisdiction, para. 16.

[583] Santiago Torres Bernádez's dissent in *Ambiente*, para. 84ff.

[584] Counter-Memorial and Objections to Jurisdiction, para. 28(c).

[585] Reply on Jurisdiction, para. 16.

[586] Counter-Memorial and Objections to Jurisdiction, para. 28(c).

[587] Reply on Jurisdiction, para. 16.

453. Even if the Tribunal were to follow the reasoning in the decisions on which the Claimants rely, the Respondent asserts that it would not apply here because the claims being brought are so disparate. The Respondent relies on the following analysis of the authorities to support its contention.

454. First, the Respondent asserts that the language of the relevant BIT in *Ambiente*, *Alemanni* and *Abaclat*, between Italy and Argentina, is materially different. That BIT refers within the Article containing consent to arbitration to "investor" and "investors" interchangeably.[588] As outlined in paragraph 447 above, on the Respondent's analysis, the Italy-Albania BIT only uses the plural to describe general provisions, and not to deal with a specific claim brought by an investor.

455. Second, the Respondent asserts that the decisions on which the Claimants rely require a close similarity, even identity, of: the interests for which a group of claimants seeks protection in a single arbitration; the alleged breaches of which the claimants complain; and the subject matter covered by the claims.[589]

a. In *Alemanni*, the Tribunal found that "the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute."[590]

b. In *Abaclat*, the majority considered the relevant question to be "whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT."[591]

c. The Tribunal in *CMS v. Argentina*,[592] although not concerned with an arbitration brought by multiple claimants, nevertheless addressed objections to jurisdiction on

[588] Counter-Memorial and Objections to Jurisdiction, para. 27. The relevant consent to arbitration is also contained in Article 8 of the Italy-Argentina BIT, an unofficial translation of which can be found at para. 270 of *Abaclat*.

[589] Counter-Memorial and Objections to Jurisdiction, para. 37; Reply on Jurisdiction, paras. 28-31.

[590] *Alemanni*, para. 292 (CL-114).

[591] *Abaclat*, para. 541 (CL-111).

[592] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 (CL-144) ("*CMS*").

the basis that more than one dispute was being brought.[593] It found that "As long as they affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct."[594]

d. In *Guaracachi*, the two claimants were parent and subsidiary companies, and the Tribunal found that a single arbitration could be brought "given the obvious link between both claimants and the identity of the facts alleged".[595] The claims by the two claimants were found to be "in essence one and the same claim".[596]

456. The Respondent asserts that the Claimants' claims cannot satisfy these requirements because they "relate to different purported investments in different industries (hydroelectric energy, wind energy, media) which are subject to different Albanian laws involving different Albanian entities and involve different factual inquiries. The alleged breaches of the BIT are said to have happened in different ways and at different times."[597]

457. Further, not each investor has an interest in each investment, as can be seen from the table reproduced in paragraph 441 above.

b. The Claimants' Position

(i) Whether the BIT provides consent for arbitration by multiple claimants

458. The Claimants begin[598] by pointing out that Article 31 of the Vienna Convention provides that the BIT must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[599]

[593] *Ibid*, para. 90.
[594] *Ibid*, para. 109 (Respondent's emphasis).
[595] *Guaracachi*, para. 340 (CL-182).
[596] *Ibid*, para. 345.
[597] Counter-Memorial and Objections to Jurisdiction, para. 36.
[598] Rejoinder on Jurisdiction, para. 12.
[599] Vienna Convention on the Law of Treaties, concluded on 23 May 1969 (CL-242), Article 31.

459. According to the Claimants, the plain language of Article 8 of the BIT makes it clear that it was intended to apply to multiple investors. The title, "Settlement of disputes between Investors and one of the Contracting Parties", refers to investors in the plural and a singular Contracting Party.[600]

460. The singular and plural are used, on the Claimants' account, interchangeably throughout the BIT.[601] The Claimants assert that the Respondent's distinction between use in the BIT of the plural and singular to refer to general and specific cases should be rejected as having no basis in the text of the BIT, its object or purpose, or authority.[602] In any event, the Claimants assert that the use of the plural in Article 8's title indicates that it was intended to be a general provision and not limited to the specific situation of an investor.[603]

461. As to the object and purpose of the BIT, the Claimants point out that its stated purpose is "to create favourable conditions for greater economic cooperation between the two Countries and, in particular, for investments by investors of one Contracting Party in the territory of the other Contracting Party".[604] The Claimants also point out that the BIT specifically covers types of investment likely to involve multiple investors, such as stocks, bonds and exploration of natural resources.[605] The stated purpose of the BIT could not, therefore, be furthered by permitting only one investor at a time to bring a claim, fragmenting proceedings, multiplying costs and risking contradictory rulings.[606]

462. The Claimants also assert that this reading of the BIT is supported by authority and international practice. Multiparty arbitration is, on the Claimants' account, commonplace in ICSID arbitration and there is no need for specific consent beyond that ordinarily

[600] *Ibid*, para. 13.

[601] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 253.

[602] Rejoinder on Jurisdiction, para. 14.

[603] *Ibid*, para. 15.

[604] Preamble to the BIT, quoted at Rejoinder on Jurisdiction, para. 18.

[605] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 256, referring to Articles 1(1)(b) and 1(1)(e) of the BIT, and para. 258, referring to *Abaclat*, para. 490 (CL-111).

[606] Rejoinder on Jurisdiction, para. 19.

given.[607] The Claimants also rely on *Alemanni*, in which the Tribunal found that there was no justification for reading "but only one" investor into the text of the Italy-Argentina BIT (which also refers to an investor in the singular) or to take even the exclusive use of the singular to exclude multiparty arbitration.[608]

463. The Claimants assert that the Respondent's attempts to distinguish the decisions in *Ambiente*, *Alemanni* and *Abaclat* on the basis that the Italy-Argentina BIT being interpreted in those decisions differs to the Italy-Albania BIT must fail. On the Claimants' argument, the arbitration clauses in the two are materially the same, as both refer to "investors" in the plural in their title and "investor" in the singular in the body of the Article.[609] The tribunals in all three of the bondholder decisions found that multiparty arbitration is permissible.

464. As to the PCA decision on which the Respondent relies, the Claimants assert that it in fact supports their position. In that decision, the tribunal acknowledged that several claimants can join their claims in one proceeding where there are common linkages between the claims but declined jurisdiction because the claims were "entirely unrelated." The Claimants contend that this is not the case here, for the reasons that the Claimants assert there is only one dispute before the Tribunal (summarised in the next section).[610]

(ii) Whether the claims are within jurisdiction

465. The Claimants respond in two ways to the Respondent's assertion that the Tribunal lacks jurisdiction over the claims because multiple disputes are sought to be arbitrated.

466. First, they assert that the BIT permits multiple disputes to be arbitrated, relying on Article 8(2) stating that if "such disputes" cannot be amicably resolved within 6 months the concerned investor may refer "them" to arbitration. Doing so is consistent with the purpose of the BIT, as it avoids unnecessary cost and allows investors to dispose of their disputes

[607] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 255, referring to: *Ambiente*, para. 141; *Guaracachi*, para. 343 (CL-182); C. Schreuer, The ICSID Convention, A Commentary, Cambridge University Press, 2nd ed., 2009, pp. 162-163 (CL-004 bis). See also Rejoinder on Jurisdiction, para. 20.

[608] *Alemanni*, paras. 270-271 (CL-114).

[609] Rejoinder on Jurisdiction, para. 23.

[610] *Ibid*, para. 28.

with the State in an expeditious fashion.[611] The Claimants assert that the Respondent's reliance on *Abaclat* and *Alemanni* in this context is misplaced. Whilst those tribunals found that only a single dispute could be brought under the Italy-Argentina BIT, the Claimants assert that the language of the arbitration provision in that BIT refers to a single "dispute". The Claimants therefore assert that those decisions are not relevant when interpreting the Italy-Albania BIT.[612]

467. Second, the Claimants assert that they are seeking to have several claims arbitrated but only one dispute, being "Albania's campaign of destruction against Mr. Becchetti, his companies, and associates."[613] The Claimants contend that the authorities permit all of the claims brought to be considered in one arbitration, emphasising that "dispute" has been broadly defined as a "disagreement on a point of law or fact, a conflict of legal views or interests between" parties.[614] A dispute is therefore a broader concept than a claim,[615] and so "the fact that [the claims] may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct."[616]

468. The Claimants accept that the *CMS* decision requires claims to share the same subject matter if they are to constitute one dispute.[617] They assert that the claims being brought here do so. Further, the reason the claims are brought together is said to be the following:[618]

> *Several claimants have interests in multiple investments. For example, Mr. Becchetti has interests in claims related to Agonset as well as those related to Hydro, another Claimant in this arbitration; Ms. Condomitti has interests in claims related to Agonset, Hydro, and the Costruzioni companies (Energy, Cable System, 400 KV, and Rener); and Mr. De Renzis has an interest in the claims of Agonset and Rener. These investments have been the target of a concerted campaign of destruction on behalf of the Government of Albania. In*

[611] *Ibid*, para. 33.

[612] *Ibid*, paras. 34-35.

[613] *Ibid*, para. 38.

[614] *Mavrommatis Palestine Concessions*, PCIJ, Judgment No. 2, 30 August 1924, p. 11 (CL-133).

[615] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 151 (CL-188).

[616] *CMS*, para. 109 (CL-144).

[617] Rejoinder on Jurisdiction, para. 40.

[618] *Ibid*, para. 41 (footnotes omitted).

> *order to avoid unnecessary costs and the risk of contradictory decisions, therefore, it is only logical to adjudicate all claims in one proceeding.*

469. Finally, the Claimants assert that there can be no prejudice to Albania in all claims being addressed in this arbitration. Albania will face these claims either separately or together, and will enjoy the same cost benefits as the Claimants if all claims are heard together.[619] Contrary to Albania's assertions, the Claimants contend that no particular expertise is required to determine the issues of fact raised in each claim.[620] The Claimants also deny that there has been any attempt to "muddy the waters" as to which Claimant has suffered what loss in relation to each alleged breach. The Claimants point out that they provided in their Memorial a detailed table showing the interest of each investor in each investment,[621] and that in any event those matters go only to the issue of how any award of damages should be allocated between the Claimants.[622]

(2) The Tribunal's Analysis

470. The Respondent is right to point out that too expansive a construction is not to be given to consent, following the decision in *Tulip Real Estate*,[623] and that the burden lies with the Claimants to show that the Tribunal has jurisdiction.[624]

471. It is also trite to observe that, following Article 31 of the Vienna Convention, the BIT must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[625]

472. When the relevant terms of the BIT are examined, there is some force in the Respondent's analysis of the use of the singular and plural of "investor" throughout the BIT.[626] However,

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[619] *Ibid*, para. 42.

[620] *Ibid*, paras. 43-44.

[621] Reproduced in section II.A above.

[622] Rejoinder on Jurisdiction, para. 45.

[623] *Tulip Real Estate Investment and Development Netherlands BV v. Turkey* (ICSID Case No. ARB/11/28), Decision in Bifurcated Jurisdictional Issues, 5 March 2013, para. 44 (RL-0035).

[624] *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 280 (CL-172).

[625] Vienna Convention on the Law of Treaties, concluded on 23 May 1969 (CL-242), Article 31.

[626] Summarised in paras. 446-448 above.

that analysis cannot bear the weight that the Respondent's arguments require it to. As the Claimants point out, the plural "investors" is used in the heading of Article 8. More significantly, the BIT specifically covers types of investment likely to involve multiple investors, such as stocks, bonds and exploration of natural resources.[627] The use of the singular "investor" in Article 8, on which the Respondent relies, must be read in this context. The Tribunal therefore respectfully agrees with the reasoning of the Tribunal in *Alemanni* that there is no justification for reading into the Article the words "but only one". For the reasons given by the Claimants, the relevant treaty in that decision is certainly sufficiently similar to assist the Tribunal in its interpretation of the BIT.[628] The Tribunal's finding is further supported by the fact that, as Professor Schreuer points out, multiparty arbitration is commonplace in ICSID arbitration and there is no need for specific consent beyond that ordinarily given.[629]

473. As there is no bar to multiple investors bringing a claim under the BIT, the question becomes:

a. whether the BIT permits more than one dispute to be brought in a single arbitration; and / or

b. whether the relationship between the various claims brought by the Claimants is such that they constitute one dispute.

474. As the Tribunal has found, for the reasons that follow, that the claims do constitute one dispute it is not necessary to address the first question and the Tribunal does not do so.

475. The parties agree, and the authorities establish, that there must be some linkage between different claims if they are to be brought in one arbitration.[630] There is less agreement in the authorities as to how that linkage is to be expressed, as the summary of the parties'

[627] Articles 1(1)(b) and 1(1)(e) of the BIT, and see *Abaclat*, para. 490 (CL-111).

[628] The Tribunal does not find the Respondent's suggestion that the bondholder cases have been controversial of assistance in determining what weight to accord the reasoning in those decisions, which of course stands or falls on its own merits.

[629] C. Schreuer, The ICSID Convention, A Commentary, Cambridge University Press, 2nd ed., 2009, pp. 162-163 (CL-004 bis).

[630] Reply on the Merits and Counter-Memorial on Jurisdiction, paras. 27-31; Rejoinder on Jurisdiction, paras. 38-40.

contentions above demonstrates. The Tribunal accepts that there must be a common thread or common elements running through the various claims. However, any attempt to lay down, in the abstract, principles of general application regarding how closely those claims must be related is unlikely to be useful.[631] The Tribunal respectfully agrees with the observation made in *CMS v. Argentina* that "the fact that [the claims] may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct."[632]

476. The gravamen of the Respondent's complaint is that:

a. not all investors have an interest in each investment the subject of a claim; and

b. the claims "relate to different purported investments in different industries (hydroelectric energy, wind energy, media) which are subject to different Albanian laws involving different Albanian entities and involve different factual inquiries. The alleged breaches of the BIT are said to have happened in different ways and at different times."[633]

477. Regarding the first, there is significant overlap in the holdings of the various Claimants, as can be seen from the table reproduced in paragraph 441 above and the Claimants' submissions extracted in paragraph 468 above.

478. Regarding the second, there are significant interrelationships between the investments over which the Tribunal finds it has jurisdiction,[634] such as the relationships between the Kalivaç Project, Energji's lost profits, the submarine transmission cable and the Green Certificates.[635] Further, aspects of the tribunals' decisions in *Abaclat*, *Ambiente* and *Funnekotter*[636] are of assistance here. In each of those decisions, the tribunals emphasised

[631] A view also taken by the majority in *Ambiente* at para. 154 (CL-112).

[632] *CMS*, para. 109 (CL-144).

[633] Counter-Memorial and Objections to Jurisdiction, para. 36.

[634] The Tribunal has found, as set out in section VI.H below, that is does not have jurisdiction over the claims concerning Energji's request to build a wind farm.

[635] As explained in sections IV.A(2), IV.C(1) and IV.D(2) above.

[636] *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009 (CL-161) ("*Funnekotter"*).

that the only relationships (or disparities) that are relevant are those that relate to the treaty claims being advanced.[637] Thus, differences between the contractual relationships of each of the claimants in the bondholder cases were found to be relevant only to contractual claims that might be brought by the claimants, and not to their treaty claims.[638]

479. Viewed in light of this analysis, the Respondent's complaint that the claims relate to different industries subject to different Albanian laws and entities involving different factual enquiries does not necessarily mean that they cannot constitute a dispute grounding jurisdiction under the BIT. The question is whether there is a sufficient link between the treaty claims that are being brought.

480. When the Claimants' complaints and the factual narrative that emerges from the evidence are viewed as a whole, the Tribunal finds that a sufficient relationship does emerge. The Tribunal emphasises that this finding is based on the very particular set of facts (and particular allegations as to how the Claimants have been harmed by the measures of which they complain) with which it has been presented.

481. It would, for example, be highly artificial to attempt to disentangle the effects of the State measures of which the Claimants complain on each investment given the allegation that those measures constitute a campaign against the group of Claimants as a whole. There is no doubt that the criminal investigations, seizure orders, arrest warrants and criminal charges which the Claimants allege constitute part of this campaign are predicated on a conspiracy that involves all of the Claimants and their investments to varying degrees. So much is apparent from the recitation of facts in section IV.J above, and in particular the factual allegations that based the Arrest Warrants,[639] and the effect of the Seizure Decision on all of the Claimants' investments.[640]

[637] *Abaclat*, paras. 541-542 (CL-111); *Ambiente*, paras. 161-162 (CL-112), and see *Funnekotter*, paras. 94-95 (CL-161).

[638] *Abaclat*, paras. 541-542 (CL-111); *Ambiente*, paras. 161-162 (CL-112).

[639] As described in paragraphs 393-398 above.

[640] As described in paragraphs 429-437 above.

482. The allegations made by the Claimants are therefore relevantly common and the issues raised by the various claims are sufficiently intertwined to demonstrate that the claims constitute one dispute for the purposes of Article 8. The Claimants also seek the same relief, namely indemnification under the BIT for the acts allegedly committed by the Respondent.[641]

B. WHETHER INDIRECT INVESTORS ARE PROTECTED BY THE BIT

(1) The Parties' Positions

a. The Respondent's Position

483. As can be seen from Annex A to the Memorial, extracted in section II.A above, a number of the Claimants are making claims in relation to assets in which they hold an indirect interest. As the Respondent points out, the Annex shows a series of indirect investments via a number of intermediaries, some of which are themselves Claimants. Frequently, the chain between Claimant and purported investment involves several layers of (at times) minority shareholdings, meaning that the purported "investor" does not control the chain of companies.[642]

484. The Respondent asserts that the language of the BIT does not permit claims to be brought by a party who has indirectly invested in Albania. It does so on the basis of the language of Articles 1(1) and 1(2), which respectively relevantly provide as follows.

> *"Investment" means, independently of the selected legal form and legal system of reference, every asset invested by investors of one Contracting Party in the other's territory in compliance with the latter's laws and regulations.*
>
> *"Investor" means an individual or a legal entity of a Contracting Party who, having obtained every required administrative approval, has undertaken, undertakes or has assumed an irrevocable obligation to make investments in the territory of the other Contracting Party, in compliance with the latter's laws and regulations.*

[641] See paragraph 438 above.

[642] Counter-Memorial and Objections to Jurisdiction, para. 42.

485. The Respondent draws the following points from the following specific aspects of those definitions.[643]

> *(a) An "Investment" under the BIT means "every asset invested by" an "Investor". That contemplates* […] *that the investor has itself made the investment (and not via an intermediary company)* […].
>
> *(b) An Investment is one that is made "in the territory of the other Contracting Party." That strongly suggests that if a shareholding is to constitute an investment, it must be an investment* ***in*** *an Albanian company that is said to constitute the investment.*
>
> *(c) The definition of "Investor" in Article 1(2) provides that in order to qualify, the putative "investor" must have undertaken irrevocable obligations and obtained every necessary administrative approval to make investments in Albanian territory and in accordance with its laws and regulations. That wording plainly envisages that the putative investor will itself have entered into such obligations and/or itself obtained the necessary authorisations. It also importantly envisages that the Investor will itself have actually made the investment in the other Contracting Party's territory. The only way this can sensibly be understood, when applied to Article 1(1)(a) of the BIT, is that in order for an Investor "to make" an investment in the shares of an Albanian company, it has to hold those shares itself and not via an intermediate subsidiary.*
>
> *(d) Likewise, the reference in Article 6 to an Investor having complied with tax requirements of the relevant country as a precondition to being able to transfer funds in exchangeable currency presupposes a direct link between the investor and the country in which the investment is to be made.*
>
> *(e) Article 1(1)(a) of the BIT does not contain the wording that one sometimes sees in investment treaties, viz. that an investment covers assets held or controlled "directly or indirectly"* […].

[643] *Ibid*, para. 46.

486. The Respondent asserts that the language it emphasises therefore demonstrates that the BIT was not intended to apply to indirect investments. In particular, the Respondent asserts that Article 1(2) requires that a putative investor "undertake an irrevocable obligation to make investments in Albanian territory."[644] On this basis, the Respondent asserts that even if, in principle, an indirect shareholder could qualify as an investor in respect of its shareholding in an Albanian subsidiary, that shareholder would still need to demonstrate that it had undertaken an irrevocable obligation to make investments in Albania. As none of the Claimants has done so, jurisdiction is lacking on that ground alone.[645]

487. The Respondent contends that this reading is supported by the decision of the tribunal in *Berschader v. Russia*[646] and at least left open by the decision in *Standard Chartered Bank*.[647] In *Berschader*, the tribunal distinguished decisions on which the claimants in that case sought to rely (which overlap with the decisions on which the Claimants in this proceeding seek to rely to the same end) as showing indirect investments were covered by the treaty. It did so on the basis that the tribunals in those other authorities were not confronted with the scenario in *Berschader* that "the sole claimants are foreign shareholders in a foreign incorporated company seeking to rely upon the terms of a BIT without having made any direct investment on their own part."[648] It therefore concluded that the relevant BIT could not be presumed to encompass "the kind of indirect investment relied on in the case."[649]

488. In contrast, the Respondent asserts that the decisions on which the Claimants rely should be distinguished from the present case for the following reasons.[650]

[644] Reply on Jurisdiction, para. 40(a), emphasis in the original.

[645] *Ibid*, para. 43(b).

[646] *Berschader v. Russia* (SCC Case 080/2004), Award, 21 April 2006 (RL-0036) ("*Berschader"*).

[647] *Standard Chartered Bank v. Tanzania* (ICSID Case No ARB/10/12), Award, 2 November 2012, para. 240 (RL-0037).

[648] *Berschader*, para. 135 (RL-36).

[649] *Ibid*.

[650] Reply on Jurisdiction, para. 42 and 44.

a. In *AMPAL v. Egypt*,[651] the relevant treaty expressly provided that the definition of "own or control" for the purposes of investment included "ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates".

b. Though the treaty being interpreted in *European American Investment Bank v. Slovak Republic*[652] did have a reference to investing in the territory of the host State, and investment in accordance with local laws, it did not have the further provision that the investor had to have undertaken an irrevocable obligation to make an investment in the host State territory.

c. *Mobil v. Venezuela*[653] concerned a claim by a Dutch holding corporation and four wholly owned subsidiaries, located either in Delaware or the Bahamas. The tribunal held that there was no doubt that the ultimate holding company controlled the subsidiaries. The Venezuela-Netherlands BIT did not contain a restriction in the definition of "investment" that it be made *in* the territory of Venezuela, a point that the tribunal noted in its discussion of the "direct/indirect investment".[654]

d. In *Kardassopoulos v. Georgia*,[655] the treaty wording differed, and the issue was considered only briefly by the tribunal, the focus of the respondent's argument having been on whether in fact the claimant had established the existence of the investment on which he relied.

e. In *Noble Energy v. Ecuador*,[656] the tribunal considered that Noble Energy, a Delaware entity, did have *jus standi* to bring a claim under the Ecuador-USA BIT.

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[651] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, para. 342 (CL-187).

[652] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 (CL-176).

[653] *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (CL-110) ("*Mobil"*).

[654] *Ibid*, para. 163.

[655] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (CL-108) ("*Kardassopoulos"*).

[656] *Noble Energy Inc. and Macalapower Cia. Ltda. v. Republic of Ecuador*, ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 March 2008 (CL-121) ("*Noble"*).

The wording of that treaty is materially different to the Albania-Italy BIT before this Tribunal. Further, the facts are different: the relevant subsidiary, Michala Power CIA Ltda, was wholly owned by the ultimate holding company claimant, Noble Energy Inc. Further, Ecuador had signed an investment agreement with an entity in the corporate chain that was higher than Michala Power CIA Ltda.

489. The Respondent also relies[657] on the policy concerns raised by the Tribunal in *Noble*, agreeing with the comments made by the Tribunal in *Enron v. Argentina* that:[658]

> *the Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.*

490. On this basis, the Respondent contends that the Tribunal should analyse the language of the BIT in the context of the real difficulties of overlapping, multiple claims to which allowing claims by indirect shareholders give rise, and find it lacks jurisdiction because:[659]

a. none of the Claimants have established that they undertook an irrevocable commitment to make an investment in Albanian territory;

b. the BIT does not extend to indirect investments; and

c. even if it did, the relevant Claimants would need properly to identify the investments which they claim were theirs and identify why, given the intervening corporate structure, the assets count as their investment.

b. The Claimants' Position

491. The Claimants assert that the BIT covers indirect investments, including those on which the Claimants rely. They do so primarily on the basis that there is no reference to direct or

[657] Reply on Jurisdiction, paras. 44(c) and 45.

[658] *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 50 (CL-020).

[659] Reply on Jurisdiction, paras. 45 and 46.

indirect investment in the language of the BIT, and so, in their contention, no reason to imply an exclusion on indirect investment.

492. The Claimants assert that the arguments made by the Respondent to support its view that indirect investments are not covered are not supported by the language of the BIT for the following reasons.

a. Article 1 does not require a putative "investor" to undertake an irrevocable obligation to invest in Albania. The Article refers to "an individual […] who […] has undertaken, undertakes or has assumed an irrevocable obligation to make investments in the territory" of Albania. There are therefore three possibilities: (i) having undertaken; (ii) undertaking; or (iii) assuming an irrevocable obligation to make, investments in Albania.[660]

b. Even if it did so require, there is no reason that investors could not satisfy the requirement by assuming an irrevocable obligation to make investments in Albania indirectly through other investment vehicles.[661]

c. The requirement that an investor make an investment in the territory of Albania could also be satisfied in the same, indirect, way,[662] as could the requirement to comply with any administrative or taxation obligations.[663]

493. The Claimants find support for their position in the following decisions, and assert that the Respondent is wrong to seek to distinguish them for the following reasons.

a. In *Mobil*, the tribunal found that "a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments."[664] The tribunal did not refer to the arguments on the basis of which the Respondent seeks

[660] Rejoinder on Jurisdiction, para. 51. At paragraph 52 the Claimants also state that this reading is supported by the *travaux*.

[661] *Ibid*, para. 53.

[662] *Ibid*, paras. 54-55.

[663] *Ibid*, para. 56.

[664] *Mobil*, para. 165 (CL-110), relied on at Reply on the Merits and Counter-Memorial on Jurisdiction, para. 275.

to distinguish the decision in its reasoning that supports this conclusion.[665] Rather, that reasoning is explicitly based in the fact that "there is no explicit reference to direct or indirect investments in the BIT" and that the BIT includes a "very broad" definition of investments, which "does not require that there be no interposed companies between the ultimate owner [...] and the investment".[666]

b. In *Kardassopolous*, the tribunal reached the same conclusion, following the same reasoning:[667]

> *The BIT is silent on whether the investor is required to directly own shares in a company investing in Georgia in order to qualify as an "investment" under the treaty. The tribunal in the ICSID case of* Siemens A.G. v. Argentina *was faced with a similar situation. That tribunal reasoned as follows: "*[...] *The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of 'investment' is very broad* [...] *The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments." The Tribunal agrees.*

The Claimants further assert that, contrary to the Respondent's submissions, there are no relevant differences in the language of the relevant treaties.[668]

c. The tribunal in *Noble v. Ecuador* concurred "with previous tribunals that have held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment. Failing any contrary wording, the BIT and the ICSID Convention encompass actions of indirect shareholders for their damages."[669] The Claimants assert that the factual differences between that case and the present to which the Respondent refers are not mentioned

[665] Rejoinder on Jurisdiction, para. 58.

[666] *Mobil*, para. 165 (CL-110), relied on at Rejoinder on Jurisdiction, para. 59.

[667] *Kardassopoulos*, paras. 123-124 (CL-108), relied on at Reply on the Merits and Counter-Memorial on Jurisdiction, para. 275.

[668] Rejoinder on Jurisdiction, para. 60.

[669] *Noble*, para. 77 (CL-121).

in the tribunal's reasoning on this issue.[670] The Claimants also point out that the tribunal did explicitly rely on the fact that the relevant treaty included a broad definition of "Investment" that encompassed "every kind of asset," including "shares stocks and other securities and any other form of interests in a company" without the requirement that the investment be a direct one or that there be no interposed companies.[671]

494. The Claimants accept that the tribunal in *Noble* was concerned about the possible policy implications of indirect investors claiming under the treaty and stated that "[t]here may well be a cut-off point somewhere, and future tribunals may be called upon to define it."[672] They point out, however, that the tribunal in that case found that it did not need to define such a cut-off point as "the cut-off point, whatever it may be, is not reached with two intermediate layers."[673] The Claimants go on to assert that this standard, even if it existed, would have no bearing on the instant case because the Claimants' investments fall within such a standard.[674]

(2) The Tribunal's Analysis

495. The Tribunal accepts the Claimants' analysis of the language of the BIT and agrees with the Claimants that there are no material reasons to distinguish the present case from that before the tribunals in *Mobil*, *Kardassopolous* and *Noble*, all of which reached the same conclusion.

496. The Tribunal also accepts, with the tribunals in *Noble* and *Enron*, that concerns may arise if minority shareholders seek to claim for harm alleged to have been done to the company at the end of a corporate chain. However, that is not a concern that arises on the present facts. The Claimants are right to point out that the present investments come within the "two intermediate layers" said to be permissible by the tribunal in *Noble*. More importantly,

[670] Rejoinder on Jurisdiction, para. 62, referring to *Noble*, paras. 77-83.

[671] *Ibid*, para. 61, referring to the treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993 (RL-109).

[672] *Ibid*, para. 62, referring to *Noble*, para. 82.

[673] *Ibid*, para. 62, referring to *Noble*, para. 82.

[674] *Ibid*, para. 62.

the corporate structure through which the indirect investments were made in this case was established for the purpose of the Claimants investing in Albania (as described in section II.A above and discussed further in section VI.A(2) below).

497. For these reasons, this objection to jurisdiction also fails.

C. WHETHER NOTICE WAS VALIDLY GIVEN

498. The Respondent asserts that the Claimants have failed to give the six months' notice of their disputes, as required by Article 8 of the BIT, before requesting arbitration. It asserts that this requirement is jurisdictional, cannot be varied through the application of the BIT's Most Favoured Nation ("MFN") clause, and applies regardless of whether negotiations between the parties would be futile.

499. The Claimants assert that:

a. they gave the required notice;

b. the requirement under Article 8 of the BIT is in any event not jurisdictional;

c. to the extent that it is alleged that notice was given, but is ineffective because it was within six months of the request for arbitration, the Claimants are entitled to rely on the shorter notice period provided by other BITs to which Albania is a party by virtue of the MFN clause in the BIT; and

d. in any event, it was not required to comply with the notice period because it had become futile.

500. The Tribunal has found, for the reasons given in section VI.C(2) below, that the notice required by Article 8 of the BIT was given by the Claimants more than six months before they requested arbitration in relation to those claims over which the Tribunal has otherwise

found it has jurisdiction.[675] It is therefore unnecessary for the Tribunal to consider the other matters raised by the parties in this context and it does not do so.

(1) The Respondent's Position

501. The Request for Arbitration was dated 10 June 2015. Between them, the Claimants sent 11 notices of dispute to the Respondent in October and November of 2014,[676] more than six months before the Request for Arbitration. The Respondent alleges that these notices were not effective to notify it of the disputes the Claimants now seek to have resolved because the notices did not describe those disputes in sufficient detail, or in some cases at all.

502. The Respondent asserts that "it was incumbent upon the Claimants meaningfully to inform Albania about the nature of any alleged disputes that they intended this Tribunal to determine in advance of submitting the RFA."[677] The Respondent accepts that not every fact or legal argument need be set out in notices.[678] However, it asserts that the Claimants are required, at the very least, "to refer in the notices with a proper degree of specificity to each of the alleged disputes and to the subject matter of it."[679]

503. The Respondent alleges that it was not notified of the following disputes with sufficient detail, or in some cases at all.

a. No notice of dispute was filed by the Claimants alleging that there was a dispute in respect of the bringing of criminal proceedings or extradition proceedings against Mr. Becchetti and Mr. De Renzis in Case No. 1564.[680]

[675] As discussed in section VI.H below, and for the reasons there stated, the Tribunal has found that it does not have jurisdiction over the claims relating to the Windfarm. For the reasons set out in section VII.D below, the Tribunal has also found that the Claimants' asserted right of first negotation in relation to the Poçem plant does not arise. The issue of whether those claims or disputes were properly notified to the Respondent is therefore not addressed here.

[676] See Annex A to the Counter-Memorial and Objections to Jurisdiction. Annex A also shows the six further notices that were sent in January 2015, within six months of the date of the Request for Arbitration.

[677] Reply on Jurisdiction, para. 65.

[678] Counter-Memorial and Objections to Jurisdiction, para. 70.

[679] *Ibid*, para. 65, relying on *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 309 (RL-0046) and *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, para. 57 (RL-0035).

[680] Counter-Memorial and Objections to Jurisdiction, para. 61(a).

b. No notice of dispute was filed by the Claimants alleging expropriation of the Kalivaç Project or of Agonset.[681]

c. There were complaints in the notices of dispute regarding the tax treatment of the Kalivaç Project and the criminal investigations relating to companies involved in the project. However, there was no reference to the type of dispute which the Claimants now seek to advance, namely that Albania had caused the delay of the project by, for example, failing to issue permits, disrupting the process of expropriating land and failing to provide support following floods, resulting *inter alia* in a loss of the Green Certificates.[682]

d. No notice of dispute filed by the Claimants mentions a dispute regarding Agonset's allegedly discriminatory exclusion from the process of awarding digital licenses, allegedly in breach of Article 2(2) and Article 3 of the BIT. The Respondent asserts this is plainly distinct from the claims regarding the allegedly abusive tax treatment and the criminal investigations of Agonset that were mentioned in notices of dispute.[683]

e. No notice of dispute filed by the Claimants particularises any dispute concerning the failure to consider and / or grant an application to construct a submarine cable, now alleged to be a breach of Article 2(2) of the BIT as being a discriminatory measure that failed to accord the Claimants fair and equitable treatment.[684]

504. The Respondent rejects the Claimants' assertion that, to the extent that certain claims now brought were not specifically referred to in the notices, they arise out of the same subject matter as claims of which Albania was notified, and so may be brought. It does so on the basis that, in the case of Agonset, the notices referred only to the tax treatment of the

[681] *Ibid*, para. 61(b).
[682] *Ibid*, para. 61(d).
[683] *Ibid*, para. 61(f).
[684] Reply on Jurisdiction, para. 63, fn 72.

company, and the Claimants now assert that it was expropriated. On the Respondent's case, this cannot be considered the same "subject matter".

505. The Respondent also rejects the Claimants' contention that these matters, which the Respondent describes as separate "disputes", are properly understood as "claims" that are subsumed within a broader, single dispute between the parties of which the Respondent was adequately notified. The Respondent does so on the basis that there are "a multitude of claims in this arbitration covering many different areas and which allegedly arose at different times. It is not plausible to say that all of these claims arose out of a single dispute."[685]

(2) The Claimants' Position and the Tribunal's Analysis

506. The parties are largely in agreement on the principles to be applied in determining whether adequate notice was given. Relying on the same authority as the Respondent, the Claimants assert that they "need only notify their dispute 'with a reasonable degree of specificity'; they need not notify the specific claims arising from that dispute or the entirety of the facts underlying those claims."[686] This is in essence the same as the principles on which the Respondent relies, summarised in paragraph 502 above, and this is the approach that the Tribunal has adopted.

507. Relying on *CMS v. Argentina*,[687] the Claimants also assert that, where new claims arising after a notice of dispute has been sent relate to the same subject matter as notified claims, the Tribunal has jurisdiction.[688] Albania did not express a view as to whether this is right as a matter of principle,[689] however the Tribunal accepts that this must be so. Otherwise,

[685] *Ibid*, para. 68.

[686] Rejoinder on Jurisdiction, para. 84, quoting *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 309 (RL-0046).

[687] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (CL-144).

[688] Reply on the Merits and Counter-Memorial on Jurisdiction, paras. 292-294. The Claimants also rely on *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (CL-106).

[689] Instead, as noted in paragraph 504 above, it asserts that the subject matter of the new and notified claims was in any event different.

as the Claimants point out, where there are ongoing breaches of a treaty a claimant would never be in a position to make its claim.[690]

508. Within that framework, it is clear that all of the matters of which the Respondent complains were adequately notified to the Respondent in the notices of dispute sent in October and November 2014, for the reasons that follow. The Tribunal addresses each of the five matters on which the Respondent relies, summarised in paragraph 503 above, in turn.

509. First, Mr. Becchetti's first notice, Ms. Condomitti's first notice, Hydro's first notice, Mr. De Renzis' first notice and Costruzioni's first notice[691] all referred to the criminal investigations and proceedings that ultimately led to the criminal and extradition proceedings against Mr. Becchetti and Mr. De Renzis in Case No. 1564.[692]

a. Mr. Becchetti and Ms. Condomitti complained that Albania is in "violation of the Italy-Albania BIT by opening patently baseless criminal and civil investigations against my companies for purported money-laundering on the basis of business transactions among my businesses."

b. Hydro complained that "Albania is in further and continuing violation of the Italy-Albania BIT by opening patently baseless criminal and civil investigations against KGE for purported money-laundering on the basis of business transactions considered suspicious without any legitimate reason."

c. Mr. De Renzis complained that "Albania is in further and continuing violation of the Italy-Albania BIT by opening patently baseless criminal and civil investigations against Energji for purported money-laundering on the basis of business transactions considered suspicious without any reason." Mr. De Renzis also complained that Albania "has also opened investigations into the work that Energji

[690] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 292.

[691] F. Becchetti's First Notice of Dispute, 11 October 2014, p. 2 (R-017); L. Condomitti's First Notice of Dispute, 10 October 2014, pp. 1-2 (C-082); Hydro's First Notice of Dispute, 10 October 2014, p. 2 (C-080); M. De Renzis' First Notice of Dispute, 9 October 2014, p. 2 (C-137); and Costruzioni's First Notice of Dispute, 10 October 2014, p. 2 (C-081); respectively, all of which were sent in October 2014.

[692] Rejoinder on Jurisdiction, para. 89.

has been involved with at the Kalivaç power plant under the pretense of determining if work is being carried out, when it patently is."

d. Costruzioni complained that "Albania is in further and continuing violation of the Italy-Albania BIT by opening patently baseless criminal and civil investigations against Costruzioni's Albanian companies, Energji, Cable System, 400 KV Sh.pk. and Agonset Sh.p.k. for purported money-laundering on their basis of business transactions."

510. It is clear from the recitation of the facts in section IV.J above that the criminal and extradition proceedings in Case No. 1564 (the disputes concerning which Albania asserts were not notified) are sufficiently connected to the investigations and proceedings to form one dispute.

511. In particular, the criminal investigations, Seizure Orders, Arrest Warrants and criminal charges are predicated on Albania's allegation of a conspiracy to launder money that involves all of the Claimants and their investments to varying degrees. As noted in paragraph 481 above, this is particularly apparent when regard is had to the factual allegations that founded the Arrest Warrants,[693] and the effect of the Seizure Decision on all of the Claimants' investments.[694] The Arrest Warrants were founded, in part, on the following allegations said to support charges that included money laundering.

a. "[…] through the companies 'Kalivaç Green Energy' shpk; 'Cable System' shpk; '400 KV' shpk; 'Energji' shpk; 'Fuqi' shpk; 'Investime te Rinovueshme' shpk and 'Agonset' shpk. suspicious financial transactions with no economically logical basis were made."[695]

[693] As described in paragraph 395 above.

[694] As described in paragraphs 410 to 420 above.

[695] See, for example, District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1546, 5 June 2015, pp. 18 and 31 (C-102 bis).

b. Invoices totalling €3,410,940 were issued for work not done, namely "the preparation of material selected and embankment for the construction of the dam" on the Kalivaç Project in 2009.[696]

512. Those factual allegations mirror the complaints notified to Albania in October and November of 2014 extracted in paragraph 509 above. The Tribunal therefore finds that the criminal proceedings and extradition proceedings against Mr. Becchetti and Mr. De Renzis in Case No. 1564 form part of the same subject matter as the complaints of which Albania was notified in October and November 2014 and so rejects the Respondent's challenge to the Tribunal's jurisdiction over those matters.

513. Second, the Tribunal turns to the issue of whether Albania was notified of the Claimants' allegation that the Kalivaç Project and Agonset were expropriated. Certainly, the October and November notices did not refer to "expropriation", however in those notices the Claimants allege "retaliatory" actions being taken to "harass" and "damage" the investors and their investments.[697] Mr. Becchetti alleged that the Albanian Government was "seeking to undermine [his] investment in Agonset" and complained that "Albania has not stopped harassing [him] and damaging [his] investments made under the Italy-Albania BIT."[698] The notices sent by Mr. De Renzis, Ms. Condomitti, and Costruzioni on 17 November 2014 also alleged that the Albanian government's actions are "designed to completely destroy [an investor's] investment in Energji,"[699] a company involved in the Kalivaç Project.[700]

514. Both parties acknowledge that there is no requirement that a claim be fully pleaded out. The allegations in the notices of damage to investments, referring as they do to damage to

[696] *Ibid*, p. 20.

[697] Hydro's First Notice of Dispute, 10 October 2014 (C-080); Costruzioni's First Notice of Dispute, 10 October 2014, p. 2 (C-081); L. Condomitti's First Notice of Dispute, 10 October 2014, p. 2 (C-082); Costruzioni's Second Notice of Dispute, 17 November 2014, p. 2 (C-083); L. Condomitti's Second Notice of Dispute, 17 November 2014, p. 2 (C-084); M. De Renzis' Second Notice of Dispute, 17 November 2014, pp. 1-2 (C-140); S. Grigolon's Second Notice of Dispute, 17 November 2014, p. 1 (C-141); F. Becchetti's First Notice of Dispute, 11 October 2014, p. 2 (R-017); F. Becchetti's Second Notice of Dispute, 17 November 2014, p. 2 (R-018).

[698] F. Becchetti's First Notice of Dispute, 11 October 2014, p. 2 (R-017).

[699] M. De Renzis' Second Notice of Dispute, 17 November 2014 (C-140), L. Condomitti's Second Notice of Dispute, 17 November 2014 (C-084), Costruzioni's Second Notice of Dispute, 17 November 2014 (C-083).

[700] Rejoinder on Jurisdiction, para. 90.

investments and "complete destruction" of others, are certainly adequate to put Albania on notice of an expropriation claim.

515. Third, the Respondent also asserts that it was not notified of any claim that Albania had caused the delay of the Kalivaç Project by, for example, failing to issue permits, disrupting the process of expropriating land and failing to provide support following floods, resulting *inter alia* in a loss of the Green Certificates. It further asserts that it was not notified of any claim relating to an application to build a submarine transmission cable (the fifth item listed in the summary in paragraph 503 above).

516. The Tribunal noted above that the Kalivaç Project, Energji's lost profits, the submarine transmission cable and the Green Certificates are all, as a matter of factual substance, interrelated.[701] Further, the complaints of which Albania was notified allege a broad range of state actions that were alleged to constitute harm to various investments, including the Kalivaç Project.[702] Those allegations included improper seizure of "vast volumes of old documents" and an improper investigation of whether Energji had carried out work on the Kalivaç Project as well as the allegations referred to by the Respondent concerning the tax treatment of the project and criminal investigations relating to companies involved in the project.

517. Given the breadth of the allegations made in the October and November 2014 notices and the interrelationship between the Kalivaç Project, Energji's lost profits, the submarine transmission cable and the Green Certificates, the Tribunal is satisfied those allegations made in the October and November 2014 notices are adequate to cover the additional state measures alleged to have harmed these investments. In particular, those relationships (such as the need to complete construction of the Kalivaç Project by a certain date, and be capable

[701] Noted in paragraph 478 above. The substantive factual interrelationships are described in detail in sections IV.A(2), IV.C(1) and IV.D(2) above.

[702] Costruzioni's First Notice of Dispute, 10 October 2014, p. 2 (C-081); L. Condomitti's First Notice of Dispute, 10 October 2014, p. 2 (C-082); Costruzioni's Second Notice of Dispute, 17 November 2014, p. 1 (C-083); L. Condomitti's Second Notice of Dispute, 17 November 2014, p. 1 (C-084); M. De Renzis' First Notice of Dispute, 9 October 2014, pp. 1-2 (C-137); M. De Renzis' Second Notice of Dispute, 17 November 2014, p. 1 (C-140); F. Becchetti's Second Notice of Dispute, 17 November 2014, p. 2 (R-018).

of transmitting energy to Italy, if the project was to be eligible for the Green Certificates) meant delays were likely to harm all of those investments.

518. Fourth, the Claimants rightly point out that the reason the October and November 2014 notices did not refer to Agonset's exclusion from the digital licensing process is that the exclusion did not take place until after those notices were given.[703] Section IV.H(5) above summarises the relevant events, which occurred in 2015. The relevant notices refer to a range of measures that the Claimants assert were taken against Agonset, including improper imposition of customs duties and harassment of Agonset journalists,[704] and general allegations that Albania has sought to undermine that investment.[705] It is therefore clear that the allegations of which the Respondent complains it was not notified relate to the same subject matter as those of which it was notified, namely Agonset.

D. WHETHER ANY OF THE CLAIMANTS ARE EXCLUDED AS PASSIVE INVESTORS

(1) The Parties' Positions

a. The Respondent's Position

519. The Respondent asserts that in order to attract protection of the BIT as an "investor" a person or entity must have "actively" invested in Albania. Merely passively holding shares in a company or passive ownership of other assets does not suffice. The Respondent asserts this requirement emerges from language in the BIT that refers to "making" and "investing" (and not merely "owning") assets.[706] The Respondent further argues that this language is analogous to the language considered in *Standard Chartered Bank v. Tanzania*,[707] where

[703] Rejoinder on Jurisdiction, para. 91.

[704] Costruzioni's First Notice of Dispute, 10 October 2014, p. 2 (C-081); L. Condomitti's First Notice of Dispute, 10 October 2014, p. 2 (C-082); Costruzioni's Second Notice of Dispute, 17 November 2014, p. 2 (C-083); L. Condomitti's Second Notice of Dispute, 17 November 2014, p. 2 (C-084); M. De Renzis' First Notice of Dispute, 9 October 2014, p. 2 (C-137); S. Grigolon's First Notice of Dispute, 9 October 2014, p. 1 (C-138); M. De Renzis' Second Notice of Dispute, 17 November 2014, p. 2 (C-140); S. Grigolon's Second Notice of Dispute, 17 November 2014, p. 1 (C-141); F. Becchetti's First Notice of Dispute, 11 October 2014, p. 1 (R-017); F. Becchetti's Second Notice of Dispute, 17 November 2014, pp. 1-2 (R-018).

[705] Becchetti's First Notice of Dispute, 11 October 2014, p. 1 (R-017); F. Becchetti's Second Notice of Dispute, 17 November 2014, pp. 1-2 (R-018).

[706] Counter-Memorial and Objections to Jurisdiction, paras. 73-80; Reply on Jurisdiction, paras. 37-43.

[707] *Standard Chartered Bank v. Tanzania*, ICSID Case No ARB/10/12, Award, 2 November 2012, (RL-0037) ("*Standard Chartered Bank"*).

the tribunal found, according to the Respondent, that such an active relationship was necessary.[708]

520. In *Standard Chartered Bank*, the claimant (Standard Chartered Bank – "**SCB**") was a UK company. The alleged investment was a loan acquired by a subsidiary of SCB, namely Standard Chartered Bank (Hong Kong) Limited ("**SCB HK**"). The loan had been made to finance a power plant in Tanzania. It had not been made by SCB HK, but rather the loan had been later acquired by SCB HK with SCB HK's own funds.[709] After considering both the text of the relevant BIT (UK-Tanzania) and its purpose, the tribunal concluded that the parent company, SCB, had not made an investment and the tribunal therefore did not have jurisdiction.[710]

521. The Respondent relies on the following findings of the tribunal in support of its case.[711]

> *It is difficult to see how the treaty's protections could promote investment by nationals of a Contracting State if the national of the Contracting State had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made.*
>
> […]
>
> [...] *a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.*
>
> *The Tribunal is not persuaded that an "investment of" a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.*

[708] Counter-Memorial and Objections to Jurisdiction, paras. 75-80. The Respondent also relies on the decision in *Gold Reserve Inc v. Venezuela* [2016] EWHC 153 (Comm) (RL-0039) ("*Gold Reserve*").

[709] *Standard Chartered Bank*, para. 196 (RL-0037).

[710] Summary drawn from the Counter-Memorial and Objections to Jurisdiction, para. 76.

[711] *Standard Chartered Bank*, paras. 228-232 (RL-0037).

> *Rather, for an investment to be "of" an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.*

522. On the Respondent's case, it is therefore for the Claimants to demonstrate that their shareholdings in alleged investments in Albania were not passively held.[712] The Respondent asserts that each Claimant is required to demonstrate, but has not, either that it has:[713]

a. entered into an irrevocable undertaking to make such investments;

b. made a (demonstrable) financial contribution in respect of those assets; or

c. has demonstrable control over the alleged investments at the bottom of the chain.

523. The Respondent asserts that the Claimants have done no more than show that some of the investments are by direct, rather than indirect shareholdings, and made a "half-hearted" attempt to argue that Mr. Becchetti was actively involved.[714] On the Respondent's reading of the authorities, whether shares are directly or indirectly held is not to the point.[715] As such, the Respondent asserts that the Claimants have failed to show that any one of them is protected by the BIT.

b. The Claimants' Position

524. The Claimants deny that the BIT requires any such active relationship between a putative investor and investment, disputing the Respondent's interpretation of the text of the BIT. They also assert that, when the test for "active" investment in *Standard Chartered Bank* and *Gold Reserve* is properly understood, each claimant is in any event an active investor.

[712] Counter-Memorial and Objections to Jurisdiction, para. 80.

[713] Reply on Jurisdiction, para. 105.

[714] *Ibid*, para. 104.

[715] *Ibid*, para. 102(b).

525. According to the Claimants,[716] the *Standard Chartered Bank* decision should be read in the context of the tribunal's finding that:[717]

> *In the absence of text in the BIT expressing a contrary intent and on a record indicating no involvement or control of the UK national over the investment, it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities.*

526. When read in this context, the Claimants assert that the decision requires that "some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other."[718] The tribunal there found that "[p]assive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient."[719] According to the Claimants' reading, a claimant may therefore establish an "active relationship" simply by showing that its investment is a direct one, i.e. that it invested in shares in a local company, failing which it must show control over the investment.

527. The Claimants point out that here, four of the Claimants (Hydro, Costruzioni, Stefania Grigolon, and Mauro de Renzis) have direct investments that meet the standard through their direct ownership of KGE (for Hydro); 400 KV, Cable System, and Energji (for Costruzioni); and Investime te Rinovueshme (for Ms. Grigolon and Mr. De Renzis).[720]

528. As for Mr. Becchetti and Ms. Condomitti, who hold exclusively indirect investments in Albania through Italian companies, the Claimants assert that they have shown that Mr. Becchetti has been the driving force of both the renewable energy and television investments. Similarly, Ms. Condomitti holds a controlling share of Costruzioni, which

[716] Rejoinder on Jurisdiction, para. 132.

[717] Standard Chartered Bank, para. 270 (RL-37).

[718] *Ibid*, para. 232.

[719] *Ibid*, para. 230.

[720] Rejoinder on Jurisdiction, para. 133, and see Annex A to the Memorial, extracted in section II.A above.

itself holds a controlling share directly in 400 KV, Cable System and Energji.[721] The Claimants also point out that Albania has alleged, in the criminal investigations and proceedings predicated on a conspiracy between the Claimants to launder money, that Mr. Becchetti and Ms. Condomitti have a controlling role in relation to the investments.[722]

529. The Claimants further contend that, unlike in *Standard Chartered Bank*, there can be no argument that these Claimants, Mr. Becchetti and Ms. Condomitti, have sought to take unfair advantage of protection under the BIT through their investments, as their investments pass through companies with Italian nationality. The Claimants also state that there can be no allegation of any corporate restructuring in order to take advantage of BIT jurisdiction, as the Italian Claimants' corporate structure is evidently directed at structuring the Claimants' investment in Albania and therefore guided by a deliberate relationship with those investments. This is not a situation, like in *Standard Chartered Bank*, in which the investor claimants happen to hold an investment by virtue of a global web of subsidiaries, despite showing "no involvement or control [...] over the investment."[723]

530. Similarly, the Claimants assert that Albania's reliance on *Gold Reserve* is also misplaced. In that case, an English High Court found that a Canadian company that acquired an investment as a result of a corporate restructuring could not invoke that asset as an investment under the relevant treaty. On the Claimants' analysis, the reasoning was the same as in *Standard Chartered Bank*, that is to allow the Canadian company to avail itself of the treaty's dispute resolution provisions would be abusive because:

> *construction of the BIT* [...] *did not promote and protect investments which took the form of funding the development of assets in Venezuela where such investments were made by a person who, although the indirect owner or controller of such assets, had not paid to create or acquire such assets would sit uncomfortably with*

[721] Rejoinder on Jurisdiction, para. 134, and see Annex A to the Memorial, extracted in section II.A above. The Claimants also point out that a recent tribunal decision found that investors had taken an active role in the investment despite five intervening layers of subsidiaries: *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 (CL-263).

[722] Rejoinder on Jurisdiction, para. 134.

[723] Standard Chartered Bank, para. 270 (RL-37).

> *the expressed desire to promote and protect the expansion and management of assets in Venezuela.*[724]

531. In that case, the court found that there was no evidence that the claimant had made any payment or provided consideration in respect of the investment to the US-based company during the corporate reorganization.[725] Here, however, the Claimants contend that they themselves have incorporated the Albanian investments, and managed and financed them.[726] There is no third country that could possibly disrupt the investor-investment relationship between the Italian investors and their Albanian investments.[727]

(2) The Tribunal's Analysis

532. The Tribunal agrees with the Claimants' analysis of the reasoning in *Standard Chartered Bank* and *Gold Reserve* as summarised above and accepts, for the reasons that follow, that the Claimants are not "passive" investors as that was understood by the tribunals in those decisions. It is therefore unnecessary for the Tribunal to consider the parties' arguments concerning whether the text of the BIT requires such "active" investment further, and it does not do so.

533. Four of the Claimants, Hydro, Costruzioni, Ms. Grigolon, and Mr. de Renzis, invested directly in Albanian companies. The remaining two, Mr. Becchetti and Ms. Condomitti, invested in Italian companies that were incorporated for the purposes of investing in Albania. The corporate structure into which all of the Claimants invested had such investment as its purpose, and the Claimants themselves incorporated the Albanian investments, and managed and financed them.[728]

534. There is therefore no real question here of a passive acquisition of the kind before the tribunals in either *Standard Chartered Bank* or *Gold Reserve*. Nor could this be seen as the

[724] *Gold Reserve*, para. 41 (RL-39).

[725] *Gold Reserve*, para. 44 (RL-39).

[726] Rejoinder on Jurisdiction, para. 137.

[727] *Ibid.*

[728] See, generally, section II.A above, and also: FTI Report on cash inflows recorded on bank statements of KGE, Energji, Cable System, Agonset, Albaniabeg Ambiant Sh.p.K, 400 KV and UJE SH.A, 1 May 2014 (C-072); First Becchetti Statement, para. 52 (in relation to KGE), First Becchetti Statement, paras. 9-12, 61 (in relation to Energji), First Becchetti Statement, para. 93 (in relation to Agonset).

sort of passive investing that would arise through, for example, ownership of units in a unit trust that had investments in Albania.

535. For these reasons, this objection to jurisdiction also fails.

E. OBJECTIONS BASED ON THE TIMING OF INVESTMENTS IN AGONSET

(1) The Parties' Positions

536. The Respondent asserts that, due to the timing of Mr. Becchetti's and Mr. De Renzis' acquisition of their respective interests in Agonset, the Tribunal lacks jurisdiction over their claims in relation to that investment.[729] The Respondent has the burden of showing that the transfers were abusive,[730] and objects to the Tribunal's jurisdiction on two bases.

537. First, the Respondent alleges that the transfers were for the sole or predominant purpose of acquiring the protection of the BIT (and not for a legitimate commercial purpose) when disputes with Albania were (at the least) reasonably foreseeable, and so those transfers constituted an abuse of rights.

538. Second, the Respondent asserts that, because the dispute between Mr. Becchetti and Albania, and that between Mr. De Renzis and Albania, had already arisen before they acquired their respective interests in Agonset, the Tribunal lacks jurisdiction *ratione temporis*.[731]

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[729] In the Counter-Memorial and Objections to Jurisdiction, the Respondent had also objected to Costruzioni's acquisition of shares in Cable System in May 2013: para. 102. In its Reply on Jurisdiction, however, it did not address that objection substantively, saying in footnote 122 only that the Respondent's advocates "also note the terms on which Costruzioni acquired shares". In its Rejoinder on Jurisdiction, the Claimants asserted that the Tribunal should take this reference to mean that the objection had been abandoned: para. 153. The Respondent did not refer to Costruzioni's acquisition as an abuse of rights in the final hearing: see, in particular, the Respondent's closing submissions on this issue, Day 9, T163.7-T168.4. In these circumstances, the Tribunal finds that the Respondent has abandoned this objection and does not address it further.

[730] *Chevron Corporation (USA) & Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 139 (CL-204); *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.15 (CL-218).

[731] Reply on Jurisdiction, paras. 131 and 139. This is the first occasion on which this objection was raised. In its Rejoinder on Jurisdiction, the Claimants assert that the objection was therefore waived, as it was not raised in Albania's Objections to Jurisdiction: para. 154, and see the Claimants' closing presentation, slide 22. However, at the final hearing, the Claimants disavowed any reliance on the doctrine of waiver (Day 9, T15.1-T15.14), and so the Tribunal addresses the argument in this Award.

539. As to the first contention, the Claimants do not deny that the relevant disputes were reasonably foreseeable at the time of Mr. Becchetti's and Mr. De Renzis' impugned acquisitions. They instead dispute the first contention on the following bases.

a. The transfers of which the Respondent complains were between Italian nationals, meaning the investments in question always attracted the protection of the BIT. Such a transfer cannot be abusive at international law.

b. In any event, each transfer was for a legitimate commercial purpose. Mr. Becchetti's purpose in acquiring the shares was to reflect the practical reality of his contribution to the establishment of Agonset so as to ensure that the market was not confused. Mr. De Renzis' acquisition was for the purpose of complying with Albanian ownership regulations.

540. The Claimants deny the second contention on the basis that, although disputes had already arisen between the relevant parties, those disputes had not yet crystallised, because the breach had not yet occurred. The Claimants assert that the relevant acts are:

a. its exclusion from the digital licensing process, which continued at least until April 2015, and allegedly constituted a breach of Articles 2(2) and 3 of the BIT; and

b. the Seizure Decision and Seizure Execution Decision in June 2015, which allegedly constituted expropriation for the purposes of Article 5 of the BIT.

541. Both of these acts occurred, or continued, after Mr. Becchetti acquired his interest in Agonset in March 2015 and after Mr. De Renzis acquired his interest in the company in September 2014.

(2) The transfers

542. Mr. Becchetti's alleged investment in Agonset arises from the following facts.

a. Agonset.Shpk was incorporated on 3 May 2012.[732]

[732] Historic Extract of Commercial Register for Details of Agonset.Shpk, 29 February 2016, p. 13 (C-409).

b. As at October 2014, Agonset.Shpk's ownership was as follows: 40% Costruzioni, 40% Investime, and 20% Fuqi.[733]

c. Separately, Agonset.uk was incorporated on 6 November 2014.[734]

d. Agonset.uk's original shareholding was as follows: 40% Mr. Becchetti and 60% Costruzioni.[735]

e. In March 2015, two transfers occurred. First, Costruzioni sold its 40% shareholding in Agonset.Shpk to Agonset.uk for its agreed book value of €400.[736] Second, Costruzioni sold its 60% shareholding in Agonset.uk to Mr. Becchetti for £60, making Mr. Becchetti the 100% owner of Agonset.uk.[737] Thus, as of March 2015, Mr. Becchetti indirectly owned, through Agonset.uk, the 40% shareholding in Agonset.Shpk that Costruzioni used to own.

f. In July 2016, Mr. Becchetti transferred 10% of his shareholding in Agonset.uk to Alphabet, an entity owned at 95% by Agonset.it, for Italian corporate law purposes.

543. Mr. De Renzis' alleged investment in Agonset arises from the following facts.

a. Investime was incorporated on 4 July 2010.[738] Its original ownership was as follows: 40% Mr. Celestino Becchetti; 40% Ms. Fabiola Becchetti; 20% Ms. Stefania Grigolon.[739] All three owners are Italian nationals.[740]

b. Investime became a 40% shareholder in Agonset.Shpk in February 2013.[741]

[733] *Ibid*.

[734] Certificate of Incorporation of Agonset.uk, 6 November 2014, p. 1 (C-323).

[735] *Ibid*, p. 4.

[736] Sale and Purchase Agreement between Costruzioni S r.l. and Agonset.uk Limited, 17 March 2015 (C-628).

[737] Sale and Purchase Agreement between Costruzioni S r.l. and Mr. Francesco Becchetti, 16 March 2015 (C-627).

[738] Historic Extract of Commercial Register for Details of Investime te Rinovueshme, 17 June 2016, p. 1 (C-558).

[739] *Ibid*, p. 2.

[740] Passport of Stefania Grigolon (C-006); Passport of Celestino Becchetti (C-626); Passport of Fabiola Becchetti (C-610).

[741] Historic Extract of Commercial Register for Details of Agonset.Shpk, 29 February 2016 (C-409).

c. In September 2014, Mr. De Renzis acquired Mr. Celestino Becchetti's and Ms. Fabiola Becchetti's ownership interests in Investime for approximately €575.[742] Thus, the ownership of Investime is as follows: 80% Mr. De Renzis; 20% Ms. Grigolon.

(3) Whether the transfers were an abuse of rights

544. Where a dispute has become reasonably foreseeable, a transfer for the sole or predominant purpose of obtaining treaty protection for an existing investor in relation to a domestic dispute will be an abuse of rights. So much is clear from the authorities, and the parties do not really differ on this point. [743] The Respondent, however, asserts that this is to state the position too narrowly, whereas the Claimants assert this is the limit of the principle.

545. The Respondent accepts that, at all relevant times, the investment in Agonset the subject of Mr. Becchetti's and Mr. De Renzis' claims was held by Italian nationals. The impugned transfers are therefore between people capable of attracting the BIT's protection. On the Claimants' reading of the authorities, they assert that this must be the end of the matter. There is no attempt to provide international protection to a domestic dispute, and so no abuse.

546. The Respondent nevertheless asserts that the impugned transfers are abusive because their sole or predominant purpose was to provide a person who was not a protected investor with the BIT's protection in relation to a dispute that was reasonably foreseeable. A person who could not claim under the BIT became a person who could, and this was the sole or predominant purpose of the transaction. More specifically, the Respondent asserts that the protection sought was for these investors personally, in the context of foreseeable disputes between them personally and Albania. The Respondent asserts that this can be particularly

[742] Historic Extract of Commercial Register for Details of Investime te Rinovueshme, 17 June 2016 (C-558).

[743] The Claimants assert the Respondent must, in addition, show fraudulent intent, and the Respondent denies this: Reply on the Merits and Counter-Memorial on Jurisdiction, paras. 318-321; Reply on Jurisdiction, paras. 110-112; Rejoinder on Jurisdiction, para. 143. However, the manner in which the parties presented their cases has meant this is a distinction without a difference in these proceedings. (The Tribunal makes no observation on whether the distinction may be useful or indeed crucial in other cases.) Each party has approached the issue from the perspective of whether the sole or predominant purpose of the impugned transfers was to obtain the BIT's protection, and not whether some further unspecified standard of bad faith is to be applied.

clearly seen in relation to the criminal proceedings that were the subject of notices of dispute sent in October and November 2014. It refers to Mr. Becchetti's statement, in his first notice, that he personally was being harassed in relation to Agonset.

547. The Respondent accepts that it has not identified any decisions in which a tribunal has found that such a transaction was abusive,[744] that is when the investment already benefitted from treaty protection and the restructuring did not alter the nationality of the investment or otherwise seek to create international jurisdiction. However, the Respondent points out that, in a number of the leading decisions,[745] the principle to be applied is expressed broadly, and is not limited to converting a domestic investment into an international one. A representative example of such language is the following passage from the decision in the *Phillip Morris* case.[746]

> […] *the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable.*

548. In the Tribunal's opinion, however, the concern of the leading authorities remains with conduct that constitutes "an abusive manipulation of the system of international investment protection."[747] Abusive transfers are those that "transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration";[748] or, as the *Transglobal* tribunal put it, "create artificial international jurisdiction over a pre-existing domestic dispute."[749] At all relevant times, the investors in Agonset were entitled to the protection of the BIT.

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[744] Hearing, Day 9, T166.25-T167.10.

[745] Counter-Memorial and Objections to Jurisdiction, paras. 92-97 and Reply on Jurisdiction, paras. 114-116 citing *Transglobal Green Energy LLC and Transglobal Green Panama S.A. v. Republic of Panama* (ICSID Case No. ARB/13/28) (RL-0040) ("*Transglobal"*), *Tidewater Inc v. Venezuela* (ICSID Case No ARB/10/5); Decision on Jurisdiction; 8 February 2013 (RL-0041), *Phillip Morris Asia Ltd v. Australia* (PCA Case No 2012-12; Böckstiegel, Kaufmann-Kohler, McRae) (RL-0042) ("*Phillip Morris"*) and *Phoenix Action Ltd v. Czech Republic* (ICSID Case No ARB/06/5), Award, 15 April 2009 (RL-0043) ("*Phoenix"*).

[746] *Phillip Morris*, para. 585 (RL-42).

[747] *Phoenix*, para. 144 (RL-43).

[748] *Ibid*, para. 142.

[749] *Transglobal*, para. 100 (RL-40).

There is therefore nothing "artificial" about the international jurisdiction that is being invoked.

549. This finding is reinforced when the motivations for the transfers are considered. As noted, the Respondent asserts that, given the timing of the transfers, the inference that their sole or predominant purpose was to give Mr. Becchetti and Mr. De Renzis the protection of the BIT is inevitable.[750] The disputes the subject of the arbitration had either already arisen or were foreseeable, and those Claimants had already taken a number of steps to address the concerns underlying those disputes.

550. In response, the Claimants contend that each transfer was solely or predominantly for a legitimate commercial purpose. Mr. Becchetti's purpose in acquiring the shares was to reflect the practical reality of his contribution to the establishment of Agonset so as to ensure that the market was not confused. Mr. De Renzis' acquisition was for the purpose of complying with Albanian ownership regulations.

551. As to Mr. Becchetti, it is apparent from the facts recited in sections IV.G(2) and IV.H(4)b above that he was the driving force behind Agonset, having conceived of the project and undertaken the significant majority of the preparatory work necessary to establish it in both Albania and Italy. His intimate connection with the development of the investment from its inception means the Tribunal has no difficulty accepting his evidence that the transfer was motivated by a desire to ensure that the ownership structure reflected this fact.[751] This conclusion is also supported by the fact that a subsequent transfer, in July 2016, reduced Mr. Becchetti's stake in Agonset by 10%.

552. The evidence supporting the Claimants' contention that the transfer to Mr. De Renzis was for a legitimate commercial purpose is similarly strong. On 5 April 2013, when the 2013 Media Law came into force, it introduced a prohibition on any one shareholder, including "persons related to him to the second degree," owning more than 40% of a license holder.[752] Investime then held 40% of Agonset.Shpk. Mr. Becchetti's late father (Mr. Celestino

[750] Counter-Memorial and Objections to Jurisdiction, para. 108; Reply on Jurisdiction, paras. 124-139.

[751] Second Becchetti Statement, para. 31; Hearing, Day 3, T15.15-T17.22.

[752] First Bushati Statement, para. 40; 2013 Media Law, Article 62(2) and Article 62(10).

Becchetti) and Mr. Becchetti's sister (Ms. Fabiola Becchetti) then owned 80% of Investime.[753] At that time, Costruzioni also owned 40% of Agonset.Shpk. Costruzioni was then almost wholly owned by Mr. Becchetti's mother. Transferring Mr. Celestino Becchetti's and Ms. Fabiola Becchetti's interests in Investime to a person not related to Mr. Francesco Becchetti would bring Agonset.Shpk's ownership in line with the 2013 Media Law's requirements. As Mr. De Renzis had run the company since 2012, the year it was incorporated,[754] he was a natural recipient of the transfer.

553. Mr. Francesco Becchetti gave evidence that the purpose of the transfer to Mr. De Renzis was compliance with the 2013 Media Law's ownership restrictions.[755] The Claimants proffered this explanation in their Reply on the Merits and Counter-Memorial on Jurisdiction, however the Respondent did not address it in its Reply. Mr. Becchetti was not cross-examined on this point. In these circumstances, the Tribunal has no difficulty accepting that this was the sole or predominant purpose of the transfer.

554. The Tribunal therefore finds that the impugned transfers were not an abuse of rights.

(4) Whether the Tribunal lacks jurisdiction *ratione temporis*

555. In the alternative, the Respondent asserts that the dispute concerning Agonset had arisen before Mr. Becchetti and Mr. De Renzis had acquired their interests in the company, and so the Tribunal lacks jurisdiction *ratione temporis*. Mr. Becchetti sent two notices of dispute concerning, *inter alia*, the treatment of Agonset in October and November 2014, months before he acquired shares in the company.[756] Mr. De Renzis sent his first notice of dispute less than a month after he acquired his interest in the company, and in that notice complained of matters that took place long before that acquisition.[757] The Respondent contends that the Claimants cannot aver that all of their claims form one dispute, for the purposes of addressing the objection discussed in section 443 above, and avoid the

[753] Second Becchetti Statement, para. 35.
[754] First Becchetti Statement, para. 102.
[755] *Ibid*, para. 35.
[756] Reply on Jurisdiction, para. 131.
[757] *Ibid*, para. 139.

conclusion that the relevant disputes had already arisen at the time of the impugned transfers.[758]

556. As the Claimants point out, however, the question is when the relevant breach occurred, as "the moment when an alleged breach of the treaty occurs is not necessarily the same as the moment in which the dispute arises"[759] and a "claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached."[760]

557. Tribunals have found that "[i]t is not uncommon that divergences or disagreements develop over a period of time before they finally 'crystallize' in an actual measure affecting the investor's treaty rights."[761] This reflects the conceptual difference between an abuse of process objection and a *ratione temporis* objection. As explained by the *Pac Rim* tribunal, the approaches are "materially different," because the basis for the latter objection is "the general principle of non-retroactivity."[762]

558. The principle does not exclude the application of treaty obligations where the series of acts result in an aggregate breach after the claimant acquires its investment.[763] This is because a composite act "crystallizes" or "takes place at a time when the last of these acts occurs and violates (in aggregate) the applicable rule."[764] A tribunal therefore "has jurisdiction *ratione temporis* in respect of Treaty breaches concerning acts and events having taken

[758] *Ibid*, para. 131.

[759] *Renée Rose Levy & Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 149, fn 172 (CL-222) ("*Renée"*).

[760] *Ibid*, para. 147. See also *Philip Morris,* para. 529 (emphasis added).

[761] *Renée*, para. 149 (CL-222).

[762] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.101 (CL-218) ("*Pac Rim"*).

[763] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), (CL-042) Article 15; S. A. Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors'" and Jurisdiction Ratione Temporis, 4 The Law and Practice of International Courts and Tribunals 19, 2005, p. 52 (CL-255).

[764] *Pac Rim,* para. 2.74 (CL-218).

place after [the claimant acquired the relevant investment]," and also "may take into account prior acts and events resulting in such [t]reaty breaches."[765]

559. The Claimants make two claims in relation to Agonset. First, they allege that Agonset's exclusion from the digital licensing process breached Articles 2(2) and 3 of the BIT. There is no doubt that the Claimants rely on a sequence of events that precede Mr. Becchetti's and Mr. De Renzis' acquisition of an interest in the company.[766] However, the Claimants are right to say that the alleged breach did not crystallize before at least the beauty contest regulation was passed in April 2015, and probably not until the licenses were awarded in early 2016.

560. Second, the Claimants allege that the Seizure Decision and Seizure Execution Decision constitute expropriation of Agonset in breach of Article 5 of the BIT. Again, the Claimants rely on a series of events that culminate in those decisions, [767] however the alleged breach only crystallizes with those decisions, taken in June 2015.

561. This alternative objection to jurisdiction therefore also fails.

F. WHETHER THE TRIBUNAL LACKS JURISDICTION *RATIO LOCI* OVER AGONSET

(1) The Parties' Positions

562. A significant proportion of the value of the Claimants' claim concerning Agonset is constituted by the revenues that were to be generated by Agonset.it, an Italian company.[768] Those revenues were to be derived from sales of advertising on an Italian television channel

[765] *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, p. 38 (CL-257) (*Société Générale*); and see *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 70 (CL-044); *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 62, 66 (CL-046).

[766] As described in section IV.G above.

[767] As described in sections IV.J(11)-IV.J(14) above.

[768] First Rathbone Report, para. 30.

in Italy.[769] Under a contract with Agonset Albania, Agonset.it paid Agonset Albania for the exclusive rights to broadcast programs created by Agonset Albania in Italy.[770]

563. The Respondent asserts that the Tribunal lacks jurisdiction over Agonset.it because it is an Italian company and so not an investment in the territory of Albania for the purposes of the BIT,[771] nor an "investment" for the purposes of Article 25 of the ICSID Convention.[772]

564. There is no dispute between the parties that the BIT and the Convention require any investment to be within Albania's territory if it is to attract protection. The Claimants accept that[773] an investment that is wholly confined to the investor's host State will not attract protection.[774] The issue is whether an Italian company can satisfy the territorial requirement, which here turns on whether the relationship between Agonset.it and Agonset Albania is sufficiently close for the Tribunal to treat them as one indivisible whole, as the Claimants urge.[775]

(2) Relevant principles

565. Again, there is no real dispute between the parties as to the authorities and principles relevant to determining this issue. The Claimants put forward the series of decisions involving contracts for the provision of customs services (of which *SGS v. the Philippines*[776] is perhaps the best known) as analogous to the present case. The Respondent counters that they should be distinguished.

566. In *SGS v. the Philippines*, the investor SGS was to provide customs services within and outside the Philippines, including inspections abroad.[777] The "bulk of the cost of providing

[769] *Ibid*, and see Agency Contract between PRS S r.l. and Agonset.it S.r.l.(C-317).

[770] Framework contract for the transfer of rights between AGONSET Shipk and AGONSET. IT Srl, Article 3 (C-296).

[771] Reply on Jurisdiction, paras. 159-162, relying, in particular, on Articles 1, 2, 3(1) and 4 of the Treaty.

[772] *Ibid*, paras. 155-157.

[773] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 339.

[774] *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, para. 103 (RL-0049).

[775] Reply on the Merits and Counter-Memorial on Jurisdiction, paras. 340-347; Rejoinder on Jurisdiction, paras. 164-165.

[776] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (RL-050).

[777] *Ibid*, para. 101.

the service was incurred outside the Philippines."[778] SGS was paid in Switzerland.[779] SGS's services were treated as performed abroad under the tax law of the Philippines.[780] The Philippines sought to divide up the investment and argued that "all or substantially all of SGS's investment" was made outside the territory of the Philippines.[781]

567. The tribunal rejected the Philippines' argument, finding that "SGS's services under [the contract] can[not] be subdivided in this way."[782] When an investment is "a single integrated process"[783] and a "substantial and non-severable aspect of the overall service"[784] is provided in the host State's territory, then the investment as a whole must be regarded as an investment in the territory of the host State.

568. The reasoning in the other decisions concerning similar agreements takes the same approach. In *SGS v. Paraguay*, the tribunal rejected as unsustainable the Respondent's approach of "parsing of SGS's investments and its activities" and "subdivid[ing] Claimant's activities into services provided abroad and services provided in Paraguay."[785] The investment was a set of "intertwined operations" that was "not divisible in the way Paraguay contends."[786] In *BIVAC v. Paraguay*, the tribunal emphasized that "[a]ctivities cannot be subdivided in a way as to distinguish between claims for non-payment of services abroad and claims for services in Paraguay: in practice the services were treated as inseparable."[787] In other words: "Activities that were internal and external to the territory of Paraguay formed a whole."[788]

[778] *Ibid*, para. 106.
[779] *Ibid*.
[780] *Ibid*, para. 107.
[781] *Ibid*, para. 100.
[782] *Ibid*, para. 101.
[783] *Ibid*, para. 112.
[784] *Ibid*, para. 102.
[785] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 113 (CL-214).
[786] *Ibid*, paras. 114-115.
[787] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 103 (CL-208).
[788] *Ibid*.

(3) Whether Agonset was an indivisible single investment in the territory of Albania

569. The Respondent asserts that these decisions cannot avail the Claimants because Agonset.it's relationship to Albania has none of the characteristics identified in those decisions that led to findings that there was a single, indivisible investment. In particular, the Respondent points out that Agonset.it did not enter into a contract with Albania, did not provide services in Albania, and was not paid for services it provided in Albania and nor was it paid by Albania.[789] On essentially the same basis, the Respondent asserts that Agonset.it cannot, as an Italian company, meet any of the factors identified by the *Salini* tribunal as necessary for an investment under Article 25 of the ICSID Convention, namely (i) contributions; (ii) duration of performance; (iii) participation in the risks of the transaction; and (iv) a contribution to the economic development of the host State.[790]

570. This is insufficient, however. The Claimants rightly point out that to distinguish these decisions, and to apply the *Salini* factors, by considering Agonset.it in isolation from the Albanian company is to beg the question. The question before the Tribunal is whether the two companies *should* be considered in isolation from one another.[791]

571. The Respondent also points out that the customs decisions involved a single contractual regime, between a single company and the host State. Those contracts, at least in part, required performance within the territory of the host State. Here, the supposedly indivisible investment consists of two separate companies. Their only legal relationship is a contract that is terminable at will by either party.[792]

572. The Respondent also rejects the Claimants' contention that the relationship does not depend solely on the contract, but is more substantively based in the Italian company's

[789] Reply on Jurisdiction, para. 181 (drawing a distinction between these circumstances and those relied on by the Tribunal in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (RL-050)) and para. 185 (drawing a distinction between these circumstances and those relied on by the Tribunal in *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (CL-214)).

[790] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, 16 July 2001 (RL-125).

[791] Rejoinder on Jurisdiction, para. 168.

[792] Contract between Agonset Albania and Agonset Italy, 19 May 2014 (C-296), Article 7; Reply on Jurisdiction para. 197.

economic dependence on receiving programs produced by the Albanian company.[793] As a matter of fact, the Respondent asserts that the reason Agonset.it closed shortly after Agonset Albania did so was not due to such a relationship, but rather Agonset.it closed simply because it was poorly managed.[794] In any event, the Respondent contends that simple economic dependence cannot be sufficient to show the two companies are an integrated whole for the purposes of the BIT.[795] That argument was rejected in the context of NAFTA disputes, where tribunals have found that the "economic dependence of an enterprise upon supplies of goods – in this case, water – from another State is not sufficient to make the dependent enterprise an "investor" in that other State."[796]

573. The Respondent further contends that the argument should be rejected here because it would chaotically expand the coverage of the BIT[797] and lead to the absurd result that "a company such as Agonset Italy could qualify as a covered Investment in both Italy and Albania under the Albania-Italy BIT."[798]

574. The Tribunal accepts that simple economic dependence is not a sufficient basis for finding that two entities form an integrated single investment for the purposes of the BIT. It also accepts that a licensing agreement, without more, cannot do so. However that is not the situation before the Tribunal.

575. Here, the two companies were, from the outset, conceived as an integrated whole. This was the delocalized production model which the two companies were established to implement: production in Albania of programming to be broadcast in the lucrative Italian market.[799] That model was reflected in a contractual relationship, under which Agonset.Shpk sold

[793] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 345; Rejoinder on Jurisdiction, paras. 172, 174.

[794] Hearing, Day 9, T197.14-T204.6.

[795] Reply on Jurisdiction, paras. 165-167 and 196-197.

[796] *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, para. 104 (RL-0049). See also *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, para. 114 (CL-156).

[797] Respondent's closing note, paras. 49-50 and Hearing, Day 9, T169.19-T171.6.

[798] Reply on Jurisdiction, para. 192.

[799] First Becchetti Statement, para. 92.

television rights to Agonset.it, and Agonset.it transferred a portion of the Italian advertising revenues to Agonset.Shpk.[800]

576. The Claimants rightly point out that this is reflected in the parties' experts' approach to valuing the Albanian company.[801] Mr. Rathbone states that the Albanian and Italian entities "are inextricably linked since the bulk of the revenues are produced in Italy whereas the production facilities are all in Albania."[802] He therefore states that "there is a fundamental assumption within my valuation that the two businesses would continue to depend upon each other, and the individual company valuations are only valid if that assumption holds."[803] Mr. MacGregor, for the Respondent, states "Agonset Italy's and Agonset Albania's operations and cash flows are inextricably linked and heavily interdependent",[804] and so "if I am unable to accurately forecast the cash flows for Agonset Italy, then I am also unable to do so for Agonset Albania."[805]

577. In this context, the Respondent's factual assertion that Agonset.it failed because it was poorly managed is not to the point. The Respondent does not seriously dispute that the model by which the business was established and operated depended on production being done in Albania.

578. The relationship between the Italian and Albanian companies was therefore analogous to the "single integrated process" identified in *SGS v. the Philippines*.[806] The Tribunal should here be concerned with the practical reality of the Claimants' investment, as were the tribunals in the customs cases, finding that "[a]ctivities cannot be subdivided in a way as to distinguish between claims for non-payment of services abroad and claims for services

[800] Contract between Agonset.Shpk and Agonset.it S r.l., 19 May 2014 (C-296).

[801] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 345.

[802] First Rathbone Report, para. 5.

[803] *Ibid*.

[804] First MacGregor Report, para. 4.160.

[805] *Ibid*, para. 4.157.

[806] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 112 (RL-050).

in Paraguay: in practice the services were treated as inseparable."[807] The Tribunal therefore rejects the Respondent's assertion that this is somehow to override the text of the BIT.[808]

579. The Tribunal also disagrees with the Respondent's claim that finding the two companies here form an indivisible single investment would lead to "wide-ranging"[809] or chaotic results. Simple economic dependence combined with a bare contractual relationship is insufficient to show two entities are one investment for the purposes of the BIT. It is only due to the substantive integration of these two companies in the particular business model they implemented that the Tribunal finds they constitute a single investment.[810]

580. Finally, as the Claimants' example of a pipeline that crosses the border between two States demonstrates,[811] there is nothing absurd about investments of this kind qualifying as an investment in the territory of each contracting party.

581. This objection to jurisdiction therefore also fails.

G. WHETHER CERTAIN CLAIMS ARE INADMISSIBLE

(1) The Parties' Positions

582. The Respondent asserts that certain of the claims brought in this arbitration are inadmissible on two bases.

583. First, the Respondent asserts that certain claims are purely or fundamentally contractual, and so are outside the Tribunal's jurisdiction. Such disputes are to be resolved exclusively by ICC arbitration under Article 30 of the Concession Agreement. This objection relates primarily to the claim for a penalty under Article 29 of the Concession Agreement which the Claimants dropped at the final hearing (see paragraph 440 above). The Respondent also

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[807] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 103 (CL-208).

[808] Hearing, Day 9, T173.6-T173.13; T174.25-T176.6.

[809] *Ibid*, T170.2.

[810] The Tribunal notes that, although Agonset.it became a subsidiary of Agonset Albania in April 2015 (Agreement for the Assignment of Shares between Agonset.uk and Agonset Sh.p.k., 7 April 2015 (C-695)), the Claimants do not rely on this relationship when responding to the Respondent's objection: Hearing, Day 9, T20.10-T20.15.

[811] Rejoinder on Jurisdiction, para. 173.

asserted, however, that this objection applied to the Claimants' allegations that "Albania failed to support the Kalivaç Project (Memorial [134] et seq), the alleged failure to 'respect guarantees of administrative support', not issuing timely VAT refunds to KGE and matters relating to Tax Audit 8159".[812]

584. In response, the Claimants state that all of their claims arise from sovereign acts undertaken by Albania that they allege breach protections provided under the BIT.[813] As such, the claims cannot be characterised as "purely" or fundamentally contractual, even if they might give rise to a claim for breach of contract.[814]

585. Second, the Respondent asserts that certain claims brought in the arbitration have already been submitted to the Albanian courts,[815] being:[816]

a. challenges to the validity of the Arrest Warrants;

b. pending criminal prosecutions; and

c. KGE's lodging an appeal against the outcome of Audit 8159.

586. The Respondent asserts that such claims are inadmissible as they are inconsistent with Article 26 of the ICSID Convention, which provides that the Centre's jurisdiction over claims submitted to it is exclusive.[817] In the alternative, the Respondent contends that the Tribunal ought exercise its discretion not to entertain those claims "as a matter of comity / as part of its procedural discretion."[818] In particular, the Respondent asserts that claims

[812] Counter-Memorial and Objections to Jurisdiction, para. 119 and see Reply on Jurisdiction, para. 219.

[813] Claimants' closing presentation, slide 31.

[814] Rejoinder on Jurisdiction, paras. 184-185.

[815] The Respondent also alleges that certain claims are inadmissible as having been submitted to the 2nd ICC Arbitration: Reply on Jurisdiction, para. 200(b). However, in its extrapolation of this argument, the Respondent addresses only the allegation regarding submission of claims to the Albanian courts: Reply on Jurisdiction, paras. 232-238. The Tribunal therefore does not consider the allegation regarding submission to the 2nd ICC Arbitration further.

[816] Reply on Jurisdiction, para. 233.

[817] *Ibid*, paras. 200(b) and 237.

[818] *Ibid*, para. 238.

advanced "in respect of pending criminal allegations, where there is no allegation of denial of justice, are a particularly obvious candidate for the exercise of such discretion."[819]

587. In response, the Claimants point out that the BIT contains no "fork in the road" provision and Article 26 of the Convention is not one. In any event, the Claimants contend that the matters before the Albanian courts to which the Respondent refers are very different to the claims being brought. As those matters do not have the same parties, the same object and the same cause of action, the claims are not inadmissible and there is no occasion for the Tribunal to exercise its discretion not to entertain those claims.

(2) Whether the Claimants have brought inadmissible contract claims

588. Where the parties have chosen a forum for their contractual disputes, the Tribunal must respect that choice. Article 29 of the Concession Agreement contains the parties' choice of ICC arbitration as the forum for resolving disputes arising under that agreement. The question therefore becomes whether the claims that the Claimants continue to advance[820] are "purely" contractual, or whether the breaches alleged are capable of constituting a breach of the standards imposed by the BIT.

589. This question is to be answered objectively, by characterising the substance of the claim.[821] There is no magic in a label, and a claimant cannot convert a substantively purely contractual claim to a BIT claim by describing it as such. On the other hand, it is for the claimants to put their case,[822] and the fact that the same facts are alleged to give rise to both a contractual claim and a BIT claim does not of itself mean the BIT claim is inadmissible.[823]

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[819] *Ibid.*

[820] Having abandoned the claim that formed the primary focus of the Respondent's argument under this objection: see paragraphs 439-440 above.

[821] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 475 (CL-106); *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 61 (CL-210).

[822] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 145 (CL-145); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 157 (RL-050).

[823] *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, para. 192 (CL-181); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case

590. The tribunal's analysis in *SGS v. the Philippines*,[824] on which the Respondent relies,[825] is, with respect, helpful in illustrating how this distinction is to be drawn in practice. [826] The tribunal there found that a claim for unpaid fees under a concession agreement had no life beyond that agreement. It was a simple contractual payment dispute. As such, the parties' exclusive choice of a different forum in the relevant agreement was effective to make that claim inadmissible. That tribunal explicitly contrasted the situation confronting it with the allegations that were considered by the *ad hoc* Committee in *Vivendi*. In *Vivendi*, it was found that the "claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract [...] It was open to [the c]laimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT."[827]

591. Here, the matters that the Respondent alleges are purely contractual claims are put by the Claimants as forming part of a complex concerted effort by the Albanian government to harm their investments. The alleged failures to support the Kalivaç Project, "respect guarantees of administrative support" and issue timely VAT refunds and the matters relating to Tax Audit No. 8159 are all said to form part of the conduct by Albania that was intended to, and did, expropriate their investments. The Claimants allege that this conduct is motivated by malice towards them, in part due to Agonset's independent reporting on the Albanian government.[828] The offending conduct is said to be constituted by a broad range of abusive measures that go beyond those matters the Respondent asserts are contractual but that are alleged to be interrelated to them as part of this attack on the Claimants.[829]

No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paras. 147-148, 161-162 (CL-145).

[824] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (RL-050).

[825] Counter-Memorial and Objections to Jurisdiction, para. 118 and see Reply on Jurisdiction, paras. 207-214.

[826] *SGS v. the Philippines*, paras. 157-164 (RL-50).

[827] (2001) 6 ICSID Reports 340, 370, para. 112, quoted with approval by the Tribunal in *SGS v. the Philippines*, para. 158 (RL-50).

[828] Claimants' closing presentation, slide 39.

[829] Memorial, paras. 572-577; Claimants' closing presentation, slides 36-40.

592. If the Claimants' factual claims were made out, they would be capable of constituting a breach of Articles 2(2), 3 and 5 of the BIT, as alleged.[830] As in *Vivendi*, the claims are not "simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate" the Concession Agreement. As such, the claims are admissible.

(3) Whether certain claims are inadmissible as being before Albanian courts

593. If a claim is to be excluded as having already been brought before a different forum, under the doctrine of *lis pendens*, the claim already brought elsewhere must (at least) be fundamentally the same as the claim now sought to be brought before the Tribunal. The Claimants also refer to authority for the proposition that identity of parties, object and cause of action is required if the claim is to be found inadmissible.[831]

594. The Respondent appears to suggest that the decision in *Pantechniki* stands for a lower standard,[832] supporting the proposition that "[t]o the extent that the fundamental basis of domestic proceedings is the same as [the] fundamental basis of the claims advanced before the Tribunal, the Claimants cannot refer the claim to this tribunal."[833] On this basis, the Respondent asserts that the following ways in which the claims in the national and international forums overlap is sufficient to mean the Claimants' claims are inadmissible.[834]

> *In this case, for example, the Claimants ask the Tribunal to decide that the criminal proceedings, as yet unfinished in Albania, are "based on erroneous grounds". Yet issues of the legality of the criminal proceedings have been determined in Albanian proceedings and the extent to which the criminal charges are factually justified (which the Claimants apparently invite this*

[830] See the summary in paragraph 440 above.

[831] Rejoinder of Jurisdiciton, para. 192, referring to *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 15 August 1980 (CL-243) para. 1.12-1.14.

[832] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 (CL-210).

[833] Reply on Jurisdiction, para. 237.

[834] *Ibid.*

> *Tribunal to determine) remains to be considered in proceedings to which the relevant accused (here, claimants) are party.*

595. This misunderstands the decision in *Pantechniki*, however. The tribunal found that the claims could not be brought because they were fundamentally the same as claims brought before national courts. It did so in the following terms.[835]

> *The logic is inescapable. To the extent that this prayer* [before the national courts] *was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same "fundamental basis". The Claimant's grievance thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.*

596. Here, the national proceedings identified by the Respondent do not have the same fundamental basis as the claims made in this arbitration. The criminal claims brought against some of the Claimants seek to impose criminal punishment on the basis of alleged criminal liability. The claims that the Claimants have advanced in this arbitration seek to hold Albania liable for breaches of international law and the BIT and to compensate the Claimants for the prejudice caused to them by such breaches. Neither the relief sought nor the cause of action (or "purported entitlement"), therefore, can be considered to have the same fundamental basis. Some of the Claimants and their companies have sought before Albanian courts to have the Arrest Warrants and the results of Audit No. 8159 be withdrawn and that the criminal charges against them be dropped. These are fundamentally different claims to those the Claimants bring in this arbitration.

597. The Tribunal is also not persuaded that this is an appropriate occasion for the exercise of its discretion to decline to admit the Claimants' claims on the basis of international comity. The Respondent asserts that "Claims advanced in respect of *pending* criminal allegations, where there is no allegation of denial of justice, are a particularly obvious candidate for the

[835] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 67 (CL-210).

exercise of such discretion. This Tribunal is, with the utmost respect, not to supplant the role of the Albanian domestic criminal courts."[836] There is no question of the Tribunal doing so, however, for the same reason that the doctrine of *lis pendens* does not apply here. The matters to be determined in the national criminal proceedings and those to be determined before the Tribunal are fundamentally different, for the reasons just set out.

598. The Claimants have made serious allegations of breach of the protections offered by the BIT and international law. The Tribunal is obliged to hear those allegations absent a cogent reason that it lacks jurisdiction or that the claims are inadmissible.[837] In the example the Respondent gives of a tribunal suspending its proceedings in deference to those pending elsewhere, *MOX*,[838] until the issues to be determined in the proceedings in the other forum were resolved, "there remain substantial doubts whether the jurisdiction of the Tribunal can be firmly established in respect of all or any of the claims in the dispute."[839] No such issue arises here.

599. For these reasons, this objection to the admissibility of the Claimants' claims also fails.

H. WHETHER THE CLAIMANTS' "PROJECTS" CONSTITUTE "INVESTMENTS"

(1) The Parties' Positions

600. The Respondent asserts that none of the following projects is capable of constituting an "Investment" for the purposes of Article 1(1) of the BIT in its own right, and so the Tribunal lacks jurisdiction over those projects.[840]

a. An alleged "right of first negotiation" in respect of hydroelectric plants along the Vjosa River, which the Respondent is alleged not to have respected.[841]

[836] Reply on Jurisdiction, para. 238.

[837] *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014 (CL-185) para. 188.

[838] *MOX Plant Case (Ireland v. United Kingdom)*, PCA, Order No. 3, 24 June 2003 (RL-051).

[839] *Ibid*, para. 25.

[840] Counter-Memorial and Objections to Jurisdiction, para. 121-125; Reply on Jurisdiction, para. 239-240.

[841] See paragraphs 175, 185 and 211-213 above.

b. An alleged request by Energji to build a wind farm in Albania, to which Albania is alleged not to have responded.[842]

c. An alleged request by Energji to build an underwater transmission cable, to which Albania is also alleged not to have responded.[843]

601. It is convenient to set out the BIT's definition of "Investment" here to inform the following analysis.

> *"Investment" means, independently of the selected legal form and legal system of reference, every asset invested by investors of one Contracting Party in the other's territory in compliance with the latter's laws and regulations.*
>
> *In this general context, the term investment means specifically, but not exclusively:*
>
> *a) Movable and immovable assets, as well as every right in rem, including, to the extent usable for investment, mortgages, pledges, and preferential rights;*
>
> *b) Stocks, bonds, participation shares, and any other credit security;*
>
> *c) Financial receivables or any right arising from commitments or provisions of services with an economic value and related to investments, as well as the reinvested income;*
>
> *d) Intellectual and therefore also industrial property rights, including copyright, registered trademarks, patents, industrial design, know-how, commercial business secrets, commercial names, goodwill, and other similar rights;*
>
> *e) Every other right of an economic nature granted by law, by contract, on license, or by administrative act, including the exploration, cultivation, extraction, and exploitation of natural resources.*

[842] See paragraphs 252-253 above.

[843] See paragraphs 217-218 above.

602. The Claimants respond that they do not assert that these projects are Investments in their own right.[844] Rather, the Claimants assert that they are making claims that arise out of the Claimants' investment in Albania's renewable energy sector.[845] The allegations concerning the alleged right of first negotiation are said to arise out of the Claimants' investment in the Kalivaç Project, because that alleged right formed part of the consideration for the initial investment in that project.[846] The wind farm project formed an extension of the Claimants' commitment to Albania's renewable energy sector.[847] The transmission cable would have given the Claimants' investments in the renewable energy sector, in particular, the Kalivaç Project, direct access to the Italian energy market in order to ensure that energy would arrive to that market.[848]

603. The Respondent asserts that this analysis is flawed for two reasons.

604. First, it is not possible to convert what is not an "asset" as understood in Article 1(1) of the BIT into one simply by asserting that it should be treated as joined to something else which might qualify as an "asset". Something which does not comply with the definition of Article 1(1) cannot be treated even as part of a larger "Investment".[849] The Respondent asserts that it would be particularly wrong to do so here, where the Claimants have treated the three projects separately in their pleadings, advancing separate claims for different relief with different quantum claims being sought by different Claimants arising out of each project.[850]

605. Second, in the alternative, the projects are not sufficiently interrelated (whether that relationship is considered as being to one another, to the Kalivaç Project or to the whole of the Claimants' putative investment in Albania) to be considered part of any investment in

[844] The Respondent's arguments that are intended to show that each of these projects cannot constitute investments in their own right (Counter-Memorial and Objections to Jurisdiction, paras. 121-125; Reply on Jurisdiction, paras. 250-270) are therefore not considered further here.

[845] The Respondent dedicates some time to arguing that the three projects cannot form part of a single unified investment made by the Claimants in Albania

[846] Reply on the Merits and Counter-Memorial on Jurisdiction, para. 364.

[847] Rejoinder on Jurisdiction, para. 208.

[848] *Ibid*.

[849] Reply on Jurisdiction, para. 273-274.

[850] *Ibid*, para. 274.

Albania.[851] If the projects are to form part of a single investment, the components must, on the Respondent's reading of the authorities, "form [part of] an inseparable whole".[852] The Respondent asserts this cannot be shown, for the following reasons.[853]

a. There is no overarching transaction or legal instrument that links these three projects either together, or with the Claimants' other putative Investments.

b. The subject matter of, and parties to, the three projects are different.

c. The fate of the projects, and the claims related to them, are not necessarily linked or dependent on one another.

d. The parties involved in the alleged disputes are not Claimants in the arbitration.

(2) The Tribunal's Analysis

606. The Respondent's first objection to treating the three impugned projects as part of the Claimants' investment or investments in Albania is simply counter to authority and is, in any event, unworkable in practice. It is settled that:[854]

> *An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.*

[851] *Ibid*, para. 276.

[852] *Ibid*, quoting *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 369 (RL-101) ("*Mamidoil Jetoil"*).

[853] Reply on Jurisdiction, para. 277.

[854] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999 (CL-140) para. 72, quoted with approval in R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd Ed., 2012 (CL-082 bis) p. 61.

607. The practical reality of investment just described means the Respondent's approach is simply unworkable.

608. The question is therefore whether the three projects are sufficiently related to the Claimants' Investments to qualify for protection under the BIT. The standard for which the Respondent contends, that the components must form part of an "inseparable whole", is not supported by the decision it cites, *Mamidoil Jetoil*. In that decision, the tribunal certainly found that the component there challenged as not constituting an "Investment" for the purposes of the relevant BIT formed part of an inseparable whole with assets that plainly were "Investments".[855] It is clear from that decision, however, that the tribunal considered this to be a sufficient but not necessary condition of protection. In reaching its conclusion on this issue, it uses the language of the somewhat lower standard for which the Claimants contend, namely that the impugned component be an "integral part" of the investment.[856]

609. Was, then, each of the three projects challenged by the Respondent an "integral part" of the Claimants' investments?

610. The alleged right of first refusal was, on the Claimants' case, negotiated as part of the consideration that led to the Concession Agreement. As such, it was an integral part of the Kalivaç Project, at least on the Claimants' case.

611. On the other hand, the application for permits to build a windfarm had no such relationship to any of the Claimants' investments and is not an investment. Really, the Claimants' argument here rises no higher than asserting that there was a proposal to make a further investment in the renewable energy sector in Albania. The fact that the Kalivaç Project was an investment made in the same sector does not make the windfarm an "integral part" of that project.

612. Finally, the proposed transmission cable is, like the first project, also sufficiently related to the Kalivaç Project to attract the BIT's protection. It was intended to transmit the electricity

[855] *Mamidoil Jetoil*, para. 369 (RL-101).

[856] *Ibid*, para. 366.

generated by the project to Italy for the purposes of improving the returns on the investments in the Project, by qualifying for the Green Certificates.[857]

VII. MERITS

A. WHETHER THE KALIVAÇ PROJECT WAS EXPROPRIATED

(1) The Parties' Positions

613. In their Memorial on the Merits, the Claimants asserted that Albania had expropriated the Claimants' investments in the Kalivaç Project by preventing the Claimants from realising the Kalivaç Project and by rendering valueless the local companies the sole business rationale of which had been the Kalivaç Project.[858] That is, Albania is alleged to have expropriated the Claimants' rights under the Concession Agreement[859] and the Claimants' companies associated with the Project.[860] The Claimants alleged in the Memorial on the Merits that Albania did so by:[861]

a. frustrating the Claimants' financial assumptions about the Project by failing to abide by its fiscal guarantees;[862] and

b. rendering any progress on the Project impossible through delays in issuing necessary permits,[863] refusing to cooperate in the expropriations necessary for the Project,[864] and abusively taxing the Project.[865]

[857] As explained in para. 217 above.
[858] Memorial on the Merits, para. 572.
[859] *Ibid*, para. 573.
[860] *Ibid*, para. 577.
[861] *Ibid*, para. 574.
[862] Discussed in para. 180 above.
[863] Discussed in para. 242 above.
[864] Discussed in paras. 243-244 above.
[865] Discussed in section IV.I above.

614. In their closing submissions, the Claimants put this claim differently. They asserted that Albania expropriated the Project, causing them to lose "the value of the concession".[866] This expropriation was constituted either by:

a. Albania's failure to respond substantively to KGE's letter of 19 June 2014 seeking Albania's re-affirmation of its commitment to the project;[867] or

b. the steps Albania took to re-let the project in 2017, discussed in section IV.F above.[868]

615. The failure to respond to the letter is said to mark the "consummation" of the expropriation, "because thereafter the only thing you see are unilateral acts of Albania, hostile to the concession."[869] Instead of responding substantively, on the Claimants' closing case "[w]hat Albania did was unilaterally to seize invoices to escalate the dispute with tax audits" that would "culminate with the criminal proceedings".[870]

616. In the 2nd ICC Award, the tribunal found that Hydro's decision to stop work on the Project in June 2014 was a unilateral decision,[871] which constituted abandonment of the Project in breach of the Concession Agreement.[872] As the arrest warrants and charges in the criminal proceedings and asset freezing orders of which Hydro complained in that proceeding (which overlap with the matters addressed in sections IV.I-IV.J above) were only issued in 2015, after June 2014, that tribunal found that they could not justify any assertion that Hydro could not have completed the Project.[873]

617. Following the 2nd ICC Award, the Claimants contended that the Concession Agreement remained in effect throughout 2017. The 2nd ICC Award terminated the Concession

[866] Closing presentation, slide 45. It is not clear whether this is different to the assets alleged in the Memorial on the Merits to have been expropriated (i.e., the rights under the Concession Agreement and the companies associated with the Project), however given the Tribunal's findings in the next section of this Award, nothing turns on this issue.

[867] *Ibid*, slides 37-38. See also section IV.F above.

[868] *Ibid*, slide 36.

[869] Hearing, Day 9, T27.22-T27.23.

[870] Hearing, Day 9, T26.22-T26.24.

[871] 2nd ICC Award, para. 319.

[872] *Ibid*, paras. 326, 339, 345.

[873] *Ibid*, para. 341.

Agreement on the date the 2nd ICC Award was made and not before. The Concession Agreement was therefore still in effect when Albania reopened a tender for the Kalivaç Project in May 2017 and apparently awarded the existing works to a third party in October 2017. The Claimants also pointed out that Article 14 of the Concession Agreement required the parties to continue to perform their obligations until termination was announced.[874]

618. The Respondent made a number of points in response to the Claimants' arguments. Following the Claimants' re-framing of their arguments in their closing submissions, and the 2nd ICC Award, the most pertinent are as follows.

a. The Claimants abandoned the Kalivaç Project at least by June 2014, and perhaps as early as March 2013, meaning that they are now seeking treaty protection for rights that were voluntarily surrendered.[875]

b. The tribunal in the 2nd ICC Arbitration found that Albania's right to terminate the Concession Agreement had arisen as early as July 2011, on the basis of Hydro's breaches.[876] That Tribunal also found that, under the Concession Agreement, Albania was only permitted to terminate by seeking an Award through arbitration granting it termination.[877] It was therefore purely fortuitous that it had not been terminated before May 2017, and so this fact cannot be considered legally significant.[878]

c. That tribunal also found that Albania's steps to re-let the Kalivaç Project were valid steps taken to mitigate its losses.[879] Further, in the course of that proceeding, Hydro had argued that Albania was obliged to seek to mitigate its losses. The Respondent asserts that "the Claimants cannot argue on the one hand that Albania was obliged to mitigate its losses and take advantage of a finding to that effect in the ICC

[874] Letter to the Tribunal, 16 January 2018, p. 2.

[875] Rejoinder to Reply on the Merits, para. 381; Respondent's closing note, para. 11; Respondent's letter to the Tribunal dated 2 February 2018, para. 19(b)(ii).

[876] Respondent's letter to the Tribunal dated 2 February 2018, para. 19(b)(i).

[877] *Ibid*, para. 19(b)(iii). See 2nd ICC Award, para. 351.

[878] *Ibid*.

[879] *Ibid*, para. 19(b)(iv), referring to 2nd ICC Award, para. 391.

proceedings to cap Albania's damages for Hydro's contractual breaches, whilst at the same time in these proceeding [*sic*] seeking inconsistently to rely on that very same act of mitigation as giving them a right to claim expropriation and damages before this ICSID tribunal."[880]

619. The Respondent contends that, by operation of the principles of *res judicata* and issue estoppel, the 2nd ICC Award precludes the Tribunal from determining matters decided in that award.[881] Relying on the International Law Association's ("ILA") Final Report and Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration from 2006, the Respondent asserts that:[882]

> *"arbitral awards should have conclusive and preclusive effect in further arbitral proceedings" in order to promote efficiency and finality, and such effect "may be governed by transnational rules applicable to international commercial arbitration" (see Recommendations II.1 and II.2) if the award in question:*
>
> *(a) has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration (the Partial Award is final and binding and no impediment to its recognition exists);*
>
> *(b) has decided on or disposed of a claim for relief which is being sought or re-argued in further proceedings (the Partial Award disposes of Hydro's claim for damages in respect of alleged losses relating to the Kalivaç hydroelectric plant);*
>
> *(c) is based on a cause of action which is invoked in further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings (the causes of action that form the basis of the ICC proceedings disposed of in the Partial Award have -- as identified above -- also been invoked in the present arbitration in support of claims for breach of treaty rights);*
>
> *(d) has been rendered between the same parties (the Partial Award is binding on at least Hydro, which held the rights to the Kalivac*

[880] *Ibid*.

[881] *Ibid*, para. 13.

[882] *Ibid*, paras. 14-15, footnote omitted.

hydroelectric project, but should also bind or be applied consistently against those Claimants whose treaty claims in respect of the Kalivac project have been made through Hydro).

In addition, if the Tribunal was to determine that one of these elements did not apply to the Partial Award and the claims in the present arbitration, the ILA's Recommendations also provide that an arbitral award has conclusive and preclusive effect in further arbitral proceedings as to the determination in the dispositive part "as well and in all reasoning necessary thereto" (see Recommendation II.4.2) and – critically – "issues of fact and law which have actually been arbitrated and determined by it, provided that any such determination was essential or fundamental to the dispositive part of the arbitral award" (see Recommendation II.4.2), such that the ICC tribunal's reasoning and factual findings should be applied consistently in this arbitration.

(2) The Tribunal's analysis

620. There is certainly force in the Respondent's contentions concerning *res judicata* and issue estoppel. The Tribunal however notes that the sole Claimant in the ICC arbitration was Hydro, and in this case there are additional Claimants. This raises a question of whether the requirement that the parties to the different proceedings be the same has been satisfied. Albania simply asserts that the 2nd ICC Award is "binding on at least Hydro," but does not squarely address why this should be so. In addition, it might be thought that the causes of action are not entirely on all fours with those at issue in the 2nd ICC Arbitration, for the reasons discussed in paragraphs 593 to 598 above concerning the doctrine of *lis pendens*. It is not necessary for the Tribunal to decide this matter, however, as it sees no reason to reach a different conclusion to that of the tribunal in the 2nd ICC Arbitration on the matters relevant here.

621. The Tribunal does not accept that failure to respond to a single letter can constitute expropriation in the context of the Kalivaç Project's long history. All of the work in this argument is being done by the Claimants' invitation to infer from the events that followed that, in June 2014, the Respondent had ceased to support the Kalivaç Project, thereby denying the Claimants the value of that investment. However, the Respondent rightly

points out that if the Claimants had abandoned the Kalivaç Project by that time they cannot now seek protection for rights that they have voluntarily abandoned.[883]

622. The Claimants' final case on the expropriation of the Kalivaç Project therefore fundamentally depends on whether the Claimants should be found to have abandoned the Project by June 2014. The Tribunal finds that they had, for the reasons that follow.

623. The Claimants resisted this conclusion[884] on the basis that Mr. Becchetti gave evidence to the effect that:

a. BEG had accepted Deutsche Bank's shares as part of the settlement of their dispute, indicating that BEG wished to continue to pursue the Kalivaç Project;[885]

b. he was not willing to write off the €60 million already invested in the Project;[886] and

c. he had a personal investment in the Project and its success.[887]

624. The objective record does not support Mr. Becchetti's recounting, however. The Tribunal makes no finding that Mr. Becchetti was in any sense dishonest. However, the passage of time and prolonged involvement with putting one version of events in a number of adversarial forums can distort the recollection of any witness. The following uncontested facts lead the Tribunal to conclude that the Claimants had abandoned the Kalivaç Project at least by June 2014.

a. In March 2013, work on the Kalivaç Project ceased and was never resumed.[888]

[883] Different issues might arise if the Claimants were seeking compensation for the value of the works completed at the site of the Project, however that case was not put to the Tribunal. In any event, in the context of the tribunal in the 2nd ICC Arbitration finding that the agreement has been lawfully terminated, any issues of this kind appear properly to be a matter for that Tribunal to determine applying the Concession Agreement's terms.

[884] Closing presentation, slide 43.

[885] Hearing, Day 2, T126.2-T126.11.

[886] Hearing, Day 2, T125.8-T125.13.

[887] Hearing, Day 2, T125.19-T125.22.

[888] Hearing, Day 2, T50.2-T50.8.

b. In April 2013, Agonset Albania was launched and Mr. Becchetti was devoted to it "full time".[889]

c. On 18 October 2013, Mr. Becchetti stood down as Administrator of KGE.[890]

d. In the same month, a settlement with Deutsche Bank was reached and the Bank paid €135 million to Hydro and €10 million to KGE,[891] money that the Claimants contend was sufficient to allow the Kalivaç Project to be completed.

e. The Kalivaç Project did not recommence, however, and at least some of the money from the settlement was put towards Agonset Albania.

f. In December 2013, Mr. Becchetti stood down from Hydro's board.[892]

g. In March 2014, KGE sued SACE, the Italian export credit agency that Deutsche Bank and the Tribunal in the 1st ICC Arbitration considered necessary to the Project.[893] In those proceedings, KGE described the Project as impossible to complete.[894]

625. At this time, the Claimants had made a significant profit on their investment through the settlements with Deutsche Bank. They were also aware that further work to complete the Kalivaç Project was likely to cost approximately €128 million and give an ultimate return of only €12 million after 30 years.[895] Mr. Becchetti accepted he would be unlikely to invest in a project on those terms today.[896]

626. The Tribunal finds that there was a complete cessation of work from March 2013 onwards, and taking into consideration the other factors as stated in paragraphs 624 and 625, it is

[889] Hearing, Day 2, T52.6-T52.12.

[890] Hearing, Day 2, T51.22-T51.25; Parties' Joint Chronology, p. 6; Kalivaç Green Energy Sh.p.k.'s excerpt from the Tirana Registry of Companies, 2 October 2014, p. 7 (C-319 (bis)).

[891] See paras. 233-234 above.

[892] Parties' Joint Chronology, p. 6; First Becchetti Statement, para. 4.

[893] See para. 225-226 above.

[894] *KGE Sh.p.k v. SACE SpA and Hydro S.r.l* (Tirana Judicial District), 26 February 2015, p.12 (R-037); Hearing, Day 2, T95.13-96.9.

[895] Hearing, Day 2, T121.21-T123.3, and see Appendix K to the Second Navigant Report.

[896] Hearing, Day 2, T123.4-T123.23.

clear to the Tribunal that the Claimants had abandoned the Kalivaç Project by June 2014. In consequence, the Claimants cannot claim protection for rights they voluntarily surrendered then. Nor can they rely on the actions by Albania, of which they complain, to invite the Tribunal to infer that Albania ceased to support the Kalivaç Project in June 2014, as by that time the Project had already been abandoned. Moreover, work on the Project had permanently stopped before the Rama Government was elected, and so before the Claimants allege the Rama Government's campaign of harassment began.

627. The Claimants' second argument, that seeking to re-let the Kalivaç Project while the Concession Agreement remained on foot constitutes expropriation, takes them no further. Albania's right to seek to terminate the agreement arose in or before June 2014. The tribunal in the 2nd ICC Arbitration found that Albania's right to terminate the Concession Agreement had arisen as early as July 2011, on the basis of Hydro's breaches.[897] That Tribunal also found that, under the Concession Agreement, Albania was only permitted to terminate by seeking an Award through arbitration granting it termination.[898]

628. This is because Albania could only seek termination (under Article 14 of the Concession Agreement) by seeking an Award under Article 30 of the Concession Agreement granting termination. Albania had requested termination by its Statement of Defence and Counterclaim in the 2nd ICC Arbitration dated 14 April 2016. The Respondent is right to point out that when the 2nd ICC Tribunal rendered an award granting termination is purely fortuitous. In that proceeding, Hydro contended that Albania had "an obligation under Albanian law to mitigate its loss by hiring a new contractor".[899] Having asserted that Albania was obliged to re-let the project in one proceeding, Hydro cannot now be heard as a Claimant in this proceeding to complain of that very action as expropriatory.

629. The Tribunal therefore finds that the Kalivaç Project was not expropriated.

B. WHETHER THE KALIVAÇ PROJECT WAS ACCORDED FAIR AND EQUITABLE TREATMENT

[897] Respondent's letter to the Tribunal dated 2 February 2018, para. 19(b)(i).

[898] *Ibid*, para. 19(b)(iii). See 2nd ICC Award, para. 351.

[899] 2nd ICC Award, para. 391.

(1) The Parties' Positions

630. The Claimants also alleged that Albania breached Article 2(2) of the Treaty by not according them fair and equitable treatment in relation to the Kalivaç Project.[900]

631. In particular, in their Memorial on the Merits, the Claimants alleged that Albania granted the Claimants guarantees regarding State support for the Project, tax and customs exemptions, a stabilization clause, and a right of first negotiation.[901] These guarantees were contained in the Concession Agreement and Albanian law.[902] The Claimants alleged those guarantees induced them to invest and gave rise to legitimate expectations that were violated by the following alleged State acts.[903]

a. Failing to issue permits in a timely manner (see section IV.D(4)a above).

b. Failing to engage with the Claimants regarding floods adversely affecting the Project (see section IV.D(4)c above).

c. Failing to assist with expropriation (see section IV.D(4)b above).

d. Not reimbursing VAT to KGE in a timely manner (see section IV.I(1) above).

e. Not respecting KGE's customs exemptions (see section IV.I(4) above).

f. Failing to respect the stabilisation agreement when imposing the tax representative rule (see section IV.I(2) above).

g. Assessing spurious tax liabilities on the Claimants' companies in violation of Albanian law, specifically Audit No. 8159 of KGE (see section IV.I(2) above).

632. The Claimants also alleged in their Memorial on the Merits (in the context of its allegation that the Kalivaç Project was expropriated) that these State actions rendered "any progress

[900] As noted in paragraph 440.a above.

[901] Memorial on the Merits, para. 626.

[902] See sections IV.A(1) and IV.C(1) above.

[903] Memorial on the Merits, para. 626.

on the Project impossible".[904] The Claimants' allegations that the FET standard was breached in relation to the Kalivaç Project have evolved in the course of the proceedings, however. In relation to the specific State actions of which they complain, the Claimants said the following in their Reply on the Merits.

a. The Claimants disavowed any claim that Albania's alleged failure to issue permits in a timely fashion caused delay to the Project, but stated "Albania cannot deny that issuing timely permits was an obligation under the Concession Agreement, one which Albania failed to honour."[905]

b. Responding to Albania's contention that any adverse effect of flooding on the Project did not delay it, and so KGE could not have been entitled to an extension of time,[906] the Claimants contended that the flooding "caused difficulties to the Project".[907] They did not, however, contend that the Project was delayed due to those difficulties.

c. Albania also contended that its alleged failure to assist with expropriations did not delay the Project.[908] The Claimants responded that the alleged failure demonstrated Albanian authorities were "obstructionist", but again did not seek to show any delay to the Project as a result.[909]

d. Finally, the Claimants contended that it was the cumulative effect of a "barrage of audits"[910] that constituted a violation of the FET standard,[911] rather than any one element of the actions by the tax authorities of which the Claimants complain.[912] The Claimants alleged that this was a campaign to obstruct the operation of their

[904] Memorial on the Merits, para. 574, and see paragraph 613.b above.
[905] Reply on the Merits, para. 37.
[906] Counter-Memorial on the Merits, para. 240.
[907] Reply on the Merits, para. 40.
[908] Counter-Memorial on the Merits, para. 226.
[909] Reply on the Merits, para. 38-39.
[910] Listed in the Reply on the Merits, para. 135, and described in section IV.I above.
[911] Reply on the Merits, para. 134.
[912] *Ibid*, para. 132.

companies,[913] and to impose a "crippling" tax debt through Audit No. 8159, which was alleged to be "illegitimate and illegal".[914]

633. In the Memorial on the Merits and the Reply on the Merits, these allegations appear to have been directed towards a failure to accord the Kalivaç Project as a whole fair and equitable treatment, through a violation of the Claimants' legitimate expectations.

634. In their closing submissions and at the Final Hearing, however, these allegations appear to have been directed specifically and solely towards KGE's lost opportunity to benefit from the Green Certificates regime.[915] The Claimants there contended that Hydro had a legitimate expectation it could benefit from the regime,[916] and that in order to do so the plant needed to enter commercial operation before 31 December 2012. Through the actions listed above, Albania contributed to delays at the Project, in parallel with Deutsche Bank.[917] Finally, had Albania approved the submarine transmission cable, the Project could have attracted finance and been completed and operational in 2012.[918] In those circumstances, Hydro could have qualified for the Green Certificates even if the cable, although approved, was not complete by the end of 2012, so long as an alternative means of transmitting electricity to Italy could be found, such as through Greece.[919]

635. In its Counter-Memorial on the Merits and Rejoinder on the Merits, the Respondent denied the factual allegations underlying each of the complaints made in the Memorial on the Merits and the Reply on the Merits.[920] For the following reasons, the Respondent further

[913] *Ibid*, para. 144.

[914] *Ibid*, para. 144-145.

[915] Claimants' closing presentation, slides 82-84. The Claimants' submissions concerning the Project as a whole were directed entirely to the expropriation arguments discussed in the immediately preceding section of this Award, despite referring to FET in their summary of the claims, extracted at paragraph 441 above: Closing presentation, slides 34-45.

[916] Claimants' closing presentation, slide 83, relying on Article 21 of the Concession Agreement; Hearing, Day 9, T59.23-T59.25.

[917] Claimants' closing presentation, slide 84; Hearing, Day 9, T59.3-T59.6.

[918] Claimants' closing presentation, slide 84.

[919] Hearing, Day 9, T60.1-T61.7.

[920] See, in particular, the table at Rejoinder on the Merits, para. 419.

contended that, even if those factual allegations were accepted, they would not constitute a breach of Article 2(2) of the Treaty.[921]

a. They do not rise to the high standard required if a breach of FET is to be shown.

b. Where, as here, the investor has carefully negotiated the terms of its investment relationship with the State, its legitimate expectations cannot override those negotiated terms.

c. To the extent that the alleged breaches are based in breach of domestic law, the Claimants are impermissibly seeking to "treat this Tribunal as a court of first instance, to which they can have resort without even bothering to seek any relief from the appropriate domestic forum".[922]

d. To the extent that the alleged breaches are based in breaches of the Concession Agreement, by Article 14 of that agreement the parties agreed that such disputes would be resolved in a different forum. Where such a different forum is available, the FET standard is even higher.

636. In its closing submissions, the Respondent submitted that the Claimants could not show that any breach of the FET standard caused Hydro to miss the deadline to obtain Green Certificates. The Claimants must show that but for some breach or breaches of the FET standard the plant would have been operational by the end of 2012.[923] The Respondent contends that this cannot be done, for the following reasons.

637. First, such an argument is inconsistent with the case put in other forums by the Claimants and with their contemporaneous correspondence. In other arbitrations, Hydro has put its case on the basis that the failure of Deutsche Bank to obtain finance was the reason that

[921] Counter-Memorial on the Merits, para. 360-366; Rejoinder on the Merits, para. 397-404, 415-419.

[922] Counter-Memorial on the Merits, para. 363.

[923] Respondent's closing note, para. 18.

the Green Certificates were not obtained.[924] In correspondence, and evidence before other tribunals, the Claimants have stated that the Project was ahead of schedule in 2009.[925]

638. Second, the Claimants' case in this proceeding cannot support the necessary causal relationship. The Claimants have made no effort to identify which alleged breach of the FET standard has led to what delay, so allowing the Tribunal properly to assess the claims.[926] Proper, detailed evidence of the works completed on site and delay and critical path analysis would be required if it were to do so.[927]

639. Finally, the evidence in the proceeding shows that the true cause of the Project not being complete by December 2012 was not any act of Albania's. Works were suspended on the Project for 911 days, from November 2009 to May 2012, due to the failure to pay the head contractor, Energji.[928] This delay was no fault of Albania's. When the Project resumed in May 2012, the Claimants accept that there was not sufficient time to complete construction before the end of 2012.[929] Thus, it was the lack of finance sufficient to fund the Project from November 2009 to May 2012 that resulted in the plant not being operational by 31 December 2012.

(2) The Tribunal's Analysis

640. The parties dedicated significant effort to analysing the standard that is required of the state by Article 2(2)'s obligation to accord investors and investments fair and equitable treatment. Careful argument was put by the Claimants and the Respondent concerning whether this represented an international minimum standard or was autonomous; whether it is appropriate to consider the particular circumstances of the State Respondent when determining the content and application of the standard; and whether legitimate

[924] *Ibid*, para. 18(1), and see section IV.D(3)b above.
[925] *Ibid*, para. 18(4), relying on letter from KGE to the METE dated 26 August 2009 (C-231).
[926] *Ibid*, para. 18(3).
[927] *Ibid*, para. 19(4).
[928] *Ibid*, para. 19(1).
[929] *Ibid*, para. 19(2), relying on Hearing, Day 2, T32.19-T32.23.

expectations can arise from a carefully negotiated contract such as the Concession Agreement, among other matters.[930]

641. Due to the way in which the Claimants' allegations have evolved, as described in the immediately preceding section of this Award, and the factual findings the Tribunal now makes in paragraphs 643 and following below, it is not necessary for the Tribunal to resolve these issues.

642. The Tribunal notes, however, that even if the Claimants' arguments concerning the content of the standard and how it ought be applied were accepted, in the Tribunal's view the standard was not breached by the conduct of which the Claimants complain.[931] At the final hearing, the Claimants did not devote any significant time to arguing that the Kalivaç Project had not been accorded fair and equitable treatment, focusing primarily on expropriation. When the factual record is examined concerning the matters the Claimants assert constitute a breach of the standard,[932] the Tribunal considers that these issues rise no higher than the administrative irritations and bureaucratic incompetence that might be expected on any project of this size. They are not sufficient to ground a breach of the FET standard, and nor are they sufficient to ground a claim of creeping expropriation.

643. As noted above, and discussed further in the following paragraphs, in contemporaneous correspondence KGE asserted that the project was ahead of schedule as at August 2009. Finance for the project ran out in 2009, re-started in 2012 following the payment by Deutsche Bank of the €28.9 million awarded to Hydro in the 1st Rome Arbitration and was abandoned in 2014.

644. The crucial factual question is patently whether the plant would have been operational, and capable of delivering power to Italy, and thus capable of benefitting from the Green Certificate regime, before 31 December 2012 but for the State conduct of which the Claimants complain. It is undisputed that, in November 2009, Energji stopped work on the

[930] Memorial on the Merits, para. 593-611; Counter-Memorial on the Merits, para. 542-553; Reply on the Merits, para. 427-435; Rejoinder on the Merits, para. 397-404.

[931] Summarised in paragraphs 631 and 632 above.

[932] Summarised in paragraphs 631 and 632 above, and see sections IV.D(4), IV.I(1), IV.I(2) and IV.I(4) above.

Kalivaç Project because it was not being paid, and did not resume work until May 2012.[933] The delay during this period was therefore due to a lack of finance for the Project, as described in section IV.D(3) above. It is also undisputed that the plant could not be completed in the time left between May 2012 and 31 December 2012.[934] The Claimants must therefore show that Albania materially contributed to Energji stopping work between 2009 and 2012. That is, the Claimants must show that but for Albania's conduct the Claimants would have been able to attract finance for the Project during this period, so allowing KGE to pay Energji to resume work.

645. The specific State conduct of which the Claimants complain, summarised in paragraphs 631 and 632 above, does not assist in answering that question, for the following reasons.

a. The Claimants allegations concerning failure to issue permits in a timely manner, failure to assist with expropriation and failure to assist with the effect of flooding on the Project all relate to matters that occurred before May 2012.[935] In 2009, according to Hydro's correspondence with Albanian authorities, the Project was ahead of schedule.[936] Mr. Becchetti accepted in his evidence that work during the period November 2009 to May 2012 had ceased due to Energji stopping work on the project due to a lack of finance. [937] Therefore, from 2009, when KGE stated that work was ahead of schedule and Energji then stopped work, to May 2012, when Energji resumed work, Albania's conduct, no matter how obstructive, cannot have affected progress on the Project. Further, as summarised in paragraphs 631 and 632 above, the Claimants have not, in any of their submissions, sought to explain how and to what extent these alleged failures to meet the Claimants' legitimate expectations caused delay to the Project or otherwise impeded its progress.

b. The allegations concerning a failure to respect the stabilisation agreement in applying the tax representative rule to KGE, and assessing spurious but crippling

[933] Hearing, Day 2, T14.20-T15.25, T28.1-T28.19.

[934] Hearing, Day 2, T32.14-T32.21.

[935] See section IV.D(4) above.

[936] Letter from KGE to the METE dated 26 August 2009 (C-231).

[937] Hearing, Day 2, T14.20-T15.25, T28.1-T28.19.

tax liabilities all depend on the Claimants' complaints that Audit No. 8159 was "illegitimate and illegal".[938] As the Tribunal in the 2nd ICC Arbitration identified, the Claimants declined to exercise their rights of appeal in domestic courts in relation to that audit.[939] There is no requirement that the Claimants exhaust all local remedies before bringing a claim under the Treaty or the Convention. However, a failure to do so may provide a basis for the Tribunal to infer that the measure is not in fact in breach of the State's obligations.[940] Here, that inference is also supported by the fact that the audit started before the Rama Government came to power, and, the Claimants allege, started a campaign of harassment against them. The Tribunal is therefore not satisfied that the audit constitutes a failure to accord the Claimants fair and equitable treatment.

c. Further, even if it could be shown that the audit was a breach of the FET standard, the Claimants have made no effort to articulate precisely whether, how or to what extent the matters that flowed from this audit[941] contributed to the Project not being complete by 31 December 2012. As the audit did not commence until 11 July 2012[942] it is irrelevant to the delay that ceased in May 2012 when KGE restarted work on the Project. The Claimants have also not sought to show how Albania's actions led to work on the Project stopping in March 2013, never to recommence.

d. As to the alleged failure to reimburse KGE's VAT in a timely manner, there is also no attempt to articular how this contributed to delay in completion of the Project before 31 December 2012.

[938] See sections IV.I(2) and IV.I(3) above.

[939] 2nd ICC Award, 8 January 2018, para. 265.

[940] As the Respondent points out in the context of the Claimants' allegations that Agonset was expropriated, discussed in section VII.E(2)b below and see Rejoinder to Reply on the Merits, para. 396, quoting *Generation Ukraine Inc. v. Ukraine*, (ICSID Case No. ARB/00/9), Award, 16 September 2003 (RL-0066).

[941] Such as Energji no longer being able to set off its own tax liabilities with the VAT credit owing to KGE (discussed in section IV.I(3) above) and the tax lien imposed on KGE and the freezing of KGE's accounts (discussed in section IV.I(8) above).

[942] See paragraph 326 above.

e. The sum at issue in relation to the customs refunds, €33,725.15,[943] is immaterial in the context of a project the size of the Kalivaç Project.

646. The sole matter that need be determined, therefore, is whether the Tribunal should accept the Claimants' contention that, if the submarine transmission cable had been approved, the Project would have attracted sufficient finance to be completed before 31 December 2012 and so could have taken advantage of the Green Certificates regime.

647. The only evidence adduced by the Claimants in support of this contention was that of Mr. Becchetti. In his first witness statement, Mr. Becchetti's evidence on this matter was that the cable "would be an important element in the Project's ability to obtain financing".[944] On cross-examination, he stated that:[945]

> *there was a last chance, a last opportunity, which is to build a submarine cable that would have allowed exportation of the energy to Italy on its own path. This would have transformed the project from one with an Albanian risk, which was the risk of transit on different lines through different countries than Albania, which wasn't paying, et cetera, et cetera, and to transfer it directly into Italy.*

648. Mr. Becchetti accepted that the cable might not have been constructed before 31 December 2012, as the application was made at the end of 2008 and start of 2009. However, he stated that a different means of getting power from the Kalivaç Project to Italy could have been found, through daily tenders for transmission over the cable that ran through Greece. He also stated that such delay would have been for 1 to 3 years at most. [946] On this basis, Mr. Becchetti stated that:[947]

> *if I had gone to the bank and said, "For 2/3 years I run the risk of going from 50% to 30%, however, after the third year I'm going to have the submarine cable and for 12/13 years this will enable the transfer of energy", then I think the bank would have found that*

[943] See section IV.I(4) above.

[944] First Becchetti Statement, para. 67.

[945] Hearing, Day 2, T39.17-T39.24.

[946] Hearing, Day 2, T41.4-T41.7.

[947] Hearing, Day 2, T41.24-T42.6.

> *acceptable because the rate of return […] for that kind of project would have accounted for 30% - 35%, more or less.*

649. In the Tribunal's view, this evidence is too speculative to ground a finding that, had the transmission cable been approved, sufficient finance to complete the Project would have been secured in time for the plant to be complete by 31 December 2012. Mr. Becchetti's evidence was that a further 20 to 30 months' construction would be required to complete the plant.[948] Finance would therefore have had to have been secured, and construction then commenced, by some time between June 2010 and April 2011.

650. No expert evidence was offered by the Claimants as to the state of the financial markets between the end of 2009 and the start of 2011 that would assist the Tribunal to assess the likelihood of a project of this kind attracting finance during that period. The Claimants of course have the burden of making out their case on the balance of probabilities. Mr. Becchetti's evidence in the 2nd ICC Arbitration strongly suggests that the Project would have been unlikely to attract finance, regardless of whether the submarine cable had been approved. It being pointed out during the 2nd ICC Arbitration that the delays in construction of the Kalivaç Project the delays in construction of the Kalivaç Project between November 2009 and May 2012 were not attributed to Albania,[949] Mr. Becchetti responded as follows.[950]

> *That is right but there was no reason to say so because it is not Albania that is responsible, it is the financial crisis and especially the financial crisis that Albania was living through and in the international context of the crisis.*

651. In the present proceeding, although Mr. Becchetti rejected the contention that the financial crisis was the reason KGE couldn't pay Energji,[951] he also stated the following in relation to his evidence in the 2nd ICC Arbitration.[952]

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[948] Hearing, Day 2, T33.3-T33.9.

[949] 2nd ICC Arbitration, Final Hearing, Day 1, 19 December 2016, T191.9-T191.12 (C-598).

[950] 2nd ICC Arbitration, Final Hearing, Day 1, 19 December 2016, T191.13-T191.18 (C-598).

[951] Hearing, Day 2, T32.9.

[952] Hearing, Day 2, T31.5-T31.22.

> *Now, the concept is that from mid-2008 onwards there was a huge financial international crisis, and this implied major difficulty to finance international projects. Yet projects kept being financed; with difficulty, but they kept going on.*
>
> *The crisis in Albania, seeing the conditions of that particular country, seeing the way the balance sheets, the accounts and the numbers were in Albania, put investors in very difficult conditions. It was very difficult for them to operate in that country from that period onwards. Because the crisis put everyone in difficulty: it was difficult to have discussions with banks in order to obtain funding.*

652. I have said that it's not up to me to judge why Albania found itself in that situation. Maybe someone else should judge. But it is an objective reality that that crisis was going on, and this is what I said and what is reported in the transcript. The Tribunal therefore finds that Albania's failure to approve the submarine cable did not contribute to the lack of finance that led to the delay between November 2009 and May 2012. On the evidence before it, the Tribunal finds that market conditions meant that finance was unlikely to be obtained regardless of whether approval was given for the submarine transmission cable.

653. The Claimants have not shown that but for Albania's impugned conduct the Kalivaç Project could have benefited from the Green Certificate regime. The Tribunal therefore finds that Albania did not breach Article 2(2) of the Treaty in relation to the Kalivaç Project.

C. CLAIMS RELATING TO INVESTMENTS ASSOCIATED WITH THE KALIVAÇ PROJECT

654. The Claimants also made the following claims in relation to investments associated with the Kalivaç Project.

a. Costruzioni had a legitimate expectation that the Kalivaç Project would not be expropriated, and so the expropriation constituted a failure to accord Costruzioni fair and equitable treatment under Article 2(2) of the BIT. Costruzioni thereby lost its share of the profits that Energji would have made in completing the project.[953]

[953] Claimants' closing presentation, slide 62.

b. In failing to consider Energji's application to build a transmission cable between Albania and Italy,[954] Albania failed to accord fair and equitable treatment to, and discriminated against, Costruzioni, in breach of Article 2(2) of the BIT.[955] Costruzioni thereby lost the value of its share of that potential asset.

c. Albania's failure to approve Energji's application to build a transmission cable and contributing to delays in the Kalivaç Project were contrary to Hydro's legitimate expectations and led to Hydro not being able to meet the deadline for obtaining the Green Certificates.[956]

655. As the Tribunal has found that the Kalivaç Project was not expropriated, there is no basis for the Claimants' allegation that Costruzioni was not accorded fair and equitable treatment in relation to its share of the profits that Energji would have made in completing the project. The Tribunal finds that Article 2(2) of the Treaty was not breached in this regard.

656. Any value that the transmission cable and the Green Certificates could have had as investments was wholly dependent on the Kalivaç Project generating electricity. It is electricity from the project that was to be transmitted by the proposed transmission cable to Italy, and that electricity that was to obtain the benefit of the Green Certificate regime. The value of those investments was therefore lost when the Claimants abandoned the Kalivaç Project. The Claimants cannot now seek to recover that value from Albania. As discussed in the immediately preceding section of this Award, to the extent that matters before the Project was abandoned are relevant, the Claimants have not shown any relevant breach of Article 2(2).

D. THE RIGHT OF FIRST NEGOTIATION

657. The Claimants allege that Hydro had a right of first negotiation for a concession agreement to build a power plant at Poçem. The Claimants further allege that Albania, contrary to Hydro's legitimate expectations, failed to respect that right in breach of Article 2(2) of the

[954] See section IV.D(2) above.

[955] Claimants' closing presentation, slides 66-72.

[956] Claimants' closing presentation, slides 82-86. See paras. 207 and 208 above.

BIT. The Claimants also allege that Albania discriminated against Hydro in favour of a Turkish consortium, in breach of Article 3 of the BIT, by granting that Turkish consortium a concession agreement. Hydro is alleged to have thereby lost the value of that potential investment.[957]

658. The Claimants assert the right of first negotiation, on the basis of the 1999 Council of Ministers' Decision No. 222,[958] which approved the Concession Agreement and decided:

> *4. To authorize B.E.G. SpA to study, at its own expense, the possibility of building hydropower plants on the lower part of the River Vjosa, after the Kalivaç hydropower plant.*
>
> *If the study supports the construction of another hydropower plant with BOT concession, and if the Government grants its approval, B.E.G. SpA has the right to become the first negotiator.*

659. As more fully described in section IV.A(2) above, BEG submitted a proposal for a hydroelectric project in Karbunare near Poçem vicinity in September 1999,[959] and carried out evaluation studies in 2000.[960] The project did not proceed then, nor when Hydro submitted a joint request with Deutsche Bank in 2007 after the signing of the Second Addendum.[961] Albania did not proceed with any additional hydropower projects in 2007. No claim is brought in relation to the events of 2007.

660. In late 2015, Albania approved a hydropower plant at Poçem for construction of a plant in this area by a Turkish Consortium.[962] When Hydro attempted to be the first negotiator,

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[957] *Ibid*, slides 73-76.

[958] Decision No. 222 on the Approval of the Agreement for the Kalivaç Hydropower Plant with BOT Concession, 24 May 1997 (C-183).

[959] "BOT" Concession Application for the Karbunare Hydro Power Plant on the River, 6 September 1999 (C-185).

[960] Albanian Ministry of Public Works, Institute of Hydrotechnical Studies and Planning, Analysis of Studies on the Dragot, Kaludh, and Karbunare Hydro Plants, January 2000 (C-189).

[961] Letter from BEG and Deutsche Bank to the Albanian Minister of Economy, Trade and Energy and the Albanian Minister of Public Works, Transportation and Telecommunications, with copy to the Prime Minister and the General Director of KESH, 30 May 2007 (C-201); Letter from BEG and Deutsche Bank to the Albanian Minister of Economy, Trade and Energy and the Albanian Minister of Public Works, Transportation and Telecommunications, with copy to the Prime Minister and the General Director of KESH, 30 July 2007 (C-202); Deutsche Bank, "7 Hydro Power Projects in Albania: 450 MW – 1,787,000,000 KWh/y on the Vjosa river," October 2007 (C-206); First Becchetti Statement, para. 58.

[962] Albanian Ministry of Energy and Industry, Notification of the Contract, retrieved on 11 April 2016 (C-415).

Albania refused.[963] The Claimants allege that this was contrary to their legitimate expectation that Hydro would be given the right to be the first negotiator and discriminated against Hydro in favour of the Turkish consortium.[964]

661. As the Respondent points out, however, the right of first negotiation only arises if:

a. BEG conducts a pre-feasibility study at its own expense of the possibility of building hydropower plants on the lower part of the River Vjosa, after the Kalivaç hydropower plant;

b. the study supports the construction of another hydropower plant with BOT concession; and

c. the Government grants its approval.

662. The feasibility study on which the Claimants rely relates to Karbunare, on the other side of the river from Poçem. The Respondent asserts that, because that study concerns a different area from the area in relation to which the Claimants sought to exercise a right of first negotiation, the first condition of that right arising was not satisfied.[965]

663. The Claimants contend that, given the proximity of the two locations, the Karbunare study could apply in relation to Poçem. They do so on the basis of the following extract from the analysis of the Albanian governmental authority reviewing the concession request which

[963] Letter from Hydro to the Minister of Energy and Industry, 1 October 2015, Prot. No. 51/15 (C-389); Letter from the Minister of Energy and Industry to Hydro, 5 November 2015, Prot.No. 62/53 (C-395); Letter from Hydro to the Minister of Energy and Industry, 1 December 2015, Prot. No. 55/15 (C-397); Letter from the Minister of Energy and Industry to Hydro, 28 December 2015, Prot. No. 62/63 (C-403); Letter from Hydro to the Minister of Energy and Industry, 22 March 2016, Prot. No. 19/16 (C-412).

[964] Claimants' closing presentation, slides 73-75.

[965] Counter-Memorial on the Merits, para. 174; Rejoinder to Reply on the Merits, para. 101. The Respondent contends that the Claimants cannot rely on the right of first negotiation for a range of other reasons: see Counter-Memorial on the Merits, paras. 174-176; Rejoinder to Reply on the Merits, paras. 98-100. Given the Tribunal's findings concerning this condition, however, it is unnecessary to consider those arguments and the Tribunal does not do so.

noted that the project sat on the river with a Karbunare axis and Poçem axis (it ultimately recommended beginning to build the Project on the Poçem side):[966]

> *On both axes below the Kalivac Hydro Plant, on the Pocem axis and the Karbunara axis, there is no difference in terms of electricity generation. The plant may be built in Karbunara or in Pocem.*
>
> *The geological studies done in the area of the Pocem axis show that about 750 through 800 m above the Pocem bridge there are no karst problems. There is a slippery area on the Karbunara axis stretching along the riverbank for about 1 km with a transverse extension of about 250 m up the slope.*
>
> *The depth of gravels in the riverbed for both axes is uniform.*
>
> *In view of the above we recommend investigation of the possibility of building the dam in the area of the Pocem gorge about 750 through 800 m above the vehicle bridge, since the problems of flooding on this axis are also very small.*

664. The Tribunal rejects this argument. The fact that the analysis distinguishes between the feasibility of the two locations demonstrates that a study of the feasibility of building a hydroelectric plant in Karbunare could not apply to Poçem. The first two conditions necessary for a right of first negotiation to arise were therefore not satisfied.

665. The Tribunal therefore finds that no right of first negotiation arose in relation to the site at Poçem and so there was no breach of Articles 2(2) or 3 of the Treaty in relation to this concession.

E. WHETHER AGONSET HAS BEEN EXPROPRIATED

666. It is convenient to set out the relevant text of Article 5 here to guide the following discussion.

[966] Albanian Ministry of Public Works, Institute of Hydrotechnical Studies and Planning, Analysis of Studies on the Dragot, Kaludh, and Karbunara Hydro Plants, January 2000, pp. 26-27 (C-189), quoted at Reply on the Merits, para. 65.

Nationalization or Expropriation

1. The investments covered by this Agreement may not be the subject of measures that, for a fixed or indeterminate amount of time, limit the inherent rights of ownership, possession, control or enjoyment, except when provided for by law, as a result of judgments or orders by judicial or administrative competent authorities, or as a result of general, non-discriminatory measures designed to govern economic activities.

2. Investments of the investors of one of the Contracting Parties will not be directly or indirectly nationalized, expropriated, requisitioned, or subject to measures having similar effects in the other Party's territory, unless the following conditions occur:

a) the pursuit of the public purposes or of the national interest in compliance with current laws;

b) the adoption of the aforementioned measures on a non-discriminatory basis;

c) the payment of immediate, full, and effective compensation.

(1) The Parties' Positions

a. The Claimants

667. The Claimants assert "that Albania unlawfully expropriated Agonset and that the expropriation crystallized in June 2015 with the issuance of the Seizure Decision and the Seizure Execution Decision."[967] They allege that this was a "creeping expropriation" in breach of Article 5 of the Treaty.[968] The "totality of Albania's conduct, culminating in the silencing of Agonset and the destruction of the Claimants' investment" is alleged to constitute the expropriation.[969]

668. The Claimants assert that the criminal proceedings described in section IV.J above were used "to seize the assets of or effectively shut down 400 KV, Fuqi, Cable System, and

[967] Rejoinder on Jurisdiction, para. 162, and see Hearing, Day 1, T114.12.

[968] Reply on the Merits, paras. 401 and 407; Closing presentation, slides 92-95.

[969] Reply on the Merits, para. 418.

Agonset."[970] The Claimants assert that the practical effect of the seizure was that they were incapable of any meaningful control of Agonset. With the company's assets, including its bank accounts, under the control of the AASCP, the Claimants were unable to pay the outgoings and liabilities that ultimately led to Agonset closing in April 2016.[971] The practical effect of the various criminal allegations was that it was also impossible to pay those liabilities through sources other than the frozen accounts.[972]

669. The Claimants further allege that the AASCP had an obligation under Albanian law to manage the assets under its control, including by payment of its own funds if necessary.[973] The AASCP did not meet Agonset's tax liabilities, pay Agonset's rent, staff or electricity bills, and so the investment was completely destroyed.[974]

670. The Claimants also allege that Albania's actions cannot be justified, whether as falling within:

a. the specific exception in Article 5(1) for measures "provided for by law, as a result of judgments or orders by judicial or administrative competent authorities, or as a result of general, non-discriminatory measures designed to govern economic activities"; or

b. a legitimate exercise of Albania's police powers.

671. This is because, the Claimants allege, the Seizure Decision and the Seizure Execution Decision were part of a politically motivated campaign against the Claimants, those decisions "forming part of a process of creeping expropriation through the intervention of composite acts".[975] They were also the product of a failure to afford the Claimants due

[970] *Ibid*, para. 425.

[971] As described in section IV.J(14) above.

[972] See paragraph 433 above and 696 below.

[973] Closing presentation, slide 113.

[974] Reply on the Merits, para. 426.

[975] *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014 (CL-184) para. 461, quoted by the Claimants in the Reply on the Merits, para. 401.

process.[976] Such measures cannot be said to have been undertaken in good faith, and so "'[cross] the line' that separates valid regulatory activity from expropriation."[977]

672. The Claimants invite the Tribunal to draw the inference that the measures were not *bona fides* in the public interest primarily on the basis of the following matters.

a. Prime Minister Rama explicitly declaring "success" in his "war" against the Claimants following the Seizure Decision and the Seizure Execution Decision, in the context of Agonset's independent reporting (as discussed in section IV.H(4)a above) and the Prime Minister's chief of staff having warned Mr. Becchetti "it is not a good idea to oppose the state". [978]

b. The alleged harassment of Agonset employees described in paragraph 307 above.[979]

c. The exclusion of Agonset from the digital licensing process, described by the Claimants as arbitrary and discriminatory.[980]

d. A "barrage" of tax audits, which the Claimants allege were intended to overwhelm them and obtain information for the criminal investigation described in section IV.J above that issued in the Seizure Decision and the Seizure Execution Decision.[981]

[976] Reply on the Merits, para. 405; Closing presentation, slide 105.

[977] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (CL-050) para. 264, quoted by the Claimants in their Closing presentation, slide 95. The Claimants also rely on *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423 (CL-054); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Arbitration, First partial Award, 13 November 2000, para. 285 (CL-038); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, paras. 291-300, 305 (CL-189).

[978] Reply on the Merits, para. 421, and see paragraphs 354, 422-425 above.

[979] *Ibid*, para. 422.

[980] *Ibid*, para. 423, and see section IV.H above.

[981] *Ibid*, para. 424.

e. Further, the criminal investigation was not a legitimate use of Albania's police powers because the four key bases of that investigation lacked proper factual foundations.[982]

673. These arguments are examined in more detail in the Tribunal's analysis in section VII.E(2)b below.

b. The Respondent

674. The Respondent draws a distinction between Articles 5(1) and 5(2) of the Treaty, and states it is unclear whether the Claimants intend to bring their expropriation claim under only Article 5(1) or also under 5(2).[983] It asserts that, in either case, the Claimants must fail.

675. On the Respondent's case, the requirements of Article 5(1) cannot be satisfied because the Seizure Decision and the Seizure Execution Decision fall within the Article's exception for measures provided for by law, that are a result of judgments or orders by judicial or administrative competent authorities, or are a result of general, non-discriminatory measures designed to govern economic activities.[984] The Respondent asserts that there is no basis to read into the Article the further requirements for which the Claimants contend, namely that if the exception is to apply the rulings must be issued by a court of competent jurisdiction, made in good faith, and made after due process has been accorded.[985]

676. In any event, the Respondent asserts that all three of these putative requirements are met here. In particular, the Respondent points out that the Seizure Decision and the Seizure Execution Decision were upheld by the Albanian Court of Appeal and Supreme Court, and if the Claimants' argument is that these courts "were motivated by bad faith, it would be incumbent upon them to advance that argument unambiguously and to present cogent

[982] Closing presentation, slides 98-103.

[983] Rejoinder to Reply on the Merits, para. 393. The Respondent contends that the Claimants have not "properly or clearly pleaded a breach of Article 5(2)": Respondent's closing note, para. 54. The Claimants do explicitly rely on that Article, however, stating "Albania violated every single one of the requirements of Article 5(2) of the Treaty": Reply on the Merits, para. 426. The Respondent did not make any formal objection to the Tribunal considering a claim for breach of Article 5(2), and given the text just quoted any such objection would fail.

[984] Respondent's closing note, para. 52(1).

[985] *Ibid*, para. 52(2)(a); Rejoinder to Reply on the Merits, para. 387.

evidence. They have done neither. The reasoning of these courts is unassailable."[986] The Respondent asserts that the review by the Albanian courts of the impugned decisions is also a complete answer to the Claimants' allegation that due process was not afforded.[987]

677. The Respondent contends that, if the Claimants' expropriation claim is also brought under Article 5(2) of the Treaty, the threshold to be met for the creeping, indirect expropriation thereby alleged is high, and cannot be met here.[988] Effectively, the culmination of the measures taken by Albania must be the same as if the property has been "taken" by Albania;[989] there must be a "total or substantive deprivation" of the Claimants' property.[990]

678. The Respondent contends that the Claimants' shareholdings in Agonset have not been "taken" and that none of the measures taken by Albania has the necessary permanent effect on the Claimants' shareholdings.[991] Further, the Respondent asserts that Agonset Albania, the company, has not been taken or destroyed.[992] The Respondents arguments on both points are explored further in the Tribunal's analysis below.

679. The Respondent also contends that, in any event, the Seizure Decision and the Seizure Execution Decision are legitimate uses of Albania's police powers and so cannot be expropriatory. If the Claimants are to succeed in demonstrating otherwise, the Respondent asserts that they much show both that:[993]

a. the impugned decisions were flawed as a matter of Albanian law; and

b. those decisions were the culmination of a bad faith/illegitimate and co-ordinated campaign against the Claimants by Mr. Rama's government.

[986] Rejoinder to Reply on the Merits, para. 389, footnote omitted.

[987] Counter-Memorial, para. 527.

[988] Rejoinder to Reply on the Merits, para. 394.

[989] *Pope & Talbot Inc. v. The Government of Canada* (Interim Award) UNCITRAL/NAFTA Arbitration, Award, 10 April 2001 (CL-040), cited by the Respondent in the Rejoinder to Reply on the Merits, para. 394.

[990] *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014 (CL-184).

[991] Rejoinder to Reply on the Merits, para. 394; Respondent's closing note, paras. 55-57.

[992] Respondent's closing note, para. 55.

[993] *Ibid*, para. 60.

680. The Respondent asserts that the impugned decisions complied with Albanian law, as demonstrated by their being upheld by the Albanian Court of Appeal and Supreme Court. It further asserts that the Claimants have offered no sufficient evidence to substantiate their allegations that the impugned decisions are the culmination of a political campaign against them, for the reasons discussed in section VII.E(2)b below. Ultimately, the Respondent contends that the facts show that the Claimants simply decided to close a loss-making business due to the failure of the delocalized model.[994]

(2) The Tribunal's Analysis

681. The Respondent appears to distinguish between Articles 5(1) and 5(2) of the Treaty on the following bases.

a. Something less than complete permanent loss of the protected investment need be shown for a breach of Article 5(1), whereas Article 5(2) requires such complete permanent loss.

b. There is no basis for reading into the exception carved out of Article 5(1) any requirement that the excepted state measures be undertaken in good faith following due process. As such, the police powers analysis required in relation to Article 5(2) is not required in relation to Article 5(1). It is sufficient to show that the measures are provided for by law, as a result of judgments or orders by judicial or administrative competent authorities, or as a result of general, non-discriminatory measures designed to govern economic activities.

682. The Tribunal has found, for the reasons given in the immediately following section of this Award, that the Claimants' investment in Agonset was completely and permanently destroyed. The first distinction therefore does not apply here.

683. As to the second, the Tribunal doubts that the Respondent is correct to assert that Albania would be free to implement measures that were not undertaken in good faith in the public interest following due process so long as they took the form called for by the exception to

[994] *Ibid*, paras. 62-65.

Article 5(1).[995] However, as the Tribunal has found that the more onerous "taking" requirement Albania ascribes to Article 5(2) has been met, it is unnecessary to resolve this issue and the Tribunal does not do so.

684. The two questions that must therefore be answered to determine whether Agonset was expropriated are:[996]

a. whether Agonset was "taken", in the sense of its investors being completely deprived of its value; and

b. if so, whether that taking was a legitimate exercise of Albania's police powers.

685. The Tribunal examines each in turn.

a. Whether Agonset was "taken"

686. There is no real dispute between the parties as to the principles to be applied in determining this question. In an indirect or "creeping" expropriation of the kind the Claimants allege, the following elements are to be considered:[997]

> *(i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (*i.e.*, approaching total impairment);*
>
> *(ii) the irreversibility and permanence of the contested measures (*i.e.*, not ephemeral or temporary); and*
>
> *(iii) the extent of the loss of economic value experienced by the investor.*

[995] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 263 (CL-050); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Arbitration, First partial Award, 13 November 2000, para. 285 (CL-038); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, paras. 291-300, 305 (CL-189); *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423 (CL-054).

[996] The Respondent does not dispute that Albania paid no compensation for the purposes of Article 5(2)(c) of the Treaty.

[997] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) Award, 27 August 2008, para. 193 (RL-136).

687. There is, of course, no need to show that Albania received some commensurate benefit for the "taking" or destruction to constitute an expropriation.

688. As noted, the Claimants assert that the criminal proceedings described in section IV.J above were used "to seize the assets of or effectively shut down 400 KV, Fuqi, Cable System, and Agonset."[998] The Claimants assert that the practical effect of the seizure was that they were incapable of any meaningful control of Agonset. With the company's assets, including its bank accounts, under the control of the AASCP, the Claimants were unable to pay the outgoings and liabilities that ultimately led to Agonset closing in April 2016.[999] The practical effect of the various criminal allegations was that it was also impossible to pay those liabilities through sources other than the frozen accounts.[1000]

689. The Claimants further allege that the AASCP had an obligation under Albanian law to manage the assets under its control, including by payment of its own funds if necessary.[1001] The AASCP did not meet Agonset's tax liabilities, pay Agonset's rent, staff or electricity bills, and so the investment was completely destroyed.[1002]

690. In response, the Respondent contends that the Claimants' shareholdings in Agonset have not been "taken" and that none of the measures taken by Albania has the necessary permanent effect on the Claimants' shareholdings.[1003]

a. The Claimants' shareholdings still belong to them. Agonset Albania still owns (i) its property, including its broadcasting equipment and (ii) the money that has been frozen in its account. The channel continued to be managed by Mr. De Renzis as administrator, continued to broadcast following the court order and continued to make its own business decisions and use its own equipment.

[998] Reply on the Merits, para. 425.

[999] As described in section IV.J(14) above.

[1000] See paragraph 433 above, and the more detailed discussion below.

[1001] Closing presentation, slide 113.

[1002] Reply on the Merits, para. 426.

[1003] Rejoinder to Reply on the Merits, para. 394; Respondent's closing note, paras. 55-57.

b. The Seizure Decision has temporarily blocked Ms. Condomitti, Mr. De Renzis and Ms. Troplini's shares in Agonset Albania and subjected Agonset's bank accounts and identified physical property to preventative seizure, pending the outcome of the criminal proceedings.

c. The temporary nature of the order was recognised by Agonset Albania management who successfully applied to suspend its broadcasting license on 20 June 2016 pending the result of this Arbitration and the criminal proceedings. The application was premised on the notion that the broadcasting license may be renewed in the future.

691. Further, the Respondent asserts that Agonset Albania, the company, has not been taken or destroyed, for the following reasons.[1004]

a. The Claimants are not prevented from managing the company, and Mr. De Renzis continued to act as Administrator.

b. Albania did not take over editorial direction of the TV channel.

c. Its management continued in 2016 to make regulatory applications to the AMA; Agonset Albania applied to suspend the renewal of its broadcasting license in June 2016. Agonset Albania produced and relied upon a business plan at part of that application for the period 2016-2021 filed by Ms. Shuke.

d. The AASCP denied being in control of Agonset.

e. Agonset Albania continues to pursue various legal actions, including a challenge to the eviction notice of April 2016 and a claim in the European Court of Human Rights.

f. Agonset Italy management was free to sell its Italian broadcasting license for over €10 million in June 2016.

[1004] Respondent's closing note, para. 55.

692. When considering these matters, a tribunal must focus on the substance of the *effect* of the impugned measures on the protected investments. As Dolzer and Schreuer point out, "In recent jurisprudence, the formula most often found is that an expropriation will be assumed in the event of a 'substantial deprivation' of an investment."[1005] If the Tribunal accepts the Claimants' contention that the practical effect of the measures of which they complain was to deprive them of the substantive value of their investments, this will be sufficient.

693. The fact that the Seizure Decisions are temporary, in the sense of lasting only so long as the criminal proceeding is pending, is therefore not relevant if the practical effect of even a temporary freezing of Agonset's accounts and seizing of assets is that the company could not pay its outgoings, leading to the company's value being permanently destroyed. It may also be accepted, with the Respondent, that the AASCP was under no legal obligation to pay Agonset's outgoings if the Claimants are right about the practical effect of the temporary seizure. The same is true of the formal powers to continue managing the company that the Respondent identifies, summarised in paragraphs 690 and 691 above.

694. The Respondent contends, however, that Albania's actions are not the true cause of the closure of Agonset. Rather, this was a conscious commercial decision on the part of investors to close a loss-making asset.

695. The Tribunal rejects this contention. It will be recalled that Agonset failed to pay various outgoings, including taxes, rent, wages and electricity. This failure led to proceedings being brought by unpaid employees, the power being cut, and eviction.[1006] As, again, a formal matter, it is true to say that the Seizure Decisions did not prevent these liabilities being paid from other sources by the investors in Agonset. However, the evidence is clear that this was a practical impossibility due to the allegations that underpinned the Seizure Decisions and the criminal investigation more broadly.

696. When Agonset sought to pay employees at bank accounts outside of Albania through Agonset.it, the employees received a message from their banks saying that these transfers

[1005] Dolzer and Schreuer, *Principles of International Investment Law*, 2012, p. 104 (RL-0065) (citation omitted).
[1006] See section IV.J(14) above.

were refused due to "bank policy."[1007] Mr. Arbana gave evidence that any further account opened in Albania would also have been frozen.[1008] Mr. Becchetti gave evidence that any attempt to use his money to make payment, by whatever means, would have meant a further seizure due to the outstanding money laundering allegations.[1009] He further stated that when attempts were made to make payments through accounts in other countries, those moneys were returned, and that Agonset's journalists were stopped at the border and any money with them was seized.[1010] Part payment of the electricity bill by staff was only possible because they pooled their personal funds that were already in Albania.[1011]

697. The Tribunal therefore finds that there was a permanent deprivation of the substantial value of Mr. De Renzis', Mr. Becchetti's, Ms. Grigolon's and Hydro's investment in Agonset. The deprivation developed over a period of time and crystallised on or around 5 June 2015 with the Seizure Decisions. At that point, access to finance was effectively cut off and so continuation of the investment became effectively impossible. This expropriation occurred as the culmination of a series of actions by the State which harmed the investment directly or indirectly by targeting its supporting shareholders that are described in section IV.J above.

b. Whether any taking was a legitimate exercise of Albania's police powers

698. It is trite that a State may undertake regulation that is *bona fide* in the public interest without any question of expropriation arising.[1012] The question is "whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation."[1013]

[1007] Email from STB Bank to Alda Kola, 1 October 2015 (C-390).

[1008] Hearing, Day 3, T96.18-T97.1.

[1009] Hearing, Day 3, T37.12-T37.20.

[1010] Hearing, Day 3, T35.22-T36.2.

[1011] Hearing, Day 3, T36.14-T36.16.

[1012] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 255 (CL-050), and see the authorities cited by the Respondent at Counter-Memorial on the Merits, para. 516.

[1013] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 264 (CL-050), and see *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423 (CL-054).

699. In its closing submissions, Albania asserts that the Claimants must first show that the measures of which they complain are flawed as a matter of Albanian law.[1014] On the Respondent's case, this is a necessary but not sufficient condition of finding that Albania was not legitimately exercising its police powers.[1015]

700. The Tribunal disagrees. A state cannot escape liability for measures that breach international law solely on the basis that those measures conform with domestic law. The most glaring examples are domestic legislation validly enacted that purports to limit the scope of international obligations,[1016] or that purports to abrogate legislation granting rights that have already accrued.[1017] As noted by the tribunal in *ABCI v. Tunisia*:[1018]

> *While it is recognized that, in this case, there was not only a legislative provision but also a contract that contained a sort of stabilization clause, it is nonetheless certain that the underlying principle of not affecting acquired rights is of general application.*

701. Similarly, the fact that the decision of a domestic court causes the loss of an asset or forms part of a process of creeping acquisition will not necessarily mean that these state acts are precluded from constituting a breach of international obligations.[1019]

702. It is therefore not a sufficient answer for the Respondent to point to the fact that the Albanian courts have upheld the Seizure Decisions. In its Counter-Memorial on the Merits, the Respondent took a somewhat more measured position. It there stated that the fact that the impugned measures accorded with Albanian law "militates against" a finding that they were expropriatory.[1020] So much may be accepted. However, the Tribunal's task is to

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[1014] Respondent's closing note, para. 60.

[1015] *Ibid*, para. 61.

[1016] F.A. Mann, "The Theoretical Approach Towards the Law Governing Contracts between States and Private Persons," 11 Rev. BDI (1975), p. 567 (CL-137).

[1017] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 335 (CL-157).

[1018] *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, paras. 127-128 (CL-168) (emphasis added).

[1019] *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, para. 461 (CL-184); *Sistem Mühendislik Insaat Sanayive Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, paras. 118-119 (CL-163); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, paras. 127-132 (CL-162).

[1020] Counter-Memorial on the Merits, para. 522.

consider the substance of the measures and determine, on the basis of "the real interests involved and the purpose and effect of the government measure",[1021] whether expropriation has occurred.[1022]

703. The Tribunal turns to the parties' substantive arguments concerning whether the Seizure Decision and Seizure Execution Decision are a legitimate exercise of Albania's police powers. When doing so, it is important to bear in mind that the Claimants' case is that it is the totality of the conduct of which it complains that constitutes expropriation and not those decisions considered in isolation.[1023]

704. It is convenient to set out again the matters on the basis of which the Claimants invite the Tribunal to draw the inference that the measures were not *bona fide* in the public interest because they formed part of the Rama government's political campaign against the Claimants.

a. Prime Minister Rama explicitly declaring "success" in his "war" against the Claimants following the Seizure Decision and the Seizure Execution Decision, in the context of Agonset's independent reporting (as discussed in section IV.H(4)a above) and the Prime Minister's chief of staff having warned Mr. Becchetti "it is not a good idea to oppose the state". [1024]

b. The alleged harassment of Agonset employees described in paragraph 307 above.[1025]

[1021] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Arbitration, First partial Award, 13 November 2000, para. 285 (CL-038).

[1022] In footnote 463 to the Counter-Memorial on the Merits, the Respondent relies on Dolzer's and Schreuer's statement that "it appears plausible that measures that are, under the rules of key domestic laws, normally considered regulatory without requiring compensation, will not require compensation under international law either" in support of its assertion that the fact that measures are permitted by Albanian law militates against finding them expropriatory: Dolzer and Schreuer, *Principles of International Investment Law*, 2012, p. 104 (RL-0065). Immediately following this statement, however, Dolzer and Schreuer emphasise the importance of examining the effect of the measure, not its legislative or other formal aspects, and on the same page state (citation omitted): "In recent jurisprudence, the formula most often found is that an expropriation will be assumed in the event of a 'substantial deprivation' of an investment."

[1023] Reply on the Merits, para. 418.

[1024] Reply on the Merits, para. 421, and see section IV.I(7) above.

[1025] *Ibid*, para. 422.

c. The exclusion of Agonset from the digital licensing process, described by the Claimants as arbitrary and discriminatory.[1026]

d. A "barrage" of tax audits, which the Claimants allege were intended to overwhelm them and obtain information for the criminal investigation described in section IV.J above that issued in the Seizure Decision and the Seizure Execution Decision.[1027]

e. Further, the criminal investigation was not a legitimate use of Albania's police powers because the four key bases of that investigation lacked proper factual foundations.[1028]

705. The Tribunal accepts that the tax measures of which the Claimants complain do not rise to the level of abusive behaviour. The Respondent sets out in its closing submissions a range of reasons why the position taken by the tax authorities represent a reasonable application of Albanian law.[1029] In particular, Audit No. 8159 was a significant focus of the Claimants' submissions. As the Tribunal in the 2nd ICC Arbitration identified, the Claimants declined to exercise their rights of appeal in domestic courts in relation to that audit.[1030]

706. There is no requirement that the Claimants exhaust all local remedies before bringing a claim under the Treaty or the Convention. However, the Respondent rightly points out that a failure to do so may provide a basis for the Tribunal to infer that the measure is not in fact expropriatory.[1031] As noted in paragraph 645.b above, that inference is further supported by the fact that the audit started before the Rama Government came to power, and, the Claimants allege, started a campaign of harassment against them. The Tribunal therefore finds that the audit considered alone was not expropriatory, and does not treat Audit 8159 as part of the conduct it needs to take into account when determining whether

[1026] *Ibid*, para. 423, and see section IV.H above.

[1027] *Ibid*, para. 424.

[1028] Closing presentation, slides 98-103.

[1029] Respondent's closing note, paras. 81-91.

[1030] 2nd ICC Award, 8 January 2018, para. 265.

[1031] Rejoinder to Reply on the Merits, para. 396, quoting *Generation Ukraine Inc. v. Ukraine*, (ICSID Case No. ARB/00/9), Award, 16 September 2003 (RL-0066).

Albania's conduct as a whole, culminating in the Seizure Decisions, constituted expropriation.

707. Agonset's exclusion from the digital licensing process was only complete some time after the Claimants allege the expropriation had crystallised in June 2015, as licenses were not awarded until July 2016.[1032] The reasons Agonset was not included in the efforts to award digital licenses before June 2015 included perfectly legitimate matters, such as the fact that Agonset was neither a "national historic operator" nor an operator with experience in digital broadcasting, as required by the Digital Switchover Strategy.[1033] The Tribunal therefore finds that the Claimants' allegations that their exclusion was arbitrary and discriminatory are not made out.

708. Nevertheless, the Rama government was closely associated with the incumbent operators, Agonset's commercial competitors. Former employees of those incumbents were employed by the government in key positions.[1034] In particular, the Rama government installed a former senior executive at one of the incumbents as President of the AMA. It did so by using its numbers in parliament to override the statutory requirement that the opposition party participate in the selection process. The President who was replaced as a result had been the subject of a sustained campaign on the part of the incumbent TV operators for her removal.[1035]

709. All of these matters indicate that the Rama government was close to Agonset's commercial competitors, the incumbent TV operators. This is of course hardly sufficient in and of itself. However, it provides background support for the inference the Claimants invite the Tribunal to draw. This is particularly so given the context of Agonset's critical independent reporting of the Berisha government's and Rama government's difficulties in 2014 and 2015, as set out in section IV.H(4)a above, in contrast to the close ties of the incumbent operators with government.

[1032] See paragraph 320 above.

[1033] See paragraphs 272, 284 and 293 above.

[1034] See paragraph 303 above.

[1035] See paragraphs 298-302 above.

710. In response, the Respondent alleges that the primary Agonset TV report said to have led the Rama government to retaliate aired long after the criminal investigation started, and that the Claimants have exaggerated the impact of that story in any event.[1036] Focusing on that single story, however, is to overlook the broader context just described.

711. Further background support for the Claimants' allegations is provided by the confrontations between members of the government and prominent journalists of which the Claimants complain.[1037] That is also bolstered by the fact that another of the Claimants' commercial competitors, in this case the unsuccessful applicant for the waste management concession obtained by Albaniabeg,[1038] was also a political ally of Prime Minister Rama and was elected to parliament in the same elections that installed the Rama government.[1039]

712. Of more direct significance is the first matter identified by the Claimants, the explicit statements made by government representatives concerning the motives for the criminal investigations. In late 2013 or early 2014, shortly after money laundering allegations were first raised against the Claimants, Mr. Becchetti asked the Secretary General of Prime Minister Rama's cabinet, Mr. Agaçi, why those investigations were being pursued. Mr. Agaçi said Mr. Becchetti should speak to Enkelejd Joti, the General Manager of Top Channel, one of Agonset's incumbent competitors. When Mr. Becchetti asked why he should speak to Mr. Joti, Mr. Agaçi said "It is not a good idea to oppose the State." [1040]

713. In June 2015, immediately following the Seizure Decisions (taken in part on the basis of the money laundering allegations), Prime Minister Rama explicitly stated that he considered the government to be at "war" with certain investors, including the Claimants, and that the war had been successful. He went on to say that the executive government "will shake the foundations of the judicial system" in a way that those judges who had "become part of the crime cannot even imagine."[1041]

[1036] Respondent's closing note, paras. 62(1) and 62(2).

[1037] See paragraph 307 above.

[1038] See section IV.B above.

[1039] See paragraph 298 above.

[1040] See section IV.I(7) above.

[1041] See paragraphs 423-425 above.

714. The Respondent contends that this is a misreading of Prime Minister Rama's comments, which were instead directed to the phenomenon of money laundering, and relies on the following context for the statements just quoted.[1042]

> *I was speaking about the source of funding, I have not spoken about the media. The twitter has 140 letters. You cannot make long explanations. I have said 'it is a success, because that kind of investor has caused to this state and to these people incalculable damages, with manipulated trials and in the meanwhile is holding in hostage the Albanian government with the concessions, for which he has not applied none of the conditions. I have nothing against him; I don't know him at all. I am talking about the phenomena. [I]t is scandalous phenomena against which we have declared a war, and we will fight up to the end.*

715. It is certainly true that Prime Minister Rama states that he has nothing against Mr. Becchetti. However, in the context of the matters set out in the preceding paragraphs, the Prime Minister's comments are best read as indicating a political campaign against, at least, "that kind of investor", of which Mr. Becchetti was one. This reading is further supported by the weaknesses identified in the money laundering allegations described in the following paragraphs.

716. The Claimants also point out that key allegations justifying the Arrest Warrants and Seizure Decisions have the following significant flaws.[1043]

a. The allegation that the companies were laundering overseas funds is undercut by documents provided to the prosecutor[1044] before the criminal charges were formally brought,[1045] showing a legitimate source of the funds.[1046]

b. It was also alleged that invoices were sent in relation to works that were not done, namely "foundation work on material that was selected and dug out for the

[1042] Rejoinder on the Merits, para. 408-409, quoting the English language transcript and original video of Opinion interview with Prime Minister E. Rama, 17 June 2015, p. 3 (C-129).

[1043] Closing presentation, slides 100-102.

[1044] Letter from UniCredit to Hydro enclosing bank statements and records of transfer, 19 June 2015 (C-105).

[1045] See paragraph 399 above.

[1046] See generally: Hearing, Day 5, T140.9-T142.11.

construction of the body of the dam".[1047] Reports from the relevant government agency from different years indicated that that work had been completed, however.[1048]

c. As to the allegation that Energji overcharged for works, further documents available to the prosecutor showed that Albania had approved the rate charged to it in the Second Addendum to the Concession Agreement.[1049] They also showed that Deutsche Bank had approved the rate at which KGE's contract with Energji set the works.[1050]

717. Under Albanian law, all that is required for an arrest warrant to be issued is a reasonable basis to suspect a crime has been committed. For a range of detailed reasons, set out in its final submissions,[1051] the Respondent contends that such a reasonable basis existed despite any flaws identified by the Claimants in the basis for the criminal investigation.

718. Although this may well demonstrate that the Arrest Warrant had a sufficient basis under Albanian law, this is not the end of the matter. As noted, the question is whether, in substance, the Claimants can show that Albania's actions were motivated by a political campaign against them. Even if it is accepted that there was a reasonable basis for suspicion concerning the allegations that formed the basis of the criminal investigation, the factual flaws the Claimants identify provide further basis for an inference that Albania's motivations were not *bona fide* in the public interest.

719. At around the time the Arrest Warrants were issued, INTERPOL issued "Red Notices" at Albania's request in relation to Mr. Becchetti and Mr. De Renzis. In 2016, INTERPOL repeatedly asked Albania to justify those notices in response to allegations that they were

[1047] District Court of Tirana, Judgment regarding the adoption of the precautionary measure, Act. No. 1546, 5 June 2015, p. 24 (C-102 bis).

[1048] AKBN Monitoring Report, No. Prot. 1256, 27 July 2010 (C-107); AKBN Monitoring Report, 2016 (R-131); Hearing, Day 5, T150-T151.

[1049] Second Addendum, p. 3 (C-017).

[1050] Agreement between Albaniabeg and Energji (C-479), page 26; Minutes of KGE Administrative council meeting, 3 May 2011, p. 23 (C-108); Hearing, Day 5, T156.

[1051] Respondent's closing note, para. 77.

politically motivated, lacked a proper purpose and lacked a proper evidentiary basis. Receiving no adequate response, INTERPOL withdrew the Red Notices in 2017.[1052]

720. The Respondent asserts that these matters are nevertheless insufficient to show that the impugned decisions are the culmination of a political campaign against the Claimants, for the following reasons.

a. The Claimants launched Agonset Italy in December 2014, despite a number of steps already having been taken in the criminal investigation, and Mr. Becchetti gave evidence that by "mid-2015 […] Agonset was thriving and we were looking to continue expanding."[1053]

b. The Seizure Decision did not prevent the payment of the unpaid electricity bill that led to power being cut to Agonset. If the Claimants believed Agonset was worth €300 to €400 million they would have paid this bill. Mr. Becchetti accepted that, in the ordinary course, the shareholders would assist with Agonset's outgoings. In this case, they effectively accepted their responsibility when one of the Directors, Mr. Arbana, paid part of the outstanding amount.

721. On this basis, the Respondent contends that the Claimants simply decided to close a loss-making business due to the failure of the delocalized model.

722. This is unpersuasive. Mr. Becchetti gave evidence that he proceeded with the launch of Agonset Italy because the process was already well underway by December 2014 ("the train had already left the station")[1054] and that although he knew a criminal investigation was on foot in June 2015, he also knew the investigation was "groundless".[1055]

[1052] See section IV.J(10) above.

[1053] First Becchetti Statement, para. 98, quoted by the Respondent in its closing note, para. 62(3).

[1054] Hearing, Day 2, T149.25.

[1055] Hearing, Day 2, T151.11.

723. As to the assertion that the shareholders in Agonset would have paid its bills if they believed the company was valuable, this too runs counter to the evidence, as explained in detail in paragraphs 695 and 696 above.

724. When taken together, all of the matters discussed in paragraphs 708 to 719 above therefore strongly support an inference that the Seizure Decisions were the culmination of a political campaign against the Claimants.

a. The criminal investigations were commenced by a government that was close to the Claimants' commercial competitors, incumbent operators of television stations, against a channel that was critical of the government.

b. At the outset of those investigations, a representative of the government explicitly stated that Mr. Becchetti should speak with one of those competitors if he wished to understand why the Claimants' investments were under investigation, and that it was not a good idea to oppose the state.

c. There were significant flaws in the factual basis for the allegations that underpin the criminal investigation. When called upon to justify the allegations that underpinned the Arrest Warrants by INTERPOL, Albania failed to do so.

d. Once the Seizure Decisions were issued, Prime Minster Rama stated his "war" against investors such as the Claimants had been a "success", and went on to threaten the judiciary on the basis that it was somehow implicated in the supposed wrongs of those investors.

725. Unlike the conduct of which the Claimants complained in relation to the Kalivaç Project, the Tribunal finds that these activities were deliberate interference with Agonset's business and motivated by Agonset's criticisms of government. The Tribunal therefore draws that inference for which the Claimants contend, and finds that Albania's taking of Agonset was not a legitimate exercise of its police powers. As such, Mr. De Renzis', Mr. Becchetti's, Ms. Grigolon's and Hydro's investment in Agonset was expropriated in breach of Article 5 of the Treaty.

726. The Claimants also alleged that Albania had failed to accord Agonset and its investors fair and equitable treatment and discriminated against them in breach of the BIT. Given the Tribunal's finding that the entire value of the investment has been destroyed, those claims cannot affect the quantum of the damages to which Mr. De Renzis, Mr. Becchetti, Ms. Grigolon and Hydro are entitled to compensate them for the loss of their investments in Agonset. The Tribunal therefore does not consider those claims further.[1056]

VIII. QUANTUM

727. In light of the Tribunal's findings in section VII.E above, the Claimants have been successful in their claim for expropriation of Agonset. The Tribunal now turns to the issue of quantum.

A. WHETHER THE CLAIMANTS' CAN CLAIM IN RESPECT OF AGONSET.IT

728. As a preliminary matter, the Respondent contends that the Tribunal should not award the Claimants' damages claim insofar as the value relates to the revenue of Agonset.it, an Italian company.[1057] This is predicated on the basis that Agonset.it is not an "Investment" in Albania within the meaning of the BIT, and therefore the revenues of Agonset.it are outside of the scope of the BIT.[1058]

729. The Claimants assert that because Agonset.it and Agonset Albania are a single integrated whole, they are together an "Investment" within the meaning of the BIT and the Tribunal should therefore award damages in respect of that investment.[1059]

730. In light of the Tribunal's findings above at section VI.F, the Claimants have been successful in establishing that Agonset.it is indivisible from Agonset Albania and therefore falls within the meaning of "Investment" in the BIT. It logically follows that the Claimants

[1056] Hearing, Day 9, T212-T213.

[1057] Rejoinder to Reply on the Merits, para. 535.

[1058] Rejoinder to Reply on the Merits, para. 536.

[1059] Reply on the Merits, paras. 338-347; Closing presentation, slides 27-29.

are entitled to claim damages in relation to the revenues of Agonset.it. The Tribunal for the same reasons as articulated already therefore rejects the Respondents' contention.

B. THE PARTIES' POSITIONS

(1) The Claimants' Position

a. Standard of compensation

731. The Claimants submit that they are entitled to compensation that would wipe out all of the consequences of Albania's unlawful acts on the basis of the principle of full reparation established under customary international law.[1060]

732. For the Claimants, the BIT provides no compensation standard for unlawful expropriation and therefore they ask the Tribunal to turn to customary international law for the applicable standard of relief.[1061] The Claimants say that the customary international law standard is that articulated in *Chorzów* i.e. "full reparation" that "as far as possible, wipe[s] out all the consequences of the illegal act".[1062]

733. To achieve full reparation, the Claimants claim that they are entitled to the fair market value of their interests in Agonset, which requires: (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.[1063] The Claimants rely on the Discounted Cash Flow ("DCF") method to establish the fair market value (discussed further below).

b. Valuation date

734. The Claimants submit that 31 March 2018, which was assumed for the purposes of the valuation evidence to be the date of the Award, is the appropriate valuation date for their loss with respect to Agonset.[1064]

[1060] Memorial on the Merits, para. 652; Reply on the Merits, para. 539.

[1061] Memorial on the Merits, para. 653.

[1062] Memorial on the Merits, paras. 654-655.

[1063] Memorial on the Merits, para. 655; Reply on the Merits, para. 541.

[1064] Memorial on the Merits, para. 660.

735. To achieve full reparation, the Claimants say that they are entitled to compensation of the greater of: (i) the value of the assets expropriated as at the date of expropriation; and (ii) the value of the assets expropriated as at the date of the award.[1065]

736. The Claimants rely *inter alia* on the following decisions to support their position:[1066]

a. In *ADC*,[1067] the tribunal considered whether compensation for an unlawfully expropriated investment could and should be assessed at the date of the award rather than the date of expropriation. The tribunal considered that, in circumstances where the value of the expropriated investment increased, the application of the *Chorzów* standard required assessment at the date of the award to ensure the claimant was put in the same position as if the expropriation had not occurred.[1068]

b. In *Kardassopoulos*,[1069] the tribunal considered that "[i]t may be appropriate to compensate for value gained between the date of the expropriation and the date of the award in cases where it is demonstrated that the [c]laimants would, but for the taking, have retained their investment".[1070]

c. In *Conoco*, the tribunal stated that "if the taking was unlawful, the date of valuation is in general the date of the award".[1071]

d. In *Pezold*, the tribunal accepted the reasons provided in *ADC*, and held that "compensation should be calculated at the time of the Award, rather than at the time

[1065] Memorial on the Merits, para. 656; Reply on the Merits, para. 540.

[1066] Memorial on the Merits, para. 660.

[1067] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (CL-054).

[1068] *Ibid*, paras. 496-499.

[1069] *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010 (CL-076).

[1070] *Ibid*, para. 514.

[1071] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, para. 343 (CL-089).

of the unlawful acts" on the basis that the assets had increased in value since the unlawful expropriation.[1072]

737. In the Claimants' view, Agonset was a start-up with enormous potential. They assert that but for the Respondent's expropriation, the Claimants would have retained their investments in Agonset and Agonset would have continued to grow and attract advertising revenues comparable to those of other leading channels.[1073]

738. The Claimants rely on the expert evidence of Mr. Rathbone to assert that the fair market value of Agonset would be greater at the date of the Award, than the date of the alleged expropriation.[1074]

739. Alternatively, the Claimants submit that 8 June 2015, i.e. the date Agonset was seized by Albania, is the appropriate valuation date.[1075] This is predicated on the basis that the Seizure Decisions crystallised the expropriation of Agonset.

c. Proof and causation

740. As to causation, the Claimants accept that they must prove causation.[1076] The Claimants say that the Respondent, through a campaign of destruction, totally destroyed the value of their investments in Agonset. Therefore, in their view, they need not establish the specific damages flowing from each act of Albania rather that Albania's aggregate conduct caused the total destruction of the Agonset companies.[1077] To that end, they say the causal link is clear.[1078]

741. As to the burden of proof, the Claimants accept that they bear the *burden* of proof as to their claimed damages.[1079] However, the Claimants assert that they need to establish the

[1072] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 761-764 (CL-104).
[1073] Memorial on the Merits, paras. 659-660.
[1074] Reply on the Merits, para. 592.
[1075] Reply on the Merits, para. 592.
[1076] Reply on the Merits, para. 507.
[1077] Reply on the Merits, paras. 542-543.
[1078] Reply on the Merits, para. 543.
[1079] Reply on the Merits, para. 544.

fact of the loss with sufficient certainty but thereafter need only offer a reasonable basis to estimate the amount of their loss.[1080]

742. The Claimants rely on the following decisions to support their position:[1081]

a. In *Lemire*, the tribunal stated that the standard of proof was as follows:

> *The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the* in bonis *party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.*[1082]

b. In *Crystallex*, the tribunal considered that the standard of proof for damages shifted as follows:

> *First, the* fact *(i.e., the existence) of the damage needs to be proven with certainty. In that sense, there is no reason to apply any different standard of proof than that which is applied to any other issue of merits (e.g., liability).*
>
> *Second, once the fact of damage has been established, a claimant should not be required to prove its exact* quantification *with the same degree of certainty. This is because any future damage is inherently difficult to prove.*[1083]

743. The Claimants contend that they provide a reasonable basis to estimate their damages with respect to Agonset by offering a DCF analysis.[1084]

[1080] Reply on the Merits, para. 545.

[1081] Closing presentation, slide 133.

[1082] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246 (CL-078).

[1083] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 867-888 (CL-106).

[1084] Reply on the Merits, para. 545.

744. Further, the Claimants assert that, to the extent there is any uncertainty in their quantification of damages, the uncertainty is attributable to Albania and should not affect their ability to receive damages.[1085] They rely on the finding by the tribunal in *Gemplus* that "it would be wrong in principle to deprive or diminish the [c]laimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the [r]espondent's own wrongs".[1086]

d. Valuation method

745. The Claimants submit that the DCF method is the only appropriate method to estimate the fair market value of their investments in Agonset.[1087] They point out that it is a widely-accepted valuation method, which incorporates the inherent uncertainties in valuation.[1088] While acknowledging that a proven record of profitability, history of operation, detailed business plans and other elements identified by the Respondent are desirable for the application of the DCF method, they say they are not prerequisites precluding the utility of the DCF method.[1089]

746. The Claimants reject the wasted costs method of valuation proposed by the Respondent's expert, on the basis that it has no connection to the fair market value standard and would severely understate their damages.[1090]

e. DCF analysis

747. The Claimants' expert, Mr. Rathbone, who is an experienced chartered accountant, has assessed the fair market value of Agonset using the DCF method. Mr. Rathbone uses the 2012 Business Plan created for Agonset along with an analysis of action costs for 2014 and

[1085] Closing presentation, slide 134.

[1086] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United States of Mexico*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, paras. 13-99 (RL-084).

[1087] Reply, para. 551.

[1088] Reply, para. 553.

[1089] Reply, paras. 556 -565.

[1090] Reply, paras. 545, 569-572.

2015 and market data, in order to derive the inputs for the valuation model.[1091] Each input is discussed further below.

748. Mr. Rathbone has done two valuations. First, the ex-ante valuation at the date of 8 June 2015 ("Ex-Ante Valuation Date") being when Agonset was subject to a sequestration order. Secondly, the ex-post valuation at 31 March 2018 ("Ex-Post Valuation Date") being the notional date of the Award.

749. The ex-ante valuation assumes that the two companies were sold as a going concern on the Ex-Ante Valuation Date in an arms-length sale at fair market value. The ex-post valuation assumes that the business continued to develop according to its Business Plan and Editorial Plan, with no problems with the Albanian authorities, and that the two companies would be sold together at the Ex-Post Valuation Date in an arms-length sale at fair market value.

(a) Revenue

750. Mr. Rathbone's projected revenue figures for Agonset in his valuations are based upon three key assumptions:

a. there is a 1:1 relationship between audience market share and TV advertising market share ("power ratio");

b. a 1% share of the Italian TV audience viewing is assumed to be equivalent to revenue of €30 million; and

c. Agon Italia's audience share will increase from 0.1% in 2015 to 3.5% by 2020 in the Ex-Ante Valuation and 0.1% in 2015 to 4% by 2020 in the Ex-Post Valuation.[1092]

[1091] Memorial, para. 671, citing First Rathbone Report, para. 671.

[1092] Second Rathbone Report, p. 38, Table 6.

(i) Power ratio

751. Underpinning the revenue projections of Mr. Rathbone is an assumption that there is 1:1 power ratio between the audience market share and the advertising revenue market share.[1093]

752. A power ratio is a method used by media companies to measure revenue performance compared to the audience share it controls. Essentially the power ratio measures which broadcasters earn more or less per viewer than other broadcasters.

753. Mr. Rathbone extrapolated publicly available data of the power ratios of the principal television channels in Italy for 2015 to inform his assumption on the power ratio.[1094] The power ratios for those channels range from 0.48 to 1.68.[1095] Of note, La7, considered by Mr. Pasquale to be the most comparable channel to Agonset, commanded a ratio of 1.4 with an audience share of 3%.[1096] Further, Gazetta, a channel with only 0.2% audience share achieved a power ratio of 1.05, showing that a channel with a low audience share can still obtain a one-to-one power ratio.

754. In Mr. Rathbone's opinion, the power ratio of a given channel is affected by the audience size, the quality of the audience and the difficulty to reach that specific audience.[1097] Mr. Rathbone considers it is a reasonable estimate that Agonset would be able to obtain a power ratio of 1 based on the following factors: (i) the large target audience of Agonset; (ii) 100% original programming schedule; (iii) availability on the DTT platform; (iv) Gazetta commanded ratio of 1.05; (v) La7 commanded a ratio of 1.4;[1098] (vi) the "more commercial channels" had a ratio of 1.0 or above;[1099] and (vii) the weighted average of the free to air channels in 2014 (excluding Rai and Mediaset the major duopoly channels) is 1.1.[1100]

[1093] First Rathbone Report, para. 60.
[1094] First Rathbone Report, para. 63
[1095] First Rathbone Report, Table 5-2.
[1096] First Rathbone Report, para. 64.
[1097] First Rathbone Report, para. 62.
[1098] First Rathbone Report, para. 64.
[1099] Second Rathbone Report, para. 100.
[1100] Second Rathbone Report, para. 104.

755. Mr. Pasquale, a media industry expert, considers that a power ratio of 1 is reasonable "in light of Mr. Rathbone's weighted average of FTA channels and the comparison to La7".[1101]

(ii) Value of audience share

756. Mr. Rathbone relies on PwC's Entertainment & Media Outlook in Italy 2015-2019 to calculate that a 1% share of the total €3.18 billion TV advertising revenue would equate to €31.8 million. Agonset projected, in its 2012 Business Plan, that it would achieve €30 million in 2015, and would obtain 0.9% of the total advertising revenue. Based on this, he concludes that a prudent assumption is that 1% share of viewing converts to €30 million given that the total revenue is expected to grow from 2014-2019.[1102]

*(iii)*Audience share

757. Mr. Rathbone was not provided with data regarding Agonset's actual audience share figures. Mr. Rathbone has based his audience share projections on the 2012 Business Plan and adjusted it with "appropriate public information as a reasonableness cross-check".

758. Mr. Rathbone's revised calculations are as follows.[1103]

a. 0.1% in 2015 to 3.5% by 2020 in the Ex-Ante Valuation; and

b. 0.1% in 2015 to 4% by 2020 in the Ex-Post Valuation.

759. Mr. Rathbone states that these calculations "rest both on the original programming […] and on the fact that analogous channels have prospered".[1104] Mr. Rathbone considered that the programming was likely to attract viewers,[1105] and Mr. Pasquale agrees with him.[1106] Mr. Rathbone considers that comparable channels are La Sexta and La7, which obtained 7.8% and 3.2% audience share respectively within 5 years of their launch.[1107]

[1101] Pasquale Points of Disagreement, para. 9.
[1102] First Rathbone Report, paras. 65-66.
[1103] Second Rathbone Report, paras. 85-87.
[1104] Second Rathbone Report, para. 46.
[1105] First Rathbone Report, paras. 71-74.
[1106] Pasquale Report, section 2.
[1107] First Rathbone Report, paras. 75-78; Second Rathbone Report, paras. 88-98.

760. Mr. Pasquale considers that Mr. Rathbone's viewing share projections are "both realistic and likely achievable" in light of Agonset's general-interest program strategy, and in comparison to similar channels, such as La7.[1108] La7 is similar to Agonset in the following respects: (i) both are general-interest channels, not thematic channels; (ii) both channels rely on popular anchors and television stars to attract audiences; (iii) both channels are essentially standalone channels; and (iv) La7 was recently relaunched as an essentially new channel in 2010.[1109]

(b) Expenses

(i) Agency fees

761. Selling advertising space is typically conducted by an agency, which charges fees based on a commission percentage.

762. Mr. Rathbone estimates that Agonset's agency fee commission was 30% in 2015 (based on the actual cost under a contract with a sales agency), 22.5% in 2016 and 15% afterwards. He based this reduction on the fact that an agency commission is typically 15%, and he expected that as Agonset expanded it would be able to negotiate market rates with its agency.[1110]

(ii) Cost of talent

763. Mr. Rathbone reviewed the contracts with the Italian TV stars and estimated a seasonal salary cost of €3.97 million. He noted that there are typically two seasons in production and estimated an annual cost of talent between €9-10 million. Mr. Rathbone's projections are thus based on a talent cost of €10 million increasing by 10% per annum to account for a rise in talent costs as Agonset grew.[1111]

[1108] Pasquale Report, paras. 75-79; Pasquale Points of Disagreement, para. 9.

[1109] Pasquale Report, paras. 56-64.

[1110] First Rathbone Report, paras. 86-89; Second Rathbone Report, para. 106.

[1111] First Rathbone Report, paras. 90-92.

(iii) Personnel Costs

764. Another major cost for Agonset would be the Albanian employees involved in the production and programming of the original content.

765. Mr. Rathbone took the peak monthly salary for Albanian employees when production costs were in "*full flow*" (€0.355 million in June 2015 for 322 staff) and estimated a conservative annual personnel cost of €4.3 million.[1112] Mr. Rathbone's projections are thus based on a personnel cost of €4.3 million increasing by 10% per annum to account for a rise in personnel costs as Agonset grew.[1113]

(iv) Other Costs

766. Mr. Rathbone includes an estimate for "other costs" in his cashflow analysis. He notes that the 2012 Business Plan estimates a total amount of €6,260,000 for "other costs" in 2015 comprising €2,000,000 for professional fees, €700,000 for production expenses, €1,060,000 for administrative expenses, €2,200,000 for transmission costs and €300,000 for development costs. Actual costs of this nature in 2014 amounted to €2,478,000.

767. Mr. Rathbone uses the figure in the 2012 Business Plan for 2015, increases this by 10% in 2016 and then assumes that other costs will be equivalent to 15% (excluding transmission costs) of revenues from 2017 onwards.[1114] Mr. Rathbone estimated that transmission costs vary from €2.16m in 2015 to €4.8m.[1115] These figures are based on the signed contract between Agonset.it and Persidera S.p.A. (a digital terrestrial network operator business), where Persidera agreed to transmit the broadcast signal from Albania to Italy on the Italian digital terrestrial television ("DTT") platform for a monthly payment that increased each year.[1116]

768. In response to criticisms by the Respondent's experts, Mr. Rathbone admitted that there is a lack of detail regarding this aspect of his analysis. However, he considers he has been

[1112] First Rathbone Report, para. 93.

[1113] First Rathbone Report, para. 94.

[1114] First Rathbone Report, paras. 95-98.

[1115] First Rathbone Report, para. 42 and Table 5-4.

[1116] Transmission Capacity Agreement between Agonset and Persidera S.p. A., 15 January 2015 (C-336).

appropriately prudent to account for this category of costs.[1117] Further, Mr. Pasquale considers that the Respondent's expert, Mr. Borrell, did not adequately take into account the saving on content costs on the basis of the de-localisation business model.[1118]

(v) Financing Costs

769. Mr. Rathbone includes an amount of €1 million per year as a cost of money raising or financing, which was included in the 2012 Business Plan. He notes that this is more of a contingency amount than an actual reflection of costs to be expected by Agonset.[1119]

(c) Capital investment and depreciation

770. Mr. Rathbone adopts the investment values contained in the 2012 Business Plan between 2012-2015 for the television production studios and related equipment. From 2016, the Business Plan made no provision for capital investment. Mr. Rathbone considers this unrealistic and therefore assumes that a continuing €1 million of capital investment will be needed each year, on the basis that the assets would need to be maintained.[1120]

771. Mr. Rathbone identified that Mr. MacGregor had the following three issues with his calculation of capital investment: (i) whether €1 million per annum was sufficient to cover replacement assets and capital maintenance; (ii) whether Agonset would need to invest further to meet the digitalisation of Albania's television section; and (iii) whether Agonset would need to invest further in high definition ("HD") broadcasting equipment to compete with other broadcasters moving to HD (discussed below at paragraph 811).[1121]

772. In response to Mr. MacGregor's criticisms, Mr. Rathbone stated as follows: (i) he had no further information on Albania's capital base; (ii) Agonset's facilities were already equipped for digital broadcasting and no new assets were required; and (iii) Agonset already produced in HD but did not transmit in HD because it was usually used for paid

[1117] Second Rathbone Report, para. 109.

[1118] Hearing, Day 4, T153:14-T155:24.

[1119] First Rathbone Report, para. 99; Second Rathbone Report, para. 109.

[1120] First Rathbone Report, paras. 100-102.

[1121] Second Rathbone Report, citing First MacGregor Report, paras. 4.128-4.134.

satellite services[1122]. Mr. Rathbone noted that he: added a "catch-up" amount to his DCF for a shortfall between actual expenditure and planned expenditure; and removed depreciation from the cashflow.[1123]

773. Mr. Rathbone maintains that his capital investment estimate is reasonable and states that "I understand that the license is renewable at a very modest cost and that the effective length of the license means there is an insignificant effect on valuation".[1124]

(d) Tax

774. Mr. Rathbone has allowed for a corporate tax rate of 31.4% in Italy and 15% in Albania.[1125]

(e) Financing

775. Mr. Rathbone considers that Agonset was properly financed and that any capital not already held by related parties could easily have been raised externally off the back of the businesses successful growth.[1126] Further, he considered it likely that Agonset would have been able to obtain external financing given the low gearing level and noted that any interest payments would make minimal difference to his calculations.[1127]

(f) Terminal Value

776. The terminal value refers to the value of the business at the end of the projection period. The terminal value can be calculated by: (i) undertaking a perpetuity calculation assuming that the business will continue to generate cash in perpetuity; or (ii) undertaking a valuation based on an analysis of public company financial ratios.[1128]

777. Mr. Rathbone adopts the latter market multiple method. Mr. Rathbone calculated the terminal value based on the average ratio of enterprise value (the company's total value

[1122] Second Rathbone Report, paras. 111-117.

[1123] Second Rathbone Report, paras. 118-119.

[1124] Rathbone Statement on Points of Disagreement concerning Agonset dated 1 September 2017, paras. 14-15.

[1125] First Rathbone Report, para. 103.

[1126] Second Rathbone Report, paras. 120-127; Rathbone Statement on Points of Disagreement concerning Agonset dated 1 September 2017, para. 17.

[1127] Rathbone Statement on Points of Disagreement concerning Agonset dated 1 September 2017, para. 18.

[1128] First Rathbone Report, para. 126.

("EV")) and earnings before interest, tax, depreciation and amortisation ("EBITDA") of four European broadcasting companies.[1129] He then took the average EV/EBITDA ratio of those broadcasting companies and multiplied it by the projected 2020 EBITDA for Agonset to arrive at a 2021 terminal value.[1130]

(g) Discount rate

778. The DCF Analysis requires that future cash flows be converted to their net present value through allocating a discount rate to reflect risk and having regard to the present values of the cashflows. Mr. MacGregor largely agrees with this discount rate and in fact the only points of difference stem from Mr. MacGregor's inclusion of a small company premium and a specific risk premium.[1131]

779. Mr. Rathbone does not adopt the small company premium as he considers it to be an outdated adjustment factor that is not reflected in empirical data,[1132] and he has dealt with this risk by using a prudent beta factor. [1133] The beta factor "reflects the volatility of the specific investment relative to the market as a whole" and Mr. Rathbone adjusted the equity risk premium using Professor Damodaran's European Broadcasting Industry beta for 2016.[1134] Further, Mr. Rathbone considers this risk is adequately dealt with in other aspects of his analysis.

780. Mr. Rathbone agrees that specific company attributes, such as the fact that Agonset was a start-up, should be considered in a valuation but he considers this is more appropriately dealt with in the revenue projections rather than through the imposition of a specific risk

[1129] See First Rathbone Report, para. 129 "[…] *enterprise value (which is calculated by adding back net debt and minority interests to market capitalisation) and EBITDA (Earnings before interest, tax, depreciation and amortisation)*".

[1130] First Rathbone Report, paras. 128-131.

[1131] Second MacGregor Report, p. 94 Table 16; Hearing, Day 8, T54:14-T55:4.

[1132] Second Rathbone Report, paras. 134-135; Rathbone Statement on Points of Disagreement concerning Agonset dated 1 September 2017, para. 19.

[1133] Second Rathbone Report, paras. 135-138; Rathbone Statement on Points of Disagreement concerning Agonset dated 1 September 2017, para. 19.

[1134] First Rathbone Report, para. 116 citing Professor Damodaran Industry betas (C-451); Second Rathbone Report, para. 144 citing Updated Damodaran Beta Analysis (CEG-43).

premium.[1135] Further, the primary reason stated by Mr. MacGregor for the incorporation of a specific risk premium, namely the uncertainty surrounding the legality of funds used to fund the Agonset companies, is not appropriate in this case because a report prepared by FTI establishes that the source of funds for both Agonset companies was completely legitimate.[1136]

f. Interest rate

781. The Claimants submit that Article 5 of the BIT, and the interest rate contained therein, does not apply to unlawful expropriations. [1137] Therefore, the interest rate should be "based on the commercial lending rate, compounded annually".[1138] The Claimants' experts propose two commercial interest rates.[1139]

782. First, the yield on Albanian sovereign bonds issued in Euros.[1140] The Claimants' expert considers this reasonable as this is the rate the Claimants would have received had they loaned their moneys to the Albanian government. In their view, there is no reason why the Claimants, who were in effect unwilling lenders to Albania, should be disentitled from the same rate of interest as a willing lender. Further, an award of this rate does not punish the Respondent as this is the amount it would have had to pay to borrow money from willing lenders on the open market.[1141]

783. Secondly, and alternatively, the Claimants consider that the 1 year LIBOR rate plus 4% should be used.[1142] Historically, LIBOR plus 2% is the rate offered by banks to their most

[1135] Second Rathbone Report, paras. 139-143.

[1136] Second Rathbone Report, para. 142 citing FTI Report on cash inflows recorded on bank statements of KGE, Energji, Cable System, Agonset, Albaniabeg Abian Sh.p.K, 400 KV and UJE SH.A., 1 May 2014 (CEG-42).

[1137] Reply, paras. 588-589.

[1138] Memorial, para. 673 citing *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 929-940 (CL-106), and *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 439-440 (CL-052).

[1139] Second Navigant Report, para. 183.

[1140] First Navigant Report, para. 182; Second Rathbone Report, p. 51 fn 92.

[1141] Second Navigant Report, para. 185.

[1142] Memorial, para. 673; First Navigant Report, para. 183.

creditworthy customers. Therefore, the Claimants' expert considers that LIBOR plus 4% would include a premium to reflect a rate offered more broadly in the market.[1143]

(2) The Respondent's position

a. Standard of compensation

784. The Respondent has not disputed the application of customary international law for assessing the compensation standard, the compensation standard articulated in *Chorzów*,[1144] nor that the Claimants' compensation should be anything other than the fair market value of Agonset.[1145] Rather, the Respondent appears to accept the fair market value methodology by referring to the price a willing buyer would pay for Agonset in an arm's length transaction.[1146]

b. Valuation date

785. The Respondent has not disputed that the valuation date may be the date of the Award, nor that the date for expropriation, is anything other than 8 June 2015.

786. However, the Respondent's expert, Mr. MacGregor, opines that any compensation due to the Claimants should be valued in accordance with Article 5.3 of the BIT, i.e. at the date of the expropriation.[1147]

c. Proof and causation

787. As to causation, the Respondent submits that the Claimants bear the burden of proof in establishing causation. In its view, the Claimants have inadequately particularised how the damages claimed were caused by the Respondent's actions.[1148] The Respondent considers that the Claimants must point to a specific BIT breach, for example that the Respondent

[1143] First Navigant Report, para. 183.

[1144] Reply on the Merits, paras. 539.

[1145] Reply on the Merits, para. 541.

[1146] Counter-Memorial on the Merits, para. 631; Rejoinder to Reply on the Merits, para. 539.

[1147] First MacGregor Report, para. 3.7

[1148] Counter-Memorial on the Merits, para. 634.

wrongfully preventing Agonset from competing for a digital license, and then establish how the loss flows from that specific breach.[1149]

788. Further, the Respondent considers that the Agonset companies failed for reasons other than the Respondent's actions.[1150] In particular, the Respondent asserts that the Agonset companies stopped broadcasting because the shareholders ceased funding them.[1151]

789. As to the burden of proof, the Respondent submits that the Tribunal should apply the "sufficient certainty" standard i.e. whether the damages claimed are "sufficiently certain".[1152] The Claimants must meet this standard of proof with respect to both the fact of loss and the amount of the loss.[1153]

790. The Respondent argues that the Claimants cannot discharge this burden of proof because the damages claimed, based on a discounted cash flow analysis, are "hopelessly speculative".[1154] The primary arguments advance by the Respondent are that: (i) there were serious concerns that Agonset was properly financed to meet its operating costs; and (ii) Agonset was not, and was unlikely to be, profitable.[1155]

d. Valuation method

791. The Respondent submits that the DCF method is inappropriate to value Agonset because:[1156] (i) they did not operate for sufficient time to generate adequate and reliable data;[1157] (ii) there is a large disparity between the amounts invested by the Claimants and

[1149] Counter-Memorial on the Merits, para. 635. Rejoinder to Reply on the Merits, paras. 542-543.

[1150] Rejoinder to Reply on the Merits, para. 544.

[1151] Rejoinder, paras. 547-548; Respondent's Closing note, para. 69.

[1152] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United States of Mexico*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, paras. 13-82, 13-87, 13-91 (RL-0084).

[1153] Counter-Memorial on the Merits, para. 638.

[1154] Counter-Memorial on the Merits, paras. 636-637, 639.

[1155] Rejoinder to Reply on the Merits, para. 31.

[1156] Counter-Memorial, paras. 666- 687; Rejoinder, paras. 570-571.

[1157] Counter-Memorial, paras. 640-649; Rejoinder, para. 546.

the profits claimed;[1158] and (iii) the 2012 Business Plan and the Editorial Plan are not sufficiently detailed or reliable to support a DCF valuation.[1159]

792. Further, any alleged future revenues of Agonset are too speculative to be subject to a DCF analysis[1160] on the following bases: (i) there was "no relevant experience/expertise at the top"; (ii) there was no content strategy or other planning documents; (iii) the de-localised model was untested;[1161] (iv) numerous issues were encountered, such as key staff leaving, bad reviews and allegations that Agonset was copying other shows; (v) the actual revenues were poor; (vi) no audience data was disclosed by the Claimants; (vii) the growth projections are unrealistic; and (vii) Agonset was not profitable.[1162]

793. Similarly, Mr. MacGregor also considers that the DCF method is inappropriate for the following primary reasons: (i) there is insufficient evidence of profitable trading by Agonset; and (ii) the 2012 Business plan is not sufficiently detailed to support a financial projection.[1163]

794. Mr. MacGregor considers that he was unable to value Agonset on any other basis.[1164] However, he suggests that the wasted costs approach may be appropriate (i.e., valuation on the basis of the amount invested in the asset alone).[1165]

e. Criticisms of the DCF Method

795. Mr. MacGregor summarily states that the value of Agonset is zero on the basis that there are no reliable historical results for the companies, or projections or details of the amount invested.[1166] However he did not undertake a detailed DCF analysis.

[1158] Counter-Memorial, paras. 650-653.
[1159] Counter-Memorial, paras. 654-665; Rejoinder, para. 570(c).
[1160] Rejoinder, para. 55.
[1161] See also Rejoinder, paras. 560-565.
[1162] Respondent's Closing note, para. 70.
[1163] First MacGregor Report, paras. 4.36-4.51.
[1164] First MacGregor Report, para. 3.27; Second MacGregor Report, para. 2.33.
[1165] First MacGregor Report, paras. 3.24-3.26.
[1166] First MacGregor Report, para. 3.27; Second MacGregor Report, para. 2.33.

796. Both Mr. MacGregor, a chartered accountant, and Mr. Borrell, a media industry expert, criticise certain inputs into the valuation undertaken by Mr. Rathbone, which will be summarised below.

(a) Revenue

(i) Power ratio

797. Mr. MacGregor considers that there is insufficient evidence to support Mr. Rathbone's findings that there is 1:1 power ratio.[1167] Mr. MacGregor considers that the power ratio should be comparable to that obtained by the "*Others*" category (independent TV channels), which command a 0.48 ratio, or 0.23 without Sky.[1168] Mr. MacGregor considers that Sky's ratio should be excluded because Sky is part of a group of channels. Applying Mr. MacGregor's ratio of 0.23 results in an over 75% reduction in Mr. Rathbone's total revenue objections, and result in the Agonset project being loss-making.[1169] He points out that if the weighted average of the free to air channels in 2014 excludes Sky it drops from 1.1 to 0.86.[1170] Further, he notes that the power ratio of La7, considered to be the most similar channel to Agonset.it, is 0.9.[1171]

798. Mr. Borrell considers that Mr. Rathbone's power ratio did not seem realistic or likely. Mr. Borrell goes on to state that a ratio of between 0.3 and 0.6 would be more likely.[1172] Further, "the power ratio of a new independent national channel (other than a major national or international brand) is typically less than 0.5".[1173] However, during cross-examination, Mr. Borrell acknowledged that the power ratio comparison underlying his estimation included thematic channels (which typically have a smaller audience[1174]) rather than generalist channels.[1175]

[1167] First MacGregor Report, paras. 4.57-4.60.
[1168] First MacGregor Report, para. 4.62.
[1169] First MacGregor Report, para. 4.63.
[1170] Second MacGregor Report, para. 3.69.
[1171] Second MacGregor Report, para. 3.71.
[1172] Borrell Report, p. 29.
[1173] Borrell Report, pp. 38-39.
[1174] Hearing, Day 5, T68:24-T70:5.
[1175] Hearing, Day 4, T76:10-T77:22.

(ii) Value of audience share

799. Mr. MacGregor's real issue with this assumption is carried forward from his issues with the calculation of the power ratio. He agrees that a 1% share of the TV advertising revenues would equate to €31.8million. However, he does not agree that if Agonset.it had 1% TV audience share that this would equate to a 1% share of TV advertising revenue being €31.8 million because there is insufficient evidence that Agonset.it would obtain a 1:1 power ratio.[1176]

(iii) Audience share

800. Mr. MacGregor takes issue with this input on the basis that there is no evidence supporting this growth in market share, and the 2012 Business Plan was "hopelessly optimistic". He points out that Agonset.it's actual advertising revenue decreased from December 2014 to May 2015 (before the expropriation) and this is contrary to the prediction that revenue would increase exponentially each year.[1177] Further he considers the comparative channels used by Mr. Rathbone do not support the high growth rates projected.[1178]

801. Mr. Borrell considers that a viewing share rising from 0.1% to 4% between 2015 and 2020 was not realistic or likely. He considers the viewing share might instead be between 0.03%-0.06% in 2015 to 0.5-2% in 2020. He mainly bases this calculation on the estimated actual revenue of Agonset (which appears to be lower than 0.1% in the first 6 months).[1179]

[1176] First MacGregor Report, paras. 4.65-4.68.

[1177] First MacGregor Report, paras. 4.74-4.80.

[1178] First MacGregor Report, paras. 4.81-4.86.

[1179] Borrell Report, pp. 27-28.

(b) Expenses

(i) Agency fees

802. Mr. MacGregor initially disputed Mr. Rathbone's assumption that Agonset Italy could re-negotiate its agency agreement down from 30 per cent to 15 per cent,[1180] but has since accepted it.[1181] Mr. Borrell considers that this assumption does not seem unreasonable.[1182]

(ii) Cost of talent

803. Mr. MacGregor pointed out that the talent contracts had not been disclosed to him and he was unable to verify Mr. Rathbone's calculations.[1183] Further, he considered Mr. Rathbone may have double counted the talent in some areas.[1184] Mr. MacGregor, after receiving the talent contracts, stated that he had not reviewed them in any detail but made no further comments.[1185]

804. Mr. Borrell took no specific issue with the cost of talent estimated by Mr. Rathbone but does state that content costs, which presumably include talent costs, "seem very low".[1186]

(iii) Personnel Costs

805. Mr. MacGregor initially pointed out that the Agonset management accounts had not been disclosed and he was unable to verify Mr. Rathbone's calculations.[1187] Mr. MacGregor, after receiving the management accounts, did not further dispute personnel costs.[1188]

[1180] First MacGregor Report, paras. 4.96-4.102.
[1181] Second MacGregor Report, paras. 3.75-3.76.
[1182] Borrell Report, p. 30.
[1183] First MacGregor Report, paras. 4.103-4.104.
[1184] First MacGregor Report, paras. 4.105-4.109.
[1185] Second MacGregor Report, para. 3.77; Hearing, Day 2, T38:15-T40:6.
[1186] Borrell Report, pp. 31-32.
[1187] First MacGregor Report, paras. 4.113-4.115.
[1188] Second MacGregor Report, para. 3.31; Hearing, Day 8, T40:7-40:13.

806. Mr. Borrell again took no specific issue with the personnel costs estimated by Mr. Rathbone but does state that content costs, which include personnel costs, "seem very low".[1189]

(iv) Other Costs

807. Mr. MacGregor considers that Mr. Rathbone's estimates are speculative with no solid evidence supporting them and notes that they are not based on any management accounts that would show the historical cost.[1190]

808. He further points out that Mr. Rathbone had to depart from this methodology for the 2015 year because 15% of the revenue (which Mr. Rathbone assumed to be the equivalent of other costs from 2016 onwards) was less than the historical costs, which he considers suggests that Mr. Rathbone's assumption may be incorrect for future years.[1191]

809. Neither Mr. MacGregor[1192] nor Mr. Borrell dispute the transmission cost amounts as they are based on the signed contract and market values for distribution in Italy.[1193]

(v) Financing Costs

810. Mr. MacGregor considered that this need not be included in the projection.[1194]

(c) Capital investment and depreciation

811. Mr. MacGregor considered the capital investment figure was too low for the following reasons: (i) he had not been provided with a copy of Agonset's capital accounts to show the capital base; (ii) it was unclear whether further investment would be required to meet the digitalisation of Albanian TV; (iii) it was unclear whether further investment would be required to compete with other channels which had moved to HD broadcasting; (iv) Mr.

[1189] Borrell Report, pp. 31-32.

[1190] First MacGregor Report, paras. 4.116-4.121; Second MacGregor Report, para. 3.78.

[1191] Second MacGregor Report, para. 3.79.

[1192] Hearing, Day 2, T40:14-T41:3.

[1193] Borrell Report, pp. 30-31.

[1194] First MacGregor Report, paras. 4.122-4.123.

Rathbone had not calculated for the renewal of the broadcasting license; and (v) he would expect higher capital expenditure costs due to potential repairs and maintenance costs.[1195]

(d) Tax

812. Mr. MacGregor does not dispute the taxation costs input.[1196]

(e) Financing

813. Mr. MacGregor considers that Agonset might not have sufficient financing because: (i) the maximum funding requirements are likely to be higher than estimated by Mr. Rathbone;[1197] (ii) there were insufficient funds held by related parties to finance the business;[1198] (iii) Mr. Rathbone has not made it sufficiently clear how much external financing Agonset would have sought and how much interest would have consequently been payable;[1199] and (iv) it is unlikely that external financiers would have lent to Agonset given that both companies were balance-sheet insolvent.[1200]

(f) Discount Rate

814. Mr. MacGregor largely agrees with Mr. Rathbone's discount rate, except he considers that a small company premium and a specific risk premium should be included.[1201]

815. Mr. MacGregor includes a small company premium of 2.68% to reflect the higher risk associated with investments in smaller, less diversified companies such as the Agonset.[1202] Mr. MacGregor relies on the data provider Duff and Phelps' estimation of historical small company premiums.

816. Mr. MacGregor includes a specific risk premium of 3% due to the uncertainty of the source and legality of funds used to fund the Agonset companies, and the fact that the Agonset

[1195] First MacGregor Report, paras. 4.124-4.134; Second MacGregor Report, paras. 3.80-3.87.
[1196] First MacGregor Report, paras. 4.136-4.138; Hearing, Day 8, T41:4-6.
[1197] Second MacGregor Report, paras. 3.89-3.93.
[1198] Second MacGregor Report, paras. 3.94-3.103.
[1199] Second MacGregor Report, paras. 3.104-3.107.
[1200] Second MacGregor Report, para. 3.109.
[1201] Second MacGregor Report, p. 94 Table 16.
[1202] First MacGregor Report, para. 8.12.

companies were "in a start-up situation".[1203] He considers that both factors would have influenced what any interested buyer would be willing to pay for the Agonset companies and are not adequately captured in Mr. Rathbone's projections.[1204]

(g) Terminal Value

817. Mr. MacGregor considered that the methodology used by Mr. Rathbone to calculate the terminal value is inappropriate in two respects:

a. Mr. Rathbone uses multiples data at 30 April 2016 against forecast cash flows in 2020 – thus assuming there will be no change in multiples between 2016 and 2020; and

b. the four companies chosen by Mr. Rathbone were not comparable.[1205]

818. Mr. MacGregor further points out that the 19 companies' EV/EBITDA ratios ranged from 3.61 to 18.19. He then concluded that Mr. Rathbone could not reasonably know what Agonset's EV/EBITDA ratio would be.[1206] Undertaking a sensitivity analysis using the lowest EV/EBITDA ratio of the 19 companies (3.61), Mr. MacGregor noted that the valuation would drop by almost 50%.[1207]

819. Under cross-examination, Mr. MacGregor acknowledged that:

a. the 19 companies Mr. Rathbone used were selected by Professor Damodaran, a well-respected academic in the field of business valuation; and

b. the company that obtained a ratio of 3.61 was not an appropriate comparator.[1208]

[1203] First MacGregor Report, paras. 8.18-8.20.
[1204] Second MacGregor Report, paras. 8.11-8.16.
[1205] First MacGregor Report, para. 4.141.
[1206] Second MacGregor Report, paras. 3.112-3.117.
[1207] Second MacGregor Report, paras. 3.132-3.133.
[1208] Hearing, Day 8, T51:2-T54:13.

f. Interest rate

820. First, the Respondent contends that the interest rate should be the 6-month LIBOR Rate,[1209] which is specified in Article 5.3 of the BIT.[1210] The Respondent's expert says, while acknowledging that this is a legal matter, it is illogical that the Claimants should receive more interest than that provided in the BIT simply because they allege the expropriation was unlawful rather than lawful.[1211]

821. Secondly, and alternatively, the Respondent contends that if Article 5.3 of the BIT is inapplicable, the interest rate should by LIBOR plus 2% on the basis that this would more accurately reflect the interest that the Claimants would have lost.[1212]

g. Risk of double recovery

822. The Respondent argues that there is a real possibility of double recovery if the Tribunal should award the fair market value of Agonset to the Claimants because: (i) Agonset could recommence its operations at any time; (ii) the Claimants could continue to pursue other legal claims and potentially obtain damages; and (iii) the Claimants could, depending on the outcome of the criminal proceedings discussed at section IV.J above, receive compensation by (a) selling Agonset Albania's broadcasting license and physical property, and (b) withdrawing Agonset Albania's cash at bank.[1213]

C. THE TRIBUNAL'S ANALYSIS

(1) Standard of compensation

823. Article 8 of the BIT vests the Tribunal with the power to award "compensation for expropriation, nationalization, requisition, and similar measures". Consequently, the Tribunal is empowered to compensate the Claimants in the manner suggested, and notes that the Respondent has not made any submissions to the contrary.

[1209] First MacGregor Report, para. 9.9

[1210] Counter-Memorial, para. 379; First MacGregor Report, para. 9.8; Second MacGregor Report, para. 9.8.

[1211] Second MacGregor Report, para. 9.8.

[1212] Second MacGregor Report, para. 9.8.

[1213] Respondents' Closing Note, para. 71; Hearing, Day 9, T204:7-24.

824. The BIT does not detail any standard of compensation that the Tribunal must apply when awarding monetary damages for unlawful expropriation. Indeed, the only potentially applicable standard of compensation in the BIT is that articulated in Article 5.3, which specifies compensation for a lawful expropriation and provides that "[f]air compensation will be equivalent to the actual market value of the investment immediately preceding the moment when the decisions under point 2 are announced or made public, and will be determined on the basis of commonly recognized commercial and technical criteria".

825. In the Tribunal's view, the standard of compensation outlined in Article 5.3 of the BIT does not apply to unlawful expropriations. Article 5.2 requires a number of conditions to be met for an expropriation, or similar measure, to be legal, *inter alia,* that the expropriation be: for a public purpose, in compliance with the State's laws, made on a non-discriminatory basis, and with payment of immediate, full and effective compensation. In the Tribunal's view, Article 5.3 is intended to provide the standard by which "effective" compensation is to be judged for the purposes of the final requirement for a lawful expropriation that is contained in Article 5.2. So much is clear from the context of the Article, despite slightly different language being used ("fair" rather than "immediate, full and effective" compensation). A similar position was taken by the tribunal on *Pezold,* which considered that provisions in treaties dealing with lawful expropriation did not purport to provide for the appropriate level of compensation for unlawful expropriation.[1214]

826. In this case, the Tribunal has found that the cumulative nature of the Respondent's breaches destroyed the Claimants' investments. The *Crystallex* tribunal, after finding that there was no applicable compensation standard in the BIT, applied the "*full reparation*" standard articulated in *Chorzów* when assessing the standard of compensation for breaches of FET, in addition to an expropriation. That tribunal stated that the full reparation standard was particularly apposite "given the cumulative nature of the breaches that the [t]ribunal must compensate, and especially in view of its findings on FET that the [r]espondent's conduct caused all the investments made by [the claimant] to become worthless".

[1214] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 758 (CL-104).

827. In these circumstances, and given that the Tribunal has found that the cumulative effect of the Respondent's actions essentially destroyed the Claimants' investments in Agonset, it is appropriate for the Tribunal to apply the standard of compensation found in customary international law, and apply the full reparation standard articulated in *Chorzów*, namely compensation that "as far as possible, wipe[s] out all the consequences of the illegal act".

828. Further, as the parties agree that damages may be assessed by reference to fair market value, and the Claimants' only claim is for the value of Agonset, it is right for the Tribunal to assess damages by applying the fair market value methodology. It is well-accepted that reparation should reflect the market value of the investment as doing so will have the effect of wiping out the consequences of the breaches.[1215]

(2) Valuation date

829. The BIT does not detail any valuation date which the Tribunal must apply when awarding monetary damages for breaches of unlawful expropriation. Again, the only potentially applicable valuation date in the BIT is that articulated in Article 5.3, which specifies that compensation for a lawful expropriation shall be assessed at the time "[…] immediately preceding the moment when the decisions under point 2 are announced or made public […]".

830. For the reasons set out in paragraph 825 above, the Tribunal considers that the valuation date specified in Article 5.3 of the BIT does not apply to unlawful expropriations. The Tribunal notes that a similar conclusion was reached by the tribunal in *Conoco*, which rejected the State's argument that the valuation date for an unlawful expropriation claim should be the date specified in the treaty provision governing lawful expropriation on the basis that the provision merely established a condition to be met for lawful expropriation.[1216]

[1215] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 850 (CL-106).

[1216] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, paras. 341-343 (CL-089).

831. Consequently, the Tribunal will then have regard to the date compensation is assessed under customary international law. Compensation is usually assessed at the date of the wrongful act. However, as is clear from the findings of the tribunals in *ADC*, *Kardassopoulos* and *Pezold*, the full reparation principle articulated in *Chorzów* may require assessment at a later date, often the date of the award, where the claimant is able to demonstrate that: (i) it would have retained the investment but for the expropriation; and (ii) the value of the investment increases from the date of expropriation.

832. The Tribunal considers that these authorities take the correct approach and this approach should be adopted in this case given that the Tribunal has found that the combination of Albania's actions completely destroyed the Claimants' investments in Agonset.

833. Consequently, the Tribunal turns to whether the Claimants have established that they would have retained Agonset, and that the value of those investments would have increased since the date of expropriation found above in section VII.E.

834. In relation to the first question, the Tribunal considers that, on the balance of probabilities, the record shows that the Claimants would have retained their investments in Agonset on the basis that the Claimants: (i) considered that it was a successful investment that would continue to grow;[1217] (ii) invested €40 million into Agonset, which evinces an intention to retain the investment;[1218] and (iii) had the capacity to continue financing Agonset to potentially achieve the projected growth.[1219]

835. In relation to the second question, on the balance of probabilities, the Tribunal considers that the value of Agonset would have grown between the date of expropriation, when Agonset was just a start-up with potential, and the date of this Award, for the following reasons. Whilst the Tribunal accepts that counterfactuals are inherently uncertain, it finds it is more likely than not that Agonset would have continued to broadcast and developed its products and market. The Tribunal also finds that Agonset was more likely than not to have increased its market share and advertising revenues for the reasons discussed in

[1217] Second Becchetti Statement, para. 4.

[1218] First Becchetti Statement, para. 98; Hearing, Day 2, T12:03-T12:04.

[1219] Second Becchetti Statement, para. 7.

paragraphs 833 to 835 and 853 to 862 below and in so doing become a more attractive prospect to buyers.[1220] Further, this increased trading history would have reduced its perceived risk of failure to buyers and the lack of information regarding the direction of the business and consequently increasing its fair market value.[1221]

836. In conclusion, the Tribunal considers that compensation should be calculated at the Ex-Post Valuation Date i.e. 31 March 2018.

(3) Causation

837. The Tribunal agrees with the *Crystallex* tribunal that the appropriate principle to apply in relation to causation is as follows.

> *With regard to causation, under international law, compensation for violation of a treaty will only be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant.*[1222]

838. This principle is not really in contention, however its application is, i.e. whether causation must be proven with respect to each breach or alternatively whether causation is proved as an aggregate of the breaches.

839. The Tribunal has found in section VII.E above that through a culmination of various actions the Respondent has completely destroyed the value of the Agonset companies. In the Tribunal's view, where a tribunal finds that there has been an expropriation or total destruction of an investment, it is unnecessary to consider the causal link between each specific act and claimed loss, rather it is merely a matter of compensating the claimant for the market value of its investment.[1223]

[1220] First Rathbone Report, para. 8.

[1221] First Rathbone Report, paras. 21-23.

[1222] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 860 (CL-106).

[1223] See for example, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras. 187-188 (CL-046); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 113-115 (CL-036).

840. In these circumstances, and given that the Claimants' only claim is for the value of Agonset, the Tribunal considers that the causal link between the aggregate actions of the Respondent and the destruction of the Agonset companies is clear, as explained in paragraphs 695 to 697 above. The only question that therefore remains is how the fair market value of the destroyed investments is to be quantified.

841. Further, the Tribunal rejects the Respondent's contention that the cessation of shareholder funding caused the failure of the Agonset companies.[1224] It is true that Agonset failed to pay various outgoings, including taxes, rent, wages and electricity. However, as the Tribunal has found in paragraphs 695 to 697 above, Albania's actions made it practically impossible for the shareholders to continue funding Agonset and therefore there is no break in the causal link between Albania's actions and the destruction of Agonset.

(4) Proof

842. The Claimants correctly accept that they bear the burden of proof as to their claimed damages. However, the parties are at odds regarding the application of the *standard* of proof required for the Claimants to discharge their burden of proof.

843. The Respondent contends that the standard should be sufficient certainty in relation to the fact and the amount of loss.[1225] However, the Claimants contend that the standard is to show the existence of damage and then only offer a reasonable basis to estimate the amount of their loss.[1226]

844. The Tribunal agrees with the Claimants and adopts the approach and reasons of the tribunals in *Lemire* and *Crystallex*. Proving the amount of damages in investment cases is a notoriously difficult task and it cannot be right that, once liability has been established, the Claimants should be deprived of compensation or that the Respondent should escape practical liability for its wrongful acts. Other tribunals have come to similar conclusions. In *Gemplus* the tribunal noted that "it would be wrong in principle to deprive or diminish

[1224] Respondent's Closing note, para. 69.

[1225] Counter-Memorial on the Merits, para. 638.

[1226] Reply on the Merits, para. 545.

the [c]laimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the [r]espondent's own wrongs".[1227] Further, in SPP the tribunal observed that "it is well settled that the fact that damages cannot be assessed with any certainty is no reason not to award damages when a loss has been incurred".[1228]

845. In light of the above, the Tribunal considers that the Claimants must prove the existence of the *fact* of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the *amount of loss*. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent's wrongdoing.

846. In the Tribunal's view, the fact that the Claimants had invested some €40 million in Agonset, some of which was capital in nature, and that it was still broadcasting normally up to (and indeed for some time after) 5 June 2015, results in a conclusion that Agonset was not worthless immediately before it was expropriated. It follows that the Tribunal is sufficiently certain that the Claimants have, as a matter of *fact*, suffered damage as a result of Albania's expropriation. The Tribunal now proceeds to determine whether the Claimants have provided a reasonable basis to determine the amount of that loss.

(5) Valuation method

847. While it is not clear whether the Respondent accepted the wasted costs approach proposed by Mr. MacGregor, the Tribunal for completeness declines to apply it. The Tribunal considers that awarding the Claimants their wasted costs would merely return them to the position they would have been in if the investments in Albania had never been made, rather than returning them to the position they would have been in had Albania not committed its illegal acts, which is what is called for by the *Chorzów* standard of full reparation. A similar conclusion was made by the tribunal in *Crystallex*, namely that it "would not reflect the fair market value of the investment, as by definition it only assesses what has been

[1227] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United States of Mexico*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, paras. 13-99 (RL-084).
[1228] *Southern Pacific Properties v. Arabic Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 215 (RL-086).

expended into the project rather than what the market value of the investment is at the relevant time".[1229]

848. The Tribunal sees some limitations in the application of the DCF method to value Agonset, namely that the 2012 Business Plan is not particularly detailed and both businesses have only been operating for a short period of time. Mr. MacGregor, a chartered accountant, says there is insufficient evidence to undertake a valuation using the DCF Method. However, the Tribunal has a mandate, having found breach of the BIT, to arrive at a valuation on such evidence as it has. The tribunal in *Kardassopoulos* drew a similar conclusion stating that "The Tribunal's duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost".[1230] Further, discarding the DCF method for lack of sufficient evidence in this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.

849. On balance, the Tribunal considers that the DCF method is an appropriate method to value Agonset. While valuation is not an exact science, the DCF method is a widely-accepted valuation method that can address the uncertainties that arise in this case.

(6) Discounted cash flow analysis

850. The Tribunal rejects the valuation proposed by Mr. MacGregor on the basis that it is implausible that Agonset is valueless, especially in circumstances where significant sums have been invested.

851. The Tribunal notes that the Respondent's experts have challenged various assumptions or inputs in Mr. Rathbone's DCF analysis. These are summarised above in paragraphs 797-801, 803-808, 810-811 and 813-818. The Tribunal has carefully considered each of the criticisms raised by both Mr. MacGregor and Mr. Borrell but prefers and accepts the assumptions and inputs of Mr. Rathbone, except as noted below in respect of the power

[1229] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 882 (CL-106).
[1230] *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 594 (CL-076).

ratio and audience share. The Tribunal accepts the other assumptions and inputs as realistic and appropriate. In this regard, the Tribunal notes that Mr. MacGregor does not think that the DCF Method is appropriate for this case and concludes that Agonset was worthless. This Tribunal cannot accept his view given that the businesses were operating before they were effectively destroyed and that the Claimants had invested substantial capital into Agonset. Although not yet making a profit, they had prospects to do so, and a reasonable likelihood of so doing.

852. On balance, the Tribunal largely accepts the valuation conducted by Mr. Rathbone. However, in the case of the appropriate power ratio and audience share, the Tribunal finds below that it does not agree with Mr. Rathbone's assumptions.

a. Power ratio

853. Mr. Rathbone projected a mature power ratio of 1.0.[1231] Mr. Pasquale considered that this projected mature power ratio was reasonable "in light of Mr. Rathbone's weighted average of FTA channels and the comparison to La7".[1232] Mr. Rathbone calculates that the weighted average of the free to air channels ("FTA") power ratio in 2014 is 1.1.[1233] While La7, which Mr. Pasquale considers is the most appropriate comparator to Agonset.it,[1234] obtained a power ratio of 0.9 in 2014.[1235] Mr. Rathbone then arrives at the average of those two figures as being a power ratio of 1.0.

854. Mr. MacGregor, among other things, points out that Mr. Rathbone includes Sky Italia, a predominantly pay-tv broadcaster, in his calculation of the weighted average of the FTA channels' power ratio in 2014. When Sky Italia is excluded from the calculation, that weighted average is reduced to 0.86.[1236] Mr. Pasquale described Sky Italia as a "pay-TV satellite service"[1237] at numerous times in his report. Similarly, Mr. Borrell states that "Sky

[1231] Second Rathbone Report, para. 104 and Appendix C.
[1232] Pasquale Points of Disagreement, para. 9.
[1233] Second Rathbone Report, para. 104.
[1234] Pasquale Report, para. 56.
[1235] Second Rathbone Report, paras. 103-104, Figure 12.
[1236] Second MacGregor Report, para. 3.69.
[1237] Pasquale Report, paras. 11, 30.

Italia's revenue comes mainly from pay TV".[1238] The Tribunal accepts the proposition that a number of audience factors contribute to the power ratio.[1239] On that basis, the Tribunal considers that whether the audience chooses, and is able, to pay for a television service will likely be one of the factors that will affect the advertising revenue and therefore power ratio of a given broadcaster. Indeed, Mr. Rathbone must implicitly accept this given that he chose to only benchmark against FTA channels. Consequently, the Tribunal is of the view that it is appropriate to exclude Sky Italia from the weighted average FTA power ratio calculations.

855. Mr. Pasquale states the he cannot think of a better comparator for Agonset than La7 because of the following common features: (i) both are general-interest channels, not thematic channels; (ii) both channels rely on popular anchors and television stars to attract audiences; (iii) both channels are essentially standalone channels; and (iv) La7 was recently relaunched as an essentially new channel in 2010 and thus faced the same challenges as Agonset.[1240] Mr. Borrell considers that "La7 is not a better comparator than Cielo, Nove and TV8: other small independent TV channels are likely to be more suitable" but goes on to say that comparisons with La7, although not perfect, are a good market reference.[1241] The Tribunal is persuaded by the views of Mr. Pasquale and considers that La7 is an appropriate comparator to Agonset.

856. Given that La7 is an appropriate comparator to Agonset, La7 only obtained a power ratio of 0.9, and the adjusted weighted average FTA power ratio is 0.86, the Tribunal is not convinced that Agonset could achieve a power ratio of 1.0. The Tribunal decides that a projected mature power ratio of 0.9 should instead be used when assessing the value of Agonset.

857. However, that is not the end of the matter. Mr. Rathbone initially projected the value of Agonset based on a steady 1.0 power ratio. However, he later conceded that, "in the early growth phase, the power ratio is likely to be lower than it would be once the business

[1238] Borrell Report, p. 34-35.

[1239] First Rathbone Report, para. 62; Hearing Transcript, Day 4, T165:19-T166:4.

[1240] Pasquale Report, paras. 56-64.

[1241] Borrell Report, para. 77.

reaches maturity".[1242] Similarly, Mr. Pasquale during the hearing acknowledged that the mature power ratio was more likely to be achieved in the long term, and "in the beginning it may be slightly lower".[1243] Mr. Borrell for the Respondent opined that, as a "new" channel Agonset would more likely obtain a power ratio of between 0.3 and 0.6.[1244]

858. Presumably to that end, Mr. Rathbone presented a sensitivity analysis where the projected power ratio of Agonset was initially 0.5 and then "ramped up" to 0.9 at maturity.[1245] The Tribunal considers that, in all of the circumstances of the case, this adjustment seems reasonable to account for the fact that Agonset was in its infancy and would have commanded a lower power ratio initially than its direct comparator La7 or other FTA general-interest channels. Consequently, the Tribunal decides that the model be adjusted such that the power ratio begins at 0.5 and is "ramped up" to 0.9 by 2020.

b. Audience share

859. Mr. Rathbone projected that the audience share, under the *ex-post* valuation, would grow from 0.1% in 2015 to 4.0% in 2020.[1246] Mr. Rathbone based this calculation on the 2012 Business Plan and then adjusted it with appropriate public information as a reasonableness cross-check. Mr. Pasquale considered this audience share was reasonable "in light of Agon Italia's programming strategy and in comparison to other channels".[1247] La7, which Mr. Pasquale considers is the most appropriate comparator to Agonset.it,[1248] was relaunched in 2002 achieving an audience share of 1.8% that year and went on to obtain an audience share of 3.2% in 2014.[1249]

[1242] Rathbone Points of Disagreement, para. 9.

[1243] Hearing Transcript, Day 4, T166:1-4, T172:4-12.

[1244] Borrell Report, p. 29.

[1245] Rathbone Hearing Presentation, slide 20; Claimants' Closing Presentation, slide 178; Hearing Transcript, Day 7, T99:11-T100:10.

[1246] Second Rathbone Report, paras. 85-87, 128-129, Table 6.

[1247] Pasquale Points of Disagreement, para. 7.

[1248] Pasquale Report, paras. 77-78.

[1249] First Rathbone Report, para. 77.

860. Mr. MacGregor points out that Mr. Rathbone has not relied on Agonset's actual audience share figures in 2015 and states that extrapolating Agonset's income in 2015 over 12 months would only result in an audience share of 0.03%.[1250] Similarly, Mr. Borrell considered that an initial audience share of between 0.3 to 0.6% would be more reasonable given the estimated actual revenue by the end of 2015.[1251]

861. On balance, the Tribunal considers that a starting 0.1% audience share is reasonable. While the estimated actual revenue based on historical results for 2015 is lower, the Tribunal considers that the record shows that new channels have significant growth potential (the average audience share of Nove, Cielo and TV8 grew 0.74% audience between August 2015 and August 2016) that might not be reflected by historical results.[1252]

862. Given that the Tribunal has already found that La7 is the most appropriate comparator to Agonset, La7 only obtained an average audience share of 3.2%, and the Tribunal has concerns regarding the likely success of Agonset's programming strategy in the competitive Italian market, the Tribunal is not convinced that Agonset could achieve an audience share of 4% by 2020. The Tribunal decides that a projected audience share of 3% by 2020 should instead be used when assessing the value of Agonset.

c. Conclusion

863. Applying these adjustments to Mr. Rathbone's Ex-Post Valuation, the Tribunal finds that Agonset was worth €135,572,000 as at 31 March 2018.[1253]

(7) Value of the Claimants' investments in Agonset

864. The next issue the Tribunal must turn to is the allocation of the value of Agonset amongst the Claimants based on their relative direct and indirect shares.

[1250] First MacGregor Report, paras. 4.72-4.77.

[1251] Borrell Report, pp. 23-24.

[1252] Pasquale Report, paras. 35-36.

[1253] See Claimants' Closing Presentation, slide 178; Hearing Transcript, Day 9, T123:22-T124:7; Rathbone's Supplementary Memorandum, pp. 8-9.

865. Mr. Rathbone allocates the value of Agonset amongst the Claimants on a pro-rata basis with regard to each of the Claimants' direct and indirect shareholding in Agonset Albania and Agonset.it.[1254] Mr. Rathbone considers there is no need to apply a minority interest discount to this calculation of damages for each of the Claimants as they are acting in concert, and together have majority control.[1255] Mr. Rathbone then adjusts the value of these shareholdings to account for the implied debt Agonset would take on for business growth and the fact that Alphabet has sold Agonset's Italian broadcasting license for a sum of €10.35 million.[1256]

866. In Mr. Rathbone's Supplementary Memorandum, he calculated the damages for each of the Claimants based on a valuation of Agonset at €135,572,000 million as follows:[1257]

Table 6: Combined Valuation by Claimant under Case 3

Claimant EUR '000	Agonset Albania	Agonset Italia	Combined
Francesco Becchetti	73,410	(32,363)	41,048
Mauro de Renzis	64,011	(17,260)	46,751
Stefani Grigolon	16,003	(4,315)	11,688
Hydro S.r.l.	388	(3,596)	(3,207)
Total damages claimed	**153,812**	**(57,534)**	**96,278**
Residual stake held by Alphabet minorities	388	(664)	(276)
Value of stake held by Fuki S.p.k.	40,007	(10,788)	29,219
Funds received in mitigation		10,350	10,350
Total valuation	**194,207**	**(58,635)**	**135,572**

Source: See attached calculation file, Case 3.

867. Mr. MacGregor has not disputed the calculation of damages contained in Mr. Rathbone's Supplementary Memorandum.[1258] However, he has earlier criticised the methodology of

[1254] First Rathbone Report, para. 14, Table 7-6.

[1255] Second Rathbone Report, paras. 165-166.

[1256] Second Rathbone Report, paras. 170-172.

[1257] Rathbone Supplementary Memorandum, pp. 809, Table 6.

[1258] Letter from Mr. MacGregor to the Tribunal dated 3 January 2019.

Mr. Rathbone's allocation of damages in three respects. First, he considers that the pro-rata damages due to each of the Claimants should be discounted due to the fact that they hold minority interests.[1259] Secondly, he considers that the Claimants' have not discharged their burden of proving their interests in Agonset Albania and Agonset.it.[1260] Thirdly, as Mr. Rathbone has assumed in his ex-post calculation that Agonset would raise debt finance, the value of the shareholdings in this scenario should be reduced to reflect the value of that debt.[1261]

868. The Tribunal deals with each of these criticisms in turn.

a. Pro-rata allocation

869. While it is true that some of the Claimants only have a minority interest in Agonset Albania and Agonset.it, the evidence in this arbitration shows that they are acting in concert. Together, the Claimants have a majority interest in both Agonset Albania and Agonset.it, 76% and 80% respectively (discussed further below). Therefore, as they are acting in concert and together control the majority interest, there is no need to apply a minority interest discount to the pro-rata calculation of damages. The Tribunal notes Mr. MacGregor accepted as much in his Second Report.[1262]

b. Proof of the Claimants' interests in Agonset

870. Mr. Rathbone's calculations on damages are based on the Claimants holding the following direct and indirect interests in Agonset.[1263]

[1259] First MacGregor Report, paras. 10.2-10.4.

[1260] First MacGregor Report, paras. 10.5-10.21; Second MacGregor Report, paras. 3.144-3.149.

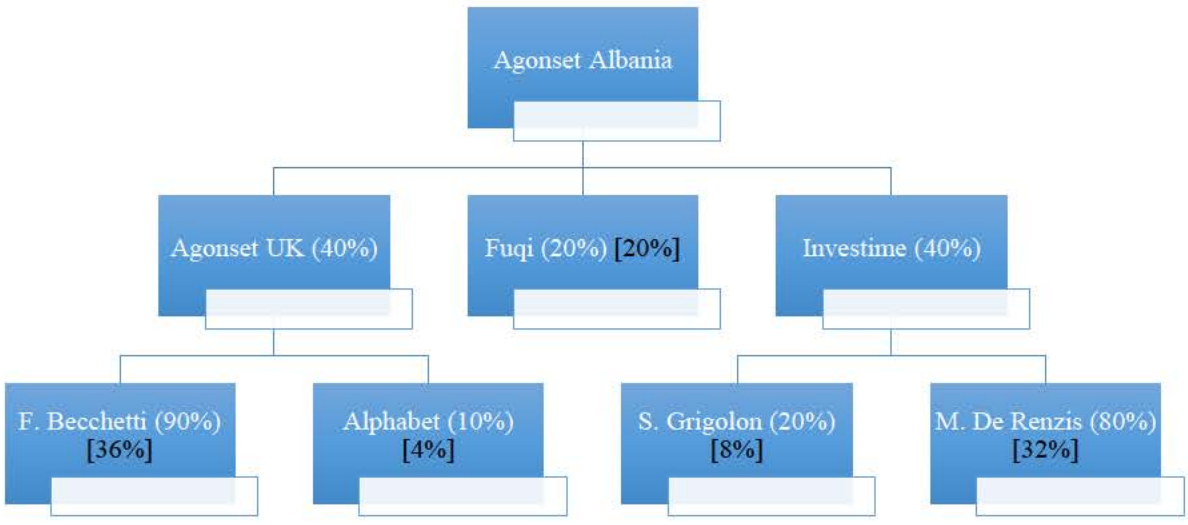
[1261] First MacGregor Report, paras. 10.17-10.18 citing First Rathbone Report, para. 122.

[1262] Second MacGregor Report, paras. 3.142-3.143.

[1263] Rathbone Supplementary Memorandum Appendices, p. 12; Second Rathbone Report, para. 167 citing Flowchart of Companies and Shareholders Mentioned in the Claimants' Submissions on Provisional Measures (CEG-50).

Claimant	Holding in Agonset Albania	Effective Holding in Agonset Italy
Francesco Becchetti	36%	45%
Mauro de Renzis	32%	24%
Stefani Grigolon	8%	6%
Hydro S.r.l.		5%
Total damages claimed		
Alphabet S.c.r.l.	4%	5%
Fuqi Sh.p.k.	20%	15%
Total valuation		

871. The Claimants' claimed interests in Agonset are best depicted as follows:



872. In the Tribunal's view, the evidence establishes that Mr. De Renzis has an indirect interest of 32% in Agonset Albania, by virtue of the following: (i) the Albania Registry of

Companies shows that Investime holds 40% of Agonset Albania's shares;[1264] (ii) the Albania Registry of Companies shows that Mr. De Renzis holds 80% of Investime's shares.[1265]

873. In the Tribunal's view, the evidence establishes that Ms. Grigolon has an indirect interest of 8% in Agonset Albania, by virtue of the following: (i) the Albania Registry of Companies shows that Investime holds 40% of Agonset Albania's shares;[1266] (ii) the Albania Registry of Companies shows that Ms. Grigolon holds 20% of Investime's shares.[1267]

874. In the Tribunal's view, the evidence, on balance, establishes that Mr. Becchetti has an indirect interest of 36% in Agonset Albania, by virtue of the following. First, the Albania Registry of Companies shows that Construzioni holds 40% of Agonset Albania's shares.[1268] Secondly, the Sale and Purchase Agreement between Costruzioni and Agonset.uk dated 17 March 2015 shows that Costruzioni sold and transferred its 40% shares in Agonset Albania to Agonset.uk.[1269] While this transfer was not recorded in the Albania Registry of Companies the Respondent has not advanced any argument that this has the affect of voiding the transfer.[1270] Thirdly, the UK Companies House Confirmation dated 30 November 2016 shows that Mr. Becchetti holds 90% of Agonset.uk's shares.[1271]

875. The Claimants' claimed interests in Agonset.it are best depicted as follows:

[1264] Agonset Sh.p.k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 13 (C-409).

[1265] Investime's excerpt from the Albanian Registry of Companies, 17 June 2016, p. 1 (C-558).

[1266] Agonset Sh.p.k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 13 (C-409).

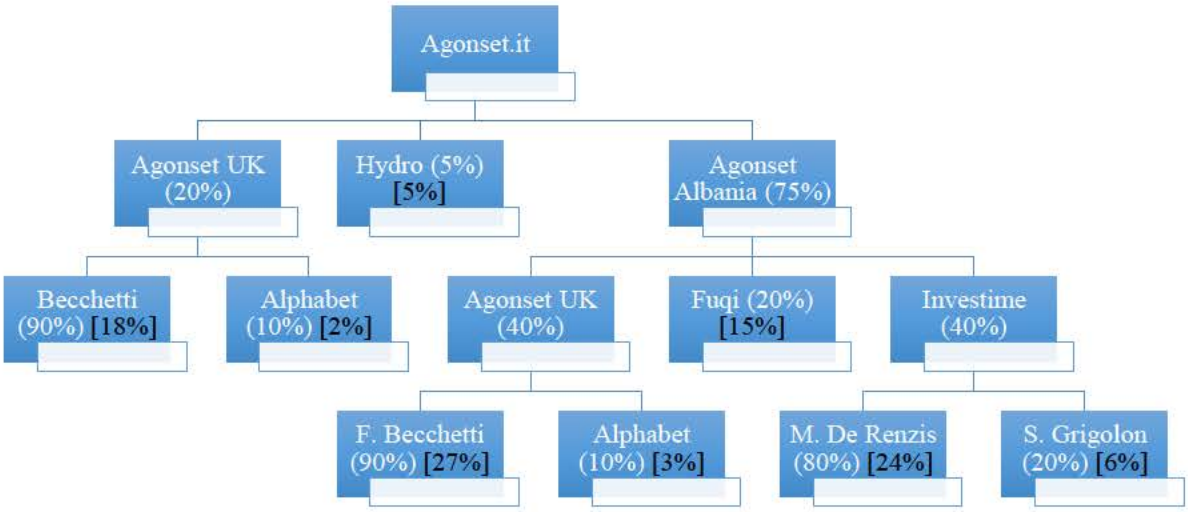
[1267] Investime's excerpt from the Albanian Registry of Companies, 17 June 2016, p. 2 (C-558).

[1268] Agonset Sh.p.k.'s excerpt from the Albanian Registry of Companies, 29 February 2016, p. 13 (C-409).

[1269] Sale and Purchase Agreement between Costruzioni S r.l. and Agonset.uk Limited, 17 March 2015, p. 3 (C-628).

[1270] Memorial, para. 22; Counter-Memorial on the Merits, para. 91; Reply on the Merits, para. 323, fn. 565; Reply on Jurisdiction, para. 126, fn. 135.

[1271] Agonset.uk Limited UK Companies House Confirmation Statement, 30 November 2016, p. 3 (C-643).



876. In the Tribunal's view, the evidence, on balance, establishes that the Claimants have the direct and indirect interests in Agonset.it summarised above based on: (i) the Italian Register of Companies confirming Agonset.it's shareholdings as follows: Agonset Albania 75%, Agonset.uk 20%, Hydro 5%;[1272] and (ii) the evidence of the shareholding of those companies summarised above at paragraphs 872 to 874.

877. Consequently, the Tribunal finds that the Claimants hold the direct and indirect interests in Agonset Albania and Agonset.it as calculated by Mr. Rathbone.

c. Adjustment of implied debt

878. The Tribunal understands that, due to the adjustment made by Mr. Rathbone to account for implied debt in the ex-post value,[1273] Mr. MacGregor's criticism has now been addressed. Mr. MacGregor said as much in his Second Report.[1274]

[1272] Agonset Italy Company Profile, 16 November 2016, p. 2 (Exhibit TT to First MacGregor Report).

[1273] Second Rathbone Report, para. 170; Rathbone Supplementary Memorandum Appendices, p. 12.

[1274] Second MacGregor Report, para. 3.141.

d. Conclusion

879. Based on the above, the Tribunal accepts Mr. Rathbone's calculation of damages and finds that:

a. Mr. Becchetti is entitled to damages of €41,048,000 for his interests in Agonset;

b. Mr. De Renzis is entitled to damages of €46,751,000 for his interests in Agonset;

c. Ms. Grigolon is entitled to damages of €11,688,000 for her interests in Agonset.

880. On Mr. Rathbone's calculation of damages attributable to Hydro there is a negative value.[1275] Hydro owns a 5% share in Agonset.it. and has no interest in Agonset Albania. While Agonset.it was expected to earn the bulk of Agonset's revenue, Agonset.it had agreed to a costs and revenue sharing contract.[1276] This had the effect of Agonset.it's capital value being worth less than that of Agonset Albania. Consequently, Hydro suffers no damages for its interests in Agonset.it and the Tribunal awards Hydro no damages. However, neither is a deduction from the damages awarded to the other shareholders warranted.

(8) Interest rate

881. For reasons articulated earlier, the Tribunal considers that the standard of compensation outlined in Article 5.3 of the BIT does not apply to unlawful expropriations and therefore rejects the interest rate contained therein.

882. The Tribunal considers that the guiding principle when determining the applicable interest rate is to ensure full reparation.[1277] This is achieved by compensating the Claimants for the loss of their ability to use the principal compensation when it fell due.[1278] This should be a commercial interest rate.

[1275] Rathbone Supplementary Memorandum, para. 8.

[1276] Contract between Agonset Sh.p.K. and Agonset.it, 19 May 2014 (C-296), cl. 4.1; First Rathbone Report, para. 5.

[1277] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 396 (CL-056).

[1278] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 882 (CL-106).

883. The Tribunal rejects the Claimants' first proposed interest rate, i.e. the rate of yield on Albanian sovereign bonds, on the basis that the Claimants have adduced no evidence that they would have loaned monies to Albania and indeed this would be very unlikely given the matters that have arisen in this case.[1279]

884. The parties' experts both agreed that LIBOR plus a certain percentage was an appropriate commercial rate to apply.[1280] The Tribunal finds that an appropriate commercial rate for pre-Award and post-Award interest is LIBOR +3%. Such interest shall start running from the Ex-Post Valuation Date, i.e. 31 March 2018.

885. The Tribunal further finds that interest should be calculated on a compound basis, compounded quarterly. The Tribunal is aware that awarding compound interest is a recent trend to accord with the fact that modern financial activity normally involves compound interest and therefore ought to be paid as compensation to an investor.[1281]

(9) Risk of double recovery

886. The Tribunal accepts that there is a possibility that the Claimants *may* obtain double recovery if they receive the fair market value of Agonset as damages while still maintaining their shareholdings in Agonset and any accrued rights with respect to Agonset.

887. However, the Tribunal has found that the value of Agonset has been destroyed and any issues of double recovery are rather speculative and inherently unlikely in the sense that they are contingent upon the happening of several events, such as Agonset recommencing operations, the Claimants being successful in other claims for damages, and the Claimants being successful in the criminal proceedings described at section IV.J above, which may or may not happen.[1282] Further, if the Claimants did use the same corporate vehicles to resume broadcasting, they would essentially have to start from scratch, given the minimal

[1279] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 933 (CL-106).

[1280] First MacGregor Report, para. 9.7; First Navigant Report, para. 18.

[1281] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 935 (CL-106); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 439-440 (CL-052).

[1282] The sale of Agonset's Italian broadcasting license has already been taken into account: see paragraph 865 above.

assets those companies now hold. The Tribunal is not able to determine the likelihood or otherwise of these events occurring, and does not consider it proper to diminish the Claimants' claim on these speculative events. However, the Tribunal does not wish to potentially overcompensate the Claimants.

888. In the absence of guidance from the parties as to the way forward, the Tribunal looks to how other investment tribunals have dealt with similar scenarios.

889. In *Metaclad*, the tribunal dealt with the issue of double recovery where the claimants maintained an interest in the investment they were seeking compensation for by requiring the claimants to relinquish all claim, title and interest in the investment upon payment under the award. The tribunal stated "Clearly, COTERIN's substantive interest in the property will come to an end when it receives payment under this award".[1283]

890. Similarly, in *SPP*, the tribunal decided that, when compensating shareholders for an expropriated investment, "upon payment of the compensation fixed in this Award, the Respondent shall be released from any further investment claims concerning the Egyptian project as a whole and the Claimants' shareholding in EDTC shall be transferred to the Respondent".[1284]

891. Consequently, with regard to the above facts and authorities, the Tribunal decides that upon the Respondent's payment of the compensation fixed in this Award, including any interest and costs deemed payable, the Respondent shall be released from any further claims from any of the Claimants concerning Agonset.

[1283] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 127 (CL-036).

[1284] *Southern Pacific Properties v. Arabic Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 173 (RL-086).

IX. COSTS

892. Pursuant to Article 61(2) of the ICSID Convention, the Tribunal has the discretion to decide the allocation of legal costs of the arbitration between the parties, in the absence of prior agreement between the parties.

893. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

894. The Claimants have paid an advance on the costs of this arbitration of USD 674,856.00. The Respondent has paid an advance on the costs of this arbitration of USD 674,957.00. The total amount of funds that the parties have deposited with ICSID is therefore USD 1,349,813.00.

895. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):[1285]

Arbitrators' fees and expenses	
Dr. Michael Pryles	487,764.45
Mr. Charles Poncet	174,193.50
Mr. Ian Glick	75,026.37
Tribunal Assistant's fees and expenses	
Dr. Albert Dinelli	36,837.50
Mr. Timothy Maxwell	191,976.07
ICSID's administrative fees	148,000

[1285] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

Direct expenses (estimated)[1286]	176,568.95
Total	**USD1,290,366.84**

A. THE CLAIMANTS' COST SUBMISSIONS

896. The Claimants', in effect, make three main submissions on costs.

897. First, if the Claimants prevail, the Respondent should bear the total costs of this arbitration and reimburse the Claimants' costs and expenses, including attorneys' fees and expenses.[1287] Such an outcome is in line with the weight of authority that the prevailing party should receive its costs and the principle of full compensation.[1288] The Claimants allege that costs need to be awarded to make them whole, as costs are the consequences of Albania's wrongful acts.[1289] The Claimants go on to say that this is especially warranted given that the Respondent "has not conducted this arbitration in an expeditious and cost-effective manner".[1290]

898. Secondly, should the Claimants fail on the merits, the Respondent should bear the costs of the arbitration and reimburse the Claimants for their costs and expenses associated with the Provisional Measures Order and Decision on Bifurcation.[1291] The Claimants say that because they were successful in their Application for Provisional Measures and defeated the Request for Bifurcation, it follows from the relative success principle that they should receive their costs for these phases of the proceeding.[1292]

899. Thirdly, and alternatively, should the Claimants fail on the merits, the parties should bear their own costs and split the costs of the arbitration equally. The Tribunal should take into

[1286] This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

[1287] Claimants' Memorial, para. 681; Claimants' Reply on the Merits, para. 605; Claimants' Costs Submissions, p. 4.

[1288] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, para. 11.17 (CL-268).

[1289] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No.ARB/03/16, Award, 2 October 2006, para. 533 (CL-054).

[1290] Claimants' Submissions on Costs, p. 4.

[1291] Claimants' Costs Submissions, p. 3.

[1292] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, paras. 1232-1233 (CL-269).

account the Respondent's procedural conduct[1293] and find that the Respondent should not receive its costs because of its "numerous delays, refusals to comply with Tribunal orders, and generally bad-faith litigation tactics". [1294]

900. In response to the Respondent's Further Costs Submissions, the Claimants replied on two points.[1295] First, the Respondent's suggestion of costs on a claim-by-claim basis is unworkable given that the parties have not itemised in this way. Secondly, while their legal fees are higher than the Respondents, the fees are reasonable given that they relate to six distinct parties and the Claimants put on more factual evidence to demonstrate their case.

901. The Claimants have submitted the following claims for legal and other costs (excluding advances made to ICSID) totaling €10,962,984.71, itemised as follows:

Attorneys' fees	€8,355,871.26
Witness and Expert fees	€1,643,365.39
Other associated costs and expenses	€963,748.06
Total	**€10,962,984.71**

B. THE RESPONDENT'S COST SUBMISSIONS

902. The Respondent initially adopted two positions on costs.

903. First, if the Respondent prevails, the Claimants should bear the total costs of this arbitration and reimburse the Respondent's costs and expenses, including attorneys' fees and

[1293] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 620 (CL-271).
[1294] Claimants' Costs Submissions, pp. 3-4.
[1295] Claimants' Reply on Further Costs Submissions.

expenses.[1296] The Respondent says that "mounting a successful defence to the Claimants' claims" justifies an award of costs.[1297]

904. Alternatively, in the event that the Claimants or any of them are successful in their claims, the Respondent purported to reserve its right to make submissions as to costs "depending on the precise reasoning of the award".[1298]

905. However, after the Tribunal notified the Respondent that the Award would need to dispose of all matters, including those of costs, the Respondent applied for leave to and made further submissions on the allocation of costs.

906. In the Further Costs Submission, the Respondent argues that it should receive its full costs incurred in respect of any of the Claimants' claims it defeats.[1299] Further, that the Claimants should only recover their reasonable costs for the claims that they are successful in.[1300] The Respondent points out that there is a massive disparity between the costs incurred by the parties suggesting that there have been unreasonable duplicated costs due to the Claimants' decision to appoint four law firms.

907. The Respondent has submitted the following claims for legal and other costs (excluding advances made to ICSID) totaling €1,739,597.79 and £232,202.29, itemised as follows:

Legal fees	€1,200,00.00
Expert witnesses, professional advisers and professional costs of the State Advocate's Office	€531,308.79 £145,037.25
Other associated costs and expenses	€8,289.00 £87,165.04
Total	**€1,739,597.79** **£232,202.29**

[1296] Respondent's Reply, p. 221; Rejoinder on the Merits, p. 329; Respondent's Amended Costs Submission, p. 2.

[1297] Respondent's Amended Costs Submission, p. 2 citing *ADC Affiliate Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 533 (CL-54).

[1298] Respondent's Amended Costs Submission, p. 2.

[1299] Respondent's Further Cost Submission, p. 1.

[1300] Respondent's Further Cost Submission, p. 1.

C. THE TRIBUNAL'S DECISION ON COSTS

908. A general principle commonly followed in international arbitration is that a successful party under an award should recover its legal costs. Both parties rely on this principle and the Tribunal sees no reason to depart from it in the circumstances of the present case.

909. The Claimants have prevailed in this arbitration in that they succeeded in establishing the jurisdiction of the Tribunal and prevailed in one of their two broad categories of claims (Agonset) in the merits phase. They recovered the significant sum of €99,487,000 in damages plus interest. The Claimants were also successful in certain preliminary phases in the arbitration, including the Preliminary Measures Order and the Bifurcation Decision. That said, the Claimants were unsuccessful in one of the categories of their broad claims on the merits (Kalivaç Project) and in their Application to Remove Counsel. Further, the quantum recovered for the Agonset claim is approximately one-third of the quantum claimed.[1301]

910. The Tribunal does note that there is a significant disparity between the costs of the Claimants and that of the Respondent. Some disparity is to be expected, given that their counsel acted for six Claimants with some disparity of claims and interests. The individual and corporate structure of the Claimants, and other corporations in interest and involved, was complex. Further, the burden of establishing the merits is borne by the Claimants. This, in the Tribunal's view goes some way towards explaining the divergence of fees and the retention of more than one law firm by the Claimants, despite the fact that some duplication would inevitably occur. However, the Tribunal decides that some discount is justified because of the divergence in costs and the failure of the Claimants to succeed on the Kalivaç Project claims.

911. Having careful regard to the parties' submissions and the above factors, the Tribunal has determined that it is appropriate and reasonable that the Respondent reimburse the Claimants for 75% of their legal and other costs and that the Respondent reimburse the

[1301] The Claimants' damages claimed were €304,503,000.

Claimants for 100% of the costs of the arbitration for which the Claimants are liable. For the avoidance of doubt, this order includes costs incurred and claimed earlier in these proceedings but on which the Tribunal reserved its decision.[1302]

912. The costs of the arbitration have been paid out of the advances made by the parties in equal parts. As a result, both the Claimants' and the Respondent's share of the costs of the arbitration amount to USD1,290,366.84. The Respondent shall pay to the Claimants an amount of USD645,183.42 representing 100% of the amount paid by the Claimants. Any remaining monies held on deposit shall be returned to the parties in equal shares.

913. The Respondent shall pay the Claimants an amount of €8,222,238.53 in relation to their legal and other costs.

X. AWARD

914. For the reasons set forth above, the Tribunal decides and awards as follows:

(1) it does not have jurisdiction to hear the claims concerning Energji's request to build a wind farm;

(2) it has jurisdiction to hear all of the other claims in the arbitration;

(3) Albania is to pay Mauro De Renzis damages in the amount of €46,751,000 for its expropriation of his interest in Agonset contrary to Article 5 of the BIT;

(4) Albania is to pay Stefania Grigolon damages in the amount of €11,688,000 for its expropriation of her interest in Agonset contrary to Article 5 of the BIT;

(5) Albania is to pay Francesco Becchetti damages in the amount of €41,048,000 for its expropriation of his interest in Agonset contrary to Article 5 of the BIT;

[1302] See for example, PO7, para. 4.11.

(6) Albania is to pay 75% of the Claimants' legal, expert witness and associated costs, fixed in the amount of €8,222,238.53;

(7) Albania is to pay 100% of the costs of the arbitration for which the Claimants are liable, fixed in the amount of USD645,183.42;

(8) Albania is to pay interest at the rate of LIBOR + 3% compounded quarterly on the amounts in paragraphs (3) to (8) above from 31 March 2018 until the date of full payment; and

(9) upon payment of the amounts in paragraphs (3) to (7) above and the interest calculated on those amounts under paragraph (8) above Albania is released from any further claims from any of the Claimants concerning Agonset.

(10) All other claims and requests made by the parties in this arbitration have been rejected.

Mr. Ian Glick QC
Arbitrator

Date: 12 April 2019

Dr. Charles Poncet
Arbitrator

Date: 10 April 2019

Dr. Michael C. Pryles AO PBM
President of the Tribunal

Date: 18 April 2019