Excerpts

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

DURRES KURUM SHIPPING SH. P.K., DURRES CONTAINER TERMINAL SH.A, METAL COMMODITIES FOREIGN TRADE CORP., ALTBERG DEVELOPMENTS

v.

REPUBLIC OF ALBANIA

(ICSID CASE NO. ARB/20/37)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated July 26, 2024.

[redacted]

Aurélia Antonietti
Acting Secretary-General

Washington, D.C., July 26, 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

DURRES KURUM SHIPPING SH. P.K., DURRES CONTAINER TERMINAL SH.A, METAL COMMODITIES FOREIGN TRADE CORP., ALTBERG DEVELOPMENTS LP

Claimants

and

REPUBLIC OF ALBANIA

Respondent

ICSID Case No. ARB/20/37

FINAL AWARD

Members of the Tribunal
Prof. Dr. Maxi Scherer, President of the Tribunal
Mr. Fernando Mantilla-Serrano, Arbitrator
Ms. Loretta Malintoppi, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

Assistant to the President of the Tribunal
Mr. Aonkan Ghosh

Date of dispatch to the Parties: 26 July 2024

REPRESENTATION OF THE PARTIES

Representing Durres Kurum Shipping SH. P.K. and others:

Dr. Hamid G. Gharavi
Mr. Emmanuel Foy
Ms. Déborah Schneider
Mr. Rodrigo Vieira
Derains & Gharavi
25 rue Balzac
75008 Paris
French Republic

and

Mr. Uğur Ateş
Mr. Dardan Mustafaj
Counsel to Durres Container Terminal SH.A. and Durres Kurum Shipping SH.P.K.
Durres Container Terminal
Port of Durres
Republic of Albania

Representing the Republic of Albania:

Mr. Odise Moçka
Ms. Manuela Imeraj
State Advocates Office
Rr. "Abdi Toptani"
ish-Hotel Drini, Nd.5, kati 4,
Tirana
Republic of Albania

and

Dr. Boris Kasolowsky
Mr. Gregorio Pettazzi
Ms. Enisa Halili
Freshfields Bruckhaus Deringer Rechtsanwälte Steuerberater PartGmbB
Bockenheimer Anlage 44
60322 Frankfurt am Main
Federal Republic of Germany

and

Mr. Noah Rubins KC
Freshfields Bruckhaus Deringer
9 avenue de Messine
75008 Paris
French Republic

and

Ms. Katherine Khan
Freshfields Bruckhaus Deringer
Peregringasse 4
1090 Vienna
Republic of Austria

TABLE OF CONTENTS

Table of Abbreviations / Defined Terms

Altberg	Altberg Developments LP
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
[redacted]	[redacted]
BITs	The UK-BIT (as defined) and the US-Albania BIT (as defined), collectively
Bifurcation Request or Resp. Bif. Req	Respondent's request for bifurcation of proceedings, dated 10 November 2021
C-[#]	Claimants' Exhibit
Claimants	DKS, DCT, MCTC, and Altberg, collectively
Cl. Mem. or Claimants' Memorial or Memorial	Claimants' Memorial on the Merits, dated 3 September 2021
Cl. PHB	Claimants' Post Hearing Brief, dated 5 March 2024
Cl. Rej.	Claimants' Rejoinder on Jurisdiction, dated 31 July 2023
Cl. Reply or Claimants' Reply	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, dated 22 February 2023
CL-[#]	Claimants' Legal Authority
[redacted]	[redacted]
[redacted]	[redacted]
Civil Procedure Code	Albanian Code of Civil Procedure, approved on 29 March 1996
CWS-[#]	Claimants' Witness Statement
DCT	Durres Container Terminal SH.A

DKS	Durres-Kurum Shipping SH. P.K., formerly known as Durres-Gdansk Shipyard
DPA	Durres Port Authority
Durres Court of First Instance	Durres Administrative Court of First Instance
[redacted]	[redacted]
[redacted]	[redacted]
Durres Port	The Port of Durres
ECT	Energy Charter Treaty, adopted on 17 December 1994
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Hearing	Hearing on Jurisdiction and Merits held on 4-7 December 2023
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
[redacted]	[redacted]
[redacted]	[redacted]
IT System	Information technology system
[redacted]	[redacted]
Letter of Submittal	United States Letter of Submittal, dated 6 September 1995
[redacted]	[redacted]

[redacted]	[redacted]
[redacted]	[redacted]
MCTC	Metal Commodities Foreign Trade Corp.
MFN	Most Favored Nation clause
[redacted]	[redacted]
[redacted]	[redacted]
Non-impairment standard	The legal standard of protection that protects against impairment by way arbitrary, discriminatory or unreasonable measures
The Ministry	Ministry of Public Works, Transport and Telecommunications, the Ministry of Infrastructure and Energy, and Ministry of Transport and Infrastructure, as the case may be.
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Parties	The Claimants and the Respondent collectively
PIU	Project Implementation Unit
PO1	Procedural Order, dated 3 August 2021
PO2	Procedural Order, dated 27 August 2021
PO3	Procedural Order, dated 29 November 2021
PO4	Procedural Order, dated 7 February 2022

PO5	Procedural Order, dated 11 February 2022
PO6	Procedural Order, dated 4 March 2022
PO7	Procedural Order, dated 6 September 2022
PO8	Procedural Order, dated 3 March 2023
PO9	Procedural Order, dated 7 September 2023
PO10	Procedural Order, dated 10 October 2023
PO11	Procedural Order, dated 9 November 2023
PO12	Procedural Order, dated 12 January 2024
Post-Hearing Brief(s)	The Claimants' and the Respondent's post hearing briefs, dated 5 March 2024 and 4 March 2024
R-[#]	Respondent's Exhibit
Request	Request for arbitration from the Claimants against the Republic of Albania, dated 7 September 2020
Respondent	The Republic of Albania
Resp. C-Mem. or Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated 6 June 2022
Resp. PHB	Respondent's Post Hearing Brief, dated 4 March 2024
Resp. Rej. Or Respondent's Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction, dated 30 June 2023
Resp. Req. Bif.	Respondent's Request for Bifurcation
RL-[#]	Respondent's Legal Authority
RWS-[#]	Respondent's Witness Statement
[redacted]	[redacted]
Security for Costs Application	Respondent's application for security for costs, dated 29 October 2021

[redacted]	[redacted]
Supreme Court	Administrative College of the High Court
[redacted]	[redacted] Termination Decision before the Supreme Court, dated 1 April 2019
Terminal	The container terminal at the Durres Port
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Tirana Court of Appeal	Tirana Administrative Court of Appeals
Tirana Court of First Instance	Tirana's Administrative Court of First Instance
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 15 June 2021
Tribunal's List of Questions	Tribunal's list of questions to be addressed in Cl. PHB and Resp. PHB, dated 9 January 2024.
United Kingdom	The United Kingdom of Great Britain and Northern Ireland
UK-Albania BIT	Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania for the Promotion and Protection of Investments, dated 30 March 1994, which entered into force on 30 August 1995
United States	The United States of America
[redacted]	[redacted]

US-Albania BIT	Treaty between the Government of the United States of America and the Government of the Republic of Albania, dated 11 January 1995 which entered into force on 4 January 1998
[redacted]	[redacted]
VCLT	Vienna Convention on the Law of Treaties, adopted on 22 May 1969
[redacted]	[redacted]
[redacted]	[redacted]

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of (i) the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland (the "**UK**") and the Government of the Republic of Albania for the Promotion and Protection of Investments, dated 30 March 1994, which entered into force on 30 August 1995 (the "**UK-Albania BIT**"); (ii) the Treaty between the Government of the United States of America (the "**United States**") and the Government of the Republic of Albania, dated 11 January 1995, which entered into force on 4 January 1998 ("**US-Albania BIT"**); and (iii) 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**"). The ICSID Convention entered into force for the United Kingdom of Great Britain and Northern Ireland on 18 January 1967, for the United States on 14 October 1966, and for Albania on 14 November 1991.

2. The claimants are (i) Durres Kurum Shipping SH. P.K. ("**DKS**") (a company organized under the laws of the Republic of Albania); (ii) Durres Container Terminal SH.A ("**DCT**") (also a company organized under the laws of the Republic of Albania); (iii) Metal Commodities Foreign Trade Corp. ("**MCTC**") (a company organized under the laws of the United States); and (iv) Altberg Developments LP ("**Altberg**") (a company organized under the laws of the United Kingdom) (together, the "**Claimants**").

3. The respondent is the Republic of Albania (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 a 35-year concession agreement to operate the naval shipyard of the port of Durres in the Republic of Albania, concluded between DKS and the Respondent.

6. This award is comprised of the following sections:

   a. in Section II, the Tribunal sets out the procedural history of the proceedings;

   b. in Section III, the Tribunal canvasses the factual background of the dispute;

c. in Section IV, the Tribunal sets out the claims made, and requests for relief sought, by the Parties;

d. in Section V, the Tribunal discusses its jurisdiction under the UK-Albania BIT and US-Albania BIT (the "**BITs**") and considers the Parties' rival arguments relating to the jurisdictional objections raised by the Respondent;

e. in Section VI, the Tribunal discusses the merits of the Claimants' claims; and

f. in Section VII, the Tribunal decides on the costs in this arbitration.

II. PROCEDURAL HISTORY

7. On 7 September 2020, ICSID received a request for arbitration of the same date from the Claimants against the Respondent (the "**Request**").

8. On 23 September 2019, the Secretary-General of ICSID registered the Request, as supplemented by the Claimants' letter of 18 September 2019, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the notice of registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

9. On 28 December 2020, the Parties agreed to constitute the tribunal in accordance with the following process: the tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding, arbitrator to be appointed by agreement of the two appointed co-arbitrators. The Parties also agreed that if the two party-appointed arbitrators were unable to reach an agreement on the identity of the presiding arbitrator, the Chairman of the ICSID Administrative Council would appoint the presiding arbitrator.

10. On 9 January 2021, following his appointment by the Claimants, Mr. Fernando Mantilla-Serrano, a national of the Republic of Colombia, accepted his appointment as an arbitrator.

11. On 27 January 2021, following his appointment by the Respondent which he had initially accepted, Prof. Philippe Sands withdrew his acceptance of appointment.

12. On 24 February 2021, following her appointment by the Respondent, Ms. Loretta Malintoppi, a national of the Italian Republic, accepted her appointment as an arbitrator.

13. On 14 June 2021, Prof. Dr. Maxi Scherer, a national of the Federal Republic of Germany, was appointed as the presiding arbitrator by the Chairman of the ICSID Administrative Council.

14. Accordingly, the arbitral tribunal is composed of Prof. Dr. Maxi Scherer as the presiding arbitrator, Mr. Fernando Mantilla-Serrano, and Ms. Loretta Malintoppi appointed by the Respondent (the "**Tribunal**").

15. On 15 June 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anna Holloway, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

16. In accordance with Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 22 July 2021, by video conference.

17. Following the first session, on 3 August 2021, the Tribunal issued its Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties and the rulings of the Tribunal on procedural matters. PO1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be [redacted]lish, and that the place of the proceedings would be Paris, France. PO1 also set out a procedural timetable of the proceedings.

18. On 27 August 2021, the Parties agreed to amend the procedural timetable to allow a short extension until 3 September 2021, for the submission of the Claimants' memorial, with consequent adjustments of other deadlines. The same day the Tribunal issued its Procedural Order No. 2 ("**PO2**") setting out the revised procedural timetable.

19. On 3 September 2021, the Claimants submitted the Claimants' memorial on the merits dated 3 September 2021 (the "**Claimants' Memorial**" or "**Cl. Mem**."), together with factual exhibits C-1 through C-196 and legal authorities CLA-1 through CLA-46, the witness statement

of Ms. Ada Kallcaku dated 3 September 2021, and the expert report of Fair Links dated 2 September 2021.

20. On 29 October 2021, the Respondent filed its application for security for costs of the same date (the "**Security for Costs Application**"), together with factual exhibits R-1 through R-31 and legal authorities RL-0001 through RL-0007.

21. On 1 November 2021, the Tribunal invited the Parties to confer and endeavor to agree on a briefing schedule for the Respondent's Security for Costs Application and to convey any agreed proposal by 3 November 2021.

22. On 3 November 2021, the Tribunal approved the briefing schedule for the Respondent's Security for Costs Application suggested by the Parties.

23. On 10 November 2021, the Respondent filed its request for bifurcation (the "**Bifurcation Request**" or "**Resp. Bif. Req.**") of the same date, together with factual exhibits R-32 through R-43 and legal authorities RL-8 through RL-63.

24. By its emails dated 11 and 23 November 2021, the Tribunal invited the Parties to confer and endeavor to agree on a briefing schedule for the Respondent's Bifurcation Request by 26 November 2021.

25. On 26 November 2021, the Parties agreed on a briefing schedule for the Respondent's Bifurcation Request.

26. On 29 November 2021, the Tribunal issued its Procedural Order No. 3 ("**PO3**") reflecting the changes to the procedural timetable.

27. On 8 December 2021, the Claimants filed their observations on the Respondent's Bifurcation Request together with legal authorities CL-47 through CL-59, as well as their response to the Respondent's Security for Costs Application together with exhibit C-197, and legal authorities CL-60 through CL-83.

28. On 22 December 2021, the Respondent filed its reply to the Claimants' response to the Security for Costs Application together with factual exhibits R-44 through R-51 and legal authority RL-1.

29. On 11 January 2022, the Claimants filed their rejoinder to the Respondent's Security for Costs Application, together with factual exhibits C-198 and C-199.

30. On 7 February 2022, the Tribunal issued its Procedural Order No. 4 ("**PO4**") concerning the Respondent's Bifurcation Request, dismissing the request. In PO4, the Parties were directed to confer about the procedural timetable with a view to reaching a joint proposed timetable for the remainder of the proceeding.

31. On 11 February 2022, the Tribunal issued its Procedural Order No. 5 ("**PO5**") addressing the Respondent's Security for Costs Application, dismissing the application.

32. On 14 February 2022, the Parties made a joint proposal on the procedural timetable.

33. On 16 February 2022, the Tribunal generally approved the procedural timetable proposed by the Parties on 14 February 2022, but also provided suggestions on potential amendment of the proposed procedural timetable, including a suggestion to have the hearing on 25-29 September 2023.

34. On 18 February 2022, the Respondent informed the Tribunal that it was available for a pre-hearing conference on 29 August 2023, but unavailable for a hearing on 25-27 September 2023.

35. On 21 February 2022, the Tribunal provided the Parties with several options for hearing dates and asked the Parties to revert with comments regarding their availability.

36. On 24 February 2022, the Claimants confirmed their availability for a pre-hearing conference on 29 August 2023. In the same letter the Claimants also informed the Tribunal that they were unavailable for hearing on all the dates proposed by the Tribunal, and suggested other dates when the Claimants were available.

37. Also on 24 February 2022, ICSID informed the Parties that Ms. Aïssatou Diop, ICSID Senior Legal Counsel, would act as Secretary of the Tribunal.

38. On 28 February 2022, the Tribunal invited the Respondent to confirm its availability on the new proposed hearing dates by 4 March 2022

39. On 3 March 2022, the Respondent confirmed its availability on the new proposed dates for the hearing.

40. On 4 March 2022, the Tribunal issued its Procedural Order No. 6 ("**PO6**") concerning the procedural timetable. As provided in PO6, the hearing was now scheduled for 4-9 December 2023.

41. On 6 June 2022, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction (the "**Respondent's Counter-Memorial**" or "**Resp. C-Mem.**") together with the expert report of Ms. Anastasia Malyugina, dated 6 June 2022, factual exhibits R-33 (resubmitted), R-0052 through R-139 and legal authorities RL-8 (resubmitted), RL-0064 through RL-0173.

42. On 22 August 2022, both Parties filed their requests for production of documents.

43. On 6 September 2022, the Tribunal issued its Procedural Order No. 7 ("**PO7**") concerning the Parties' requests for production of documents.

44. On 13 October 2023, ICSID informed the Parties that Ms. Anna Holloway had resumed her functions as Secretary of the Tribunal.

45. On 29 January 2023, the Parties agreed to a three-week extension, until 20 February 2023, for the submission of the Claimants' reply on merits and counter-memorial on jurisdiction, with the understanding that the Respondent would be afforded a corresponding 3-week extension for its next submission.

46. On 22 February 2023, the Claimants filed their reply on merits and counter-memorial on jurisdiction (the "**Claimant's Reply**" or "**Cl. Reply**"), together with factual exhibits C-200 through C-240 and legal authorities CL-84 through CL-128 and the second expert report of Fair Links, dated 14 February 2023.

47. On 3 March 2023, the Tribunal issued its Procedural Order No. 8 ("**PO8**") concerning the procedural timetable. PO8 reflected the changes in the procedural timetable agreed by the Parties earlier.

48. On 30 June 2023, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (the "**Respondent's Rejoinder**" or "**Resp. Rej.**"), together with factual exhibits R-0141 through R-208, legal authorities RL-0174 through RL-223, and the second expert report of Ms. Anastasia Malyugina, dated 30 June 2023.

49. On 27 July 2023, the Parties agreed to a short extension for the submission of the rejoinder on jurisdiction by the Claimants until 31 July 2023.

50. On 31 July 2023, the Claimants filed their rejoinder on jurisdiction (the "**Claimants' Rejoinder**" or "**Cl. Rej**"), together with factual exhibits C-0241 through C-0247 and legal authorities CL-0129 through CL-0137.

51. On 2 August 2023, the Parties agreed that the hearing could be shortened to 3 days (with one day to be kept in reserve) and be held on 4-6 December 2023 (with 7 December 2023 in reserve).

52. On 11 August 2023, the Parties indicated which of the other Party's witnesses and experts they each sought to cross-examine during the hearing. With their communication, the Claimants also requested that the Tribunal order the Respondent to produce certain other individuals for cross-examination at the hearing, in accordance with ICSID Arbitration Rule 34(2)(a).

53. On 14 August 2023, the Tribunal invited the Respondent to provide its comments on the Claimants' request for production of witnesses by 18 August 2023. The same day the Respondent requested an additional week, until 25 August 2023, to provide its comments on the Claimants' request for production of witnesses. The Tribunal confirmed the extension the same day.

54. On 25 August 2023, the Respondent filed its response to the Claimants' request for production of witnesses.

55. On 7 September 2023, the Tribunal issued its Procedural Order No. 9 ("**PO9**") concerning the Claimants' request for the production of witnesses. As provided in PO9, the Tribunal partially granted the Claimants' request and ordered the Respondent to produce [redacted] and [redacted] as witnesses. In addition, the Tribunal invited the Parties to inform the

Tribunal about their position regarding the procedural details of the examination of these individuals by 25 September 2023 (that deadline was subsequently extended to 2 October 2023).

56. On 2 October 2023, the Respondent submitted its comments regarding the procedural details of the examination of [redacted].

57. On 3 October 2023, the Tribunal requested both Parties' final simultaneous comments regarding the procedural details of the examination of [redacted] by 6 October 2023.

58. On 6 October 2023, the Parties submitted their final comments regarding the procedural details of witness examination.

59. On 10 October 2023, the Tribunal issued its Procedural Order No. 10 (the "**PO10**") concerning the production of witnesses.

60. On 11 October 2023, the Respondent requested additional time to submit the witness statements of [redacted]. The following day, the Tribunal invited the Claimants to submit any comments on the Respondent's extension request by 13 October 2023.

61. By their letter of 13 October 2023, the Claimants agreed to the Respondent's extension request provided that the written statements of [redacted] were submitted by 3 November 2023.

62. On 31 October 2023, the Tribunal and the Parties held a pre-hearing conference by video call.

63. On 3 November 2023, the Respondent submitted the witness statements of [redacted], and in its letter of the same day separately addressed the modalities of the examination of these witnesses at the hearing. The same day, the Tribunal invited the Claimants to provide any comments in regard to the modalities of the examination of these witnesses at the hearing by 7 November 2023.

64. On 7 November 2023, the Claimants submitted their comment in regard to the modalities of the examination of these witnesses at the hearing.

65. On 8 November 2023, as requested by the Tribunal and agreed by the Parties, Mr. Aonkan Ghosh was appointed as an assistant to the President of the Tribunal.

66. On 9 November 2023, the Tribunal issued its Procedural Order No.11 ("**PO11**") concerning the organization of the hearing.

67. The hearing was held at the Delos Dispute Resolution (Espace Hamelin) in Paris, France, on 4-7 December 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Prof. Maxi Scherer	President
Mr. Fernando Mantilla-Serrano	Arbitrator
Ms. Loretta Malintoppi	Arbitrator
Assistant to President	
Mr. Aonkan Ghosh	Assistant to the President (remote)
ICSID Secretariat:	
Ms. Anna Holloway	Secretary of the Tribunal
For the Claimants:	
Counsel:	
Dr. Hamid G. Gharavi	Counsel, Derains & Gharavi
Mr. Emmanuel Foy	Counsel, Derains & Gharavi
Mr. Rodrigo Vieira	Counsel, Derains & Gharavi
Ms. Déborah Schneider	Counsel, Derains & Gharavi
Mr. Ugur Ates	Counsel, Durres Container Terminal
Mr. Dardan Mustafaj	Counsel, Durres Container Terminal
Ms. Summia El-Awawdeh	Paralegal, Derains & Gharavi
Mr. Nasri Chedid	Intern, Derains & Gharavi
Mr. Ryan Stephan	Intern, Derains & Gharavi
Party Representative:	
[redacted] (also witness)	[redacted]
Experts:	
[redacted]	[redacted]
For the Respondent:	
Counsel:	
Dr. Boris Kasolowsky	Freshfields Bruckhaus Deringer
Mr. Noah Rubins KC	Freshfields Bruckhaus Deringer
Ms. Katherine Khan	Freshfields Bruckhaus Deringer

Mr. Gregorio Pettazzi	Freshfields Bruckhaus Deringer
Ms. Enisa Halili	Freshfields Bruckhaus Deringer
Mr. Domen Turšič	Intern, Freshfields Bruckhaus Deringer
Ms. Paulina Araiza Lozano	Intern, Freshfields Bruckhaus Deringer
Mr. Ionut Rus	Intern, Freshfields Bruckhaus Deringer

Party Representatives:

Ms. Manuela Imeraj	State Advocate General's Office
Mr. Odise Mocka	State Advocate General's Office

Witnesses:

[redacted]	(Remote)
[redacted]	(Remote)

Experts:

[redacted]	[redacted]

Court Reporter:

Ms. Claire Hill	Claire Hill Realtime Reporting

Interpreters:

Mr. Ermal Como	Independent interpreter
Mr. Genc Lamani	Independent interpreter
Mr. Ragip Luta	Independent interpreter

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

On behalf of the Claimants:

[redacted]	[redacted]

On behalf of the Respondent:

[redacted]	[redacted]

69. After the issue was initially raised during the course of the Hearing, on 5 December 2023, the Tribunal directed that, if the Claimants wished to make a formal application to introduce a standalone denial of justice claim they should do so in writing by 15 December 2023, with the Respondent to have leave to provide a written response to such an application.

70. In accordance with these directions, on 15 December 2023, the Claimants submitted a request for leave to introduce a standalone denial of justice claim. Thereafter, on 3 January 2024, the Respondent submitted its observations.

71. The Tribunal conveyed to the Parties its decision to deny the Claimants' request on 5 January 2024, with reasons to follow, and then issued its Procedural Order No. 12 setting forth its reasoning on 12 January 2024 ("**PO12**").

72. On 9 January 2024, the Parties submitted their agreed transcript corrections.

73. On the same day, the Tribunal conveyed questions to the Parties to be addressed in their post-hearing briefs (the "**Tribunal's List of Questions**").

74. On 5 and 4 March 2024, respectively, the Claimants and the Respondent filed simultaneous post-hearing briefs ("**Cl. PHB**" and "**Resp. PHB**" respectively, or "**Post-Hearing Brief(s)**").

75. On 23 April 2024, the Parties filed their submissions on costs ("**Claimants' Cost Submission**" and "**Respondent's Cost Submission**").

76. The proceedings were closed on 30 April 2024.

III. FACTUAL BACKGROUND

77. This Section sets out salient facts relating to this dispute. It is not intended to be an exhaustive summary of the facts on which the Parties rely, but rather a summary providing the background to the Parties' dispute. For the avoidance of doubt, the Tribunal has taken into account the full factual background as pleaded by the Parties, whether discussed here or not.

A. Durres Port Terminal

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. Tender Process for the Concession Agreement

[redacted]

[redacted]

[redacted]

[redacted]

C. Bid for the Concession Agreement and Side Agreement

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

D. [redacted]s Option under the Side Agreement

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

E. Incorporation of DCT

[redacted]

F. Inclusion of [redacted] as Investor

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

G. Transfer of the Terminal

[redacted]

[redacted]

[redacted]

H. So-Called Secret SPA

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

I. Alleged Issues Related to Claimants' Investments

[redacted]

[redacted]

[redacted]

J. G7 Crane

1. Purchase and Delivery of the G7 Crane

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. Parties' Disagreement on the Suitability of the G7 Crane

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

K. MHC 5150 Crane

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

L. Alleged IT Issues

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

N. Notice of Default

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted] [redacted]

[redacted] [redacted] [redacted]

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O. MHC 130 Crane

[redacted]

[redacted]

[redacted]

P. Termination of the Concession Agreement

[redacted]

[redacted]

[redacted]

[redacted]

Q. Altberg's Purchase of DKS Shares

[redacted]

R. DCT's Challenges of the Termination Decision

[redacted]

1. DCT's Appeal before the Tirana Court of Appeal

[redacted]

[redacted]

[redacted]

2. DCT's Appeal and Suspension Request before the Supreme Court

[redacted]

[redacted]

[redacted]

[redacted]

3. DCT's Suspension Request before the Tirana Court of Appeal Decision

[redacted]

4. Supreme Court's Decisions on DCT's Suspension Requests

[redacted]

[redacted]

[redacted]

S. Steps Towards the Transfer of the Terminal Back to Respondent

1. Meeting Between the Parties following the Termination Decision

[redacted]

[redacted]

2. State Attorney-General's Advice, Order No. 234 and Notification No. 5670

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Preparation of the Inventory Procedures

[redacted]

[redacted]

[redacted]

[redacted]

4. DCT's Challenge of Notification No. 5670 and Related Appeals

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

T. Takeover of the Terminal

1. Bailiff's Notices and Inventory of the Terminal's Assets

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. DCT's Challenge Before the Durres Court of First Instance and Interim Decision

[redacted]

3. Bailiff's Takeover of the Terminal

[redacted]

[redacted]

[redacted]

4. Criminal Complaints

[redacted]

5. Decision of the Durres Court of First Instance Vacating the Interim Decision

[redacted]

[redacted]

[redacted]

U. Tender of Five-Year Contract to [redacted]

[redacted]

[redacted]

IV. PARTIES' CLAIMS AND REQUESTS FOR RELIEF

192. The Claimants seek the following relief:

> *"…Claimants thus request the Tribunal to:*
>
> *756.1. Dismiss Respondent's jurisdictional objections;*
>
> *756.2. Declare that it has jurisdiction over this dispute under both the US-Albania and UK-Albania BITs, alternatively one of them as the Tribunal may deem appropriate;*
>
> *756.3. Declare that Respondent has breached its obligations towards Claimants under the BITs and/or international law;*
>
> *756.4. Order Respondent to reinstate DCT in all of its rights as Concessionaire under the Concession Agreement and to compensate Claimants for the material and moral damages incurred in the meantime, as well as those that they will inevitably incur for some time once they are restored in their rights because of Respondent's acts and omissions; or*
>
> *756.5. Alternatively, or if Respondent fails to comply with an award of restitution within three months, order Respondent to compensate Claimants for the damages they suffered as a result of Respondent's breaches amounting to a total of USD 46.9…, or any other amount*

[redacted]

deemed appropriate by the Tribunal. To this amount should be added the USD 6,848,134 initially paid for the acquisition of the Durres Shipyard between 2002 and 2009 under a 99-year lease agreement, which DKS relinquished at Albania's request in reliance on the representation from Albanian authorities that DKS would be granted no less than a 51% interest in the concessionary company over the Terminal…;

756.6. In any event, order Respondent to compensate Claimants for the moral and/or reputational damages they have incurred in the amount of USD 10 million;

756.7. Order Respondent to pay the costs of this arbitration, including all expenses incurred by Claimants, including all of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants, as well as Claimants' internal costs associated with the management of these arbitral proceedings;

756.8. Order Respondent to pay post-award interest on any amounts awarded to Claimants at a Libor + 2% rate, or any other interest deemed appropriate by the Tribunal, compounded semi-annually, as of the date these amounts are determined to have been due to Claimants, until the date of payment; and

756.9. Order any other relief that the Tribunal deems appropriate."[259]

193. For its part, the Respondent seeks the following relief:

"the Respondent respectfully requests that the Tribunal:

(i) DECLINE jurisdiction over the Claimants' claims in this arbitration in whole or in part; or, in the alternative

(ii) DISMISS the Claimants' claims in this arbitration; or, in the further alternative

(iii) HOLD that the Respondent owes no compensation to the Claimants; and, in any event

[259] Cl. Reply, at para. 756. *See also,* Cl. Mem., at para. 308; Cl. Rej., at para. 202.

(iv) ORDER the Claimants to pay all of the costs and expenses of this arbitration, including the Respondent's reasonable legal and expert fees and the fees and expenses of the Tribunal."[260]

V. JURISDICTION

194. The Respondent raises eight objections to the Tribunal's jurisdiction: four objections of general application, and four objections to jurisdiction vis-à-vis one or some, but not all, of the Claimants. Its general jurisdictional objections are:

a. that the Claimants' alleged investment was illegal (*rationae materiae* objection) (**Section V.A**);

b. that the Claimants' claims are purely contractual (**Section V.B**);

c. that the Claimants have not established a *prima facie* violation of the BITs (**Section V.C**); and

d. that the Claimants made no substantial contribution in Albania (**Section V.D**).

195. The Respondent's jurisdictional objections to certain of the Claimants are:

a. that Claimant MCTC cannot bring a claim as Albania denied the benefits of the US-Albania Treaty (**Section V.E**);

b. that Claimant MCTC lacks standing (**Section V.F**);

c. that Claimant Altberg violated international principles of good faith in the making of its investment (**Section V.G**); and

d. that two of the Claimants, DKS and DCT, do not meet the nationality requirements under the ICSID Convention and the US-Albania BIT (**Section V.H**).

196. Beyond those objections, the Parties rightly do not dispute the jurisdiction of the Centre or the competence of the Tribunal in terms of Article 25 of the ICSID Convention or the provisions

[260] Resp. C-Mem., at para. 347. *See also,* Resp. Rej., at para. 379 and below, at para. 719.

of the BITs. It is also undisputed that the Tribunal has the authority to resolve the objections to its competence and the jurisdiction of the Centre pursuant to Article 41 of the ICSID Convention.

197. Accordingly, the Tribunal addresses each of the Respondent's objections in the subsections that follow and will conclude with the findings on its jurisdiction in **Section V.I**.

A. Illegality Objection

1. Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

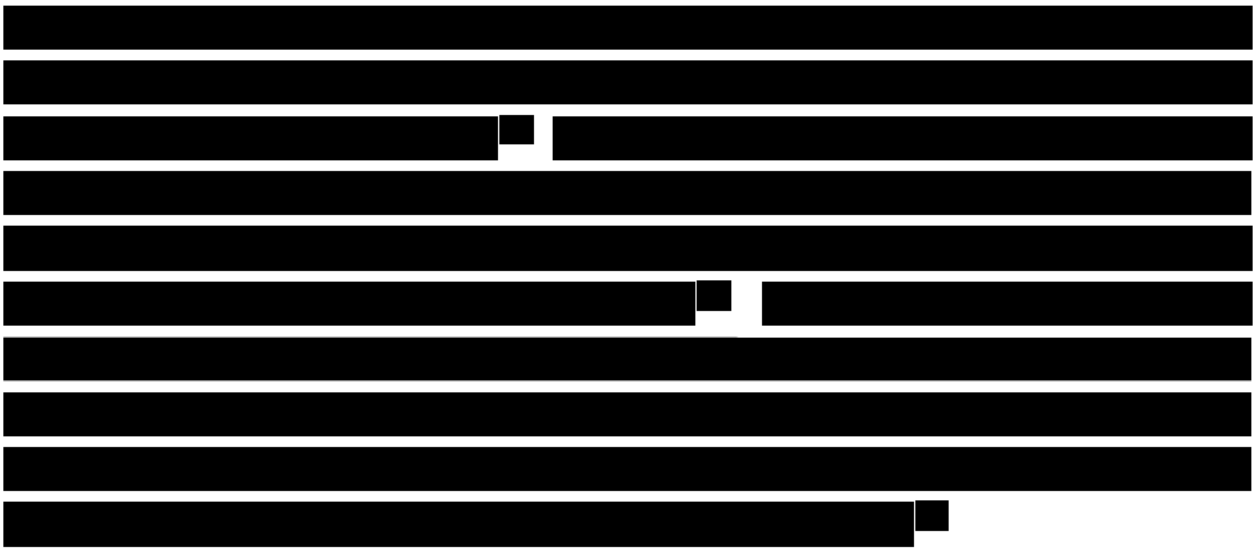
2. Claimants' Position

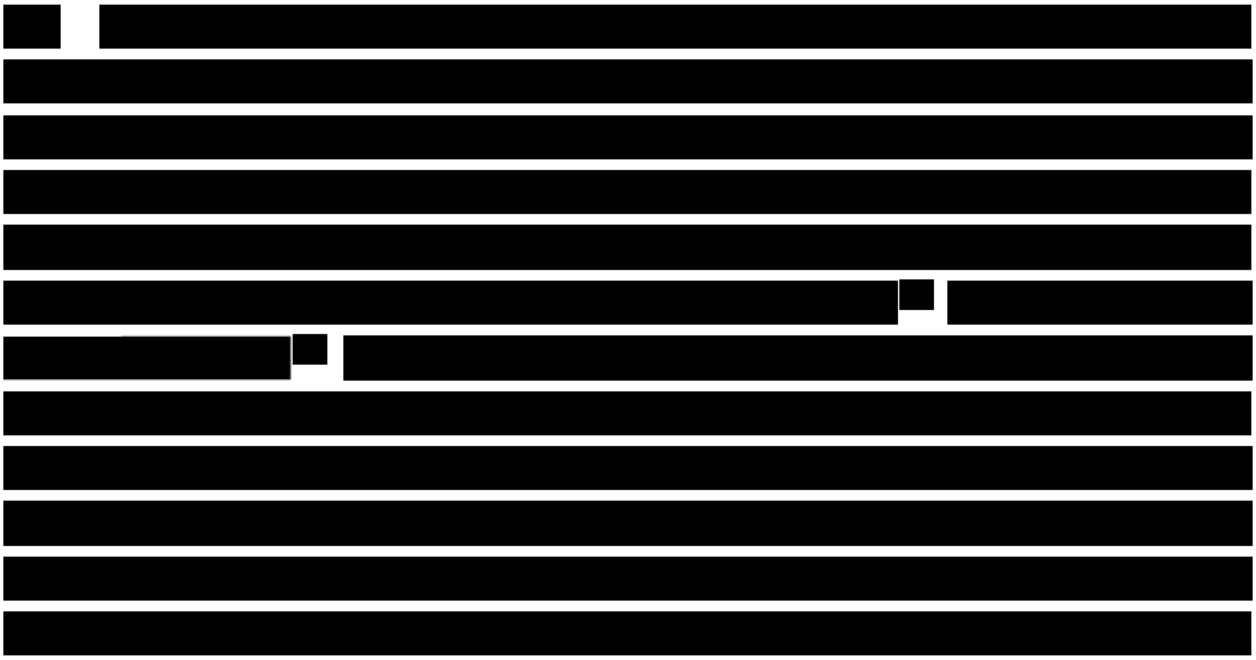
[redacted]

a) No Illegality Established

[redacted]

[redacted]





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b) Jurisdiction Under the BITs and ICSID Convention Not Conditioned on Legality

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[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

215. As detailed above, the Respondent refers to various alleged facts as constituting an illegality that would prevent the Tribunal from exercising its jurisdiction.[307] The Respondent argues that DKS circumvented requirements under the Bid for an experienced port operator to have a minimum stake in DCT, in two ways:

a. DKS made a representation that [redacted] would own 49% of DCT, but following the

[redacted]

[307] *See above* at paras. 201-203. *See also*, Resp. C-Mem., at paras. 142-222; Resp. PHB, at paras. 2-9.

execution of the Concession Agreement DCT was incorporated with [redacted] holding only 1% of its shares.[308]

b. DKS subsequently made a further misrepresentation that [redacted] would be a 48% shareholder in DCT;[309] rather, [redacted]'s participation was a fiction because DCT had entered into the Indemnity Protocol and the Secret SPA with [redacted]. According to the Respondent, under the Indemnity Protocol, DCT undertook to maintain all investments that [redacted] ought to have made and hold [redacted] harmless against any claims against it by the contracting authority; and under the Secret SPA, DKS purchased back all of [redacted]'s shares in DCT, merely five days after the hand-over of the Terminal. Therefore, the Respondent argues, the original sale of 48% of the shares in DCT to [redacted] was fictitious, and void *ab initio* under Albanian law.[310]

216. The Respondent alleges that these acts deprive the Tribunal of jurisdiction *ratione materiae* over the claims alleged in this arbitration, because they violate "international principles of good faith, public policy, and the Concession Agreement's legal framework."[311]

217. As also detailed above, the Claimants contest the underlying factual circumstances, and disagree that such facts, even if proven, would prevent the Tribunal from exercising its jurisdiction.[312] The Parties further discuss, among other things, (i) which Party bears the burden to prove illegality;[313] (ii) whether *any* illegality would be sufficient to be taken into account or whether a heightened standard applies;[314] and (iii) at what moment in time compliance with any legality requirement would need to be assessed.[315]

218. At the outset, however, the Tribunal must assess whether either the ICSID Convention or the BITs provide that the Tribunal must decline its jurisdiction in case an investment is made

[308] Resp. C-Mem., at para. 145.
[309] Resp. C-Mem., at para. 145.
[310] Resp. C-Mem., at para. 147.
[311] Resp. C-Mem., at para. 148.
[312] *See above,* at paras. 207-212. Cl. Reply, at paras. 442-506.
[313] *See above,* at paras. 200-201, 205-206. *See also,* Resp. C-Mem., at paras. 143-144; Cl. Reply, at paras. 442-446.
[314] *See above,* at paras. 201, 206. *See also,* Cl. Reply, at paras. 447-453; Resp. Rej., at paras. 185-187.
[315] *See above,* at paras. 200-201, 205-206. *See also,* Cl. Reply, at para. 489; Resp. Rej., at paras. 194-195.

illegally (often referred to as a "legality requirement"). The Respondent has not relied on the text of either the UK-Albania BIT, the US-Albania BIT, or the ICSID Convention to imply the existence of a legality requirement. Instead, it argues that despite these treaties having no text indicating the existence of a legality requirement, the principle that "a tribunal has no jurisdiction if an alleged investment is made in violation of domestic law of the respondent State, good faith, or international public policy" extends to "the ICSID and the BITs on which the Claimants rely."[316]

219. The Respondent, therefore, rightly accepts that neither the ICSID Convention, nor the BITs contain text expressly setting out a legality requirement. As such, the ICSID Convention and the BITs are different from treaties which contain language to the effect that an investment should be made or operated "in accordance with law"[317] or "made consistent with the [States'] legislation"[318] or similar formulations. When applying such treaties, tribunals have found – on account of these provisions – that their jurisdiction was limited to addressing claims in respect of investments that were legally made:

a. In *Saba Fakes v. Turkey,* Turkey objected to the tribunal's jurisdiction arguing that the ICSID Convention and the Netherlands-Turkey BIT required that all investments are made in compliance with Turkish law and alleging that the claimants had violated Turkish law in making their investment. The tribunal held that there was no legality requirement in the ICSID Convention noting "[n]either the text, nor the object and purpose of the Convention commands that any other criteria be read into" the definition of investment.[319] It was only because the Netherlands-Turkey BIT contained an express legality requirement that the tribunal stated that it would have to carry out an enquiry into the legality of the

[316] Resp. C-Mem., at para. 142.

[317] Article 1(1) of the Israel-Uzbekistan BIT ("The term 'investments' shall comprise any kind of assets, ***implemented in accordance with the laws and regulations of the Contracting Party*** in whose territory the investment is made, including, but not limited to.") (emphasis added), cited in **RL-96**, *Metal-Tech Ltd v the Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, dated 4 October 2013, at para. 130.

[318] Article 10 of the Germany-Ghana BIT 1994 ("This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation") cited in **RL-27**, *Gustav Hamester v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, dated 10 June 2010, at para. 126.

[319] **RL-98**, *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, dated 14 July 2010, at para. 121.

investment.[320]

b. In *Hamester v. Ghana,* the Germany-Ghana BIT provided that treaty protection would only extend to investments that were "made […] consistent with the latter's legislation."[321] Noting that "the precise effect of any such condition will obviously depend on the wording used," the tribunal proceeded to assess whether the making of the investment was tainted by illegality.[322]

c. In *Fraport v. Philippines,* the Germany-Philippines BIT contained language that could be read to impose a legality requirement. The definition of investment under the treaty was limited to "any kind of asset accepted in accordance with respective laws and regulations of either Contracting State," and the Philippines' instrument of ratification made a specific reference to investments "allowed by and in accordance with" the law of Philippines.[323] On that basis, the tribunal concluded that the protection under the treaty was limited only to investments made in compliance with Philippine law.[324]

d. In *Kim v. Uzbekistan,* Article 12 of the Kazakhstan-Uzbekistan BIT requirement expressly limited the scope of application of the treaty to "investments […] made in compliance with [the host state's] legislation."[325] The parties in that case agreed, and the

[320] **RL-98**, *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, dated 14 July 2010, at para. 119. The Tribunal notes however, that, in *Saba Fakes,* the tribunal did not eventually apply the illegality requirement because the claimant failed to prove that it had made a contribution for it to have a qualifying investment under the ICSID Convention.

[321] **RL-27**, *Gustav Hamester v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, dated 10 June 2010, at para. 126 (citing Article 10 of the Germany-Ghana BIT).

[322] **RL-27**, *Gustav Hamester v. Republic of Ghana*, ICSID Case No ARB/07/24, Award, dated 10 June 2010, at para. 125 (citing Article 10 of the Germany-Ghana BIT). The tribunal did, however, indicate that it might also be prepared to accept a legality requirement even if not spelled out expressly. *Gustav Hamester v. Republic of Ghana, ICSID Case No ARB/07/24, Award, dated 10 June 2010*, at para. 124 (citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Israel/Czech Republic BIT), Award, dated 15 April 2009, at para. 106).

[323] **RL-25**, *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award, dated 10 December 2014, at para. 327.

[324] **RL-25**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No ARB/03/25, Award, dated 16 August 2007, at paras. 396-404. The tribunal did, however, indicate that it might also be prepared to accept a legality requirement even if not spelled out expressly, "at least when such illegality goes to the essence of the investment". *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No ARB/03/25, Award,* dated 16 August 2007, at para. 332.

[325] **RL-99**, *Vladislav Kim et al v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction, dated 8 March 2017, at para. 365 (citing Article 12 of the Kazakhstan-Uzbekistan BIT).

Tribunal held, that this provision imposed an express legality requirement.[326]

220. Conversely, where there is no such express language in the underlying treaty that an investment should be made or operated "in accordance with law" (or similar formulations), tribunals have refrained from implying a legality requirement:

a. In *Bear Creek v. Republic of Peru,* the treaty in question provided Peru the right to impose "special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the law or regulations […]."[327] Peru had chosen not to adopt such a domestic measure, but nonetheless argued that a legality requirement was implied under the treaty. The tribunal found that it "may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties,"[328] and held that it did "not consider the alleged good faith of the investor is a further condition under the FTA for the jurisdiction of the Tribunal."[329]

b. In *Stati v. Kazakhstan,* the tribunal held that "[neither] the [Energy Charter Treaty ("**ECT**")] nor customary international law requires that an investment comply with the minutiae of domestic and administrative legal requirements in order to qualify for protection."[330] The tribunal further held that the "even where a treaty requires that an investment be made in accordance with domestic law it does not follow that that any violation will preclude jurisdiction."[331]

c. In *Metal-Tech v. Uzbekistan,* the tribunal held that while the existence or otherwise of the doctrines of good faith or abuse of rights was not in doubt, these were not "elements

[326] **RL-99**, *Vladislav Kim et al v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction, dated 8 March 2017, at para. 364.

[327] **CL-110**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, dated 30 November 2017, at para. 319.

[328] **CL-110**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, dated 30 November 2017, at para. 320.

[329] **CL-110**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, dated 30 November 2017, at para. 321.

[330] **CL-111**, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, dated 19 December 2013, at para. 756.

[331] **CL-111**, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, dated 19 December 2013, at para. 757.

> [that] are part of the objective definition of the term 'investment' contained in Article 25(1) of the ICSID Convention."[332] On this basis the tribunal did not find the legality requirement to exist as part of the ICSID Convention. The tribunal ultimately applied a legality requirement but only because, and to the extent that, it was expressly provided for in the relevant BIT.[333]

221. The Tribunal is mindful not to give the impression that the only way for a treaty to contain a legality requirement is for it to include text that expressly declares that the scope of the treaty is limited to investments made "in accordance with law" or "consistent with the State's legislation," or another similarly phrased requirement. There is no such inflexible rule; a tribunal interpreting an investment treaty may reach a conclusion that a legality requirement exists even without the legality requirement being formulated in such explicit terms. The Tribunal must therefore satisfy itself that there are no other indicators in the treaty that provide evidence of the State parties' intention to include a legality requirement. Without attempting to exhaustively identify the situations where this can occur, the Tribunal notes the following ways in which a legality requirement *could* be found to exist even where there is no express stipulation in the definition of qualifying investment.

222. ***First***, there could be indications in the *travaux préparatoires* (preparatory works) that a legality requirement was contemplated by the drafters. The decision in *Inceysa v. Ecuador* provides a good example. There the tribunal carried out a thorough review of the preparatory works to find that both El Salvador and Spain had agreed to incorporate a legality requirement by employing the phrase "in accordance with the laws of the" host state in several treaty provisions.[334] Interpretating the treaty in light of its preparatory text, the tribunal found that the absence of a clear legality requirement stipulation in the definition of a qualifying investment was simply a drafting choice because the contracting states had agreed that "the limitation requested in the definition of 'investment'" was "not necessary" "because it was included in the text...." Specifically, Article II

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[332] **RL-96**, *Metal-Tech Ltd v the Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, dated 4 October 2013, at para. 127.

[333] **RL-96**, *Metal-Tech Ltd v the Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, dated 4 October 2013, at para. 164.

[334] **RL-64**, *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, dated 2 August 2006, at paras. 190-207.

of the El Salvador-Spain BIT provided that each contracting party will admit investments "according to its legal provisions;" the *travaux préparatoires* indicated an understanding that this language created a "necessary condition for an investment to benefit" from treaty protection.[335] On this basis, the treaty was found to exclude investments that were not legally made.[336]

223. In the present instance the Parties have not provided any evidence relating to the *travaux préparatoires* or pleaded that those preparatory works show an unmistakable intention by the drafters of either the BITs, or the ICSID Convention, to impose a legality requirement under these treaties.

224. ***Second,*** there could be treaty provisions other than those related to the definition of the protected investment that imply that the treaty protection does not extend to investments made in violation of the host States' laws. For instance, in *SAUR v. Argentina,* the underlying treaty contained a provision that required the State parties to admit and encourage investments "within the framework of its law […]."[337] Unlike the decision in *SAUR,* and in *Inceysa* discussed above,[338] there is no text in the BITs or the ICSID Convention that could similarly provide a basis for inferring a legality requirement that the Respondent argues exists.

225. ***Third,*** it could also be the case that the States' intention to include a legality requirement is evidenced by reference to their practices of ratification. In *Fraport,* the tribunal relied on the Philippines' instrument of ratification (and that instrument's reference to investments made "in accordance with the laws and regulations of" the contracting parties) to find that the BIT contained a legality requirement.[339] Here, the Tribunal infers no such intention. The version of the US-Albania BIT published by the United States contains the United States Letter of Submittal (the

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[335] **RL-64**, *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, dated 2 August 2006, at paras. 194-195.

[336] **RL-64**, *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, dated 2 August 2006, at para. 203.

[337] **RL-20**, *SAUR International SA v Republic of Argentine*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability, dated 6 June 2012, at para. 306 (citing Article 2 of the France-Argentina BIT). The tribunal did, however, indicate that it might also be prepared to accept a legality requirement even if not spelled out expressly. *SAUR International SA v Republic of Argentine, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability,* dated 6 June 2012, at para. 308.

[338] *See above*, para. 222.

[339] **RL-25**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, dated 10 December 2014, at para. 337).

"**Letter of Submittal**"); this does not indicate any intention on the part of at least the United States to restrict the scope of the US-Albania BIT.[340] The Tribunal has not been provided with materials relating to the conclusion of the UK-Albania BIT.

226. Rather, as the Claimants point out, the Respondent has concluded treaties shortly before and after the BITs at issue in this proceeding that *do* contain express provisions setting out a legality requirement. In 1992, the Respondent concluded the Turkey-Albania BIT that defines investment as "all direct investments made in accordance with the laws and regulations […]."[341] The Poland-Albania BIT signed in 1993 and the Malaysia-Albania BIT signed in 1994 both expressly contain a legality requirement.[342] Some of the investment treaties signed by Albania after the BITs at issue in this proceeding were signed also contain an express legality requirement. The Sweden-Albania BIT dated 31 March 1995, the Hungary-Albania BIT dated 24 January 1996, and the Romania-Albania BIT dated 11 May 1995 each contain an express legality requirement.[343]

227. Accordingly, the Tribunal finds that there is no indication – either in the language of the BITs or otherwise – that the State parties to the BITs at issue in this proceeding intended to condition the applicability of the BITs on compliance with a legality requirement. The Tribunal must give effect to the absence of sufficient evidence in this regard, and must therefore treat the BITs which do not contain an express (or even implied) legality requirement *differently* from investment treaties that do contain such a requirement.

228. In light of the above, the Tribunal has no basis to conclude that either of the BITs or the ICSID Convention contain a legality requirement. Accordingly, it is not necessary to delve into

[340] **CL-2**, US-Albania BIT.

[341] **CL-112**, Agreement between the Republic of Turkey and the Republic of Albania Concerning the Reciprocal Promotion and Protection of Investments, dated 1 June 1992, at Article I(2)(b).

[342] **CL-113**, Agreement between the Government of the Republic of Albania and the Government of the Republic of Poland on the Reciprocal Promotion and Protection of Investments, dated 5 March 1993, at Article 1(2); **CL-114**, Agreement between the Government of Malaysia and the Government of the Republic of Albania for the Promotion and Protection of Investments, dated 24 January 1994, at Article 1(1)(c).

[343] **CL-115**, Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Albania on the Promotion and Reciprocal Protection of Investments dated 31 March 1995, at Article 1(1); **CL-116**, Agreement between the Government of Romania and the Government of the Republic of Albania for the Promotion and Reciprocal Protection of Investments dated 11 May 1995, at Article 1(1); **CL-117**, Agreement between the Republic of Hungary and the Republic of Albania for the Promotion and Reciprocal Protection of Investments dated 24 January 1996, at Article 1(1).

the facts allegedly constituting illegality because, even if the facts that the Respondent alleges were true, that would have no effect on the Tribunal's jurisdiction.

B. Objection that the Claims Are Purely Contractual

1. Respondent's Position

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2. Claimants' Position

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3. Tribunal's Analysis

253. As discussed above, the Respondent argues that the Tribunal has no jurisdiction *rationae materiae* because this is a contractual – as opposed to a treaty – dispute. The Tribunal begins by identifying the test to distinguish – for the present purposes – contract and treaty claims (**Section (a)**). Next, the Tribunal applies the test to this case (**Section(b)**).

254. As a preliminary point, the Tribunal recalls that, at the Hearing, the Claimants withdrew their claims based on the umbrella clause in Article 2(2) of the UK-Albania BIT (which, according to the Claimants, is also incorporated into the US-Albania BIT via the MFN clause in Article II(1) into that treaty).[384] Accordingly, the Tribunal need not consider the rival contentions of the Parties on this point.

a) Applicable Test to Distinguish Between Contract and Treaty Claims

255. The Parties appear to agree that whether a State's conduct in relation to a contract can give rise to a treaty claim depends on the "normative source" or the "essential basis" of the claim.[385] Only if the "normative source" or the "essential basis" of the claim is the treaty itself (and not the contract) can there be a basis for a treaty claim.[386]

256. As a starting point, the Tribunal notes that a State's breach of contract does not – ordinarily – imply a breach of its obligations under investment treaties. At the same time, a State's conduct in relation to a contract may, in certain cases, give rise to a treaty claim. As the *Bayindir v. Pakistan* tribunal put it: "the fact that a State is exercising a contractual right or remedy does not of itself exclude the possibility of a treaty breach."[387] Or, as explained by the *ad-hoc* committee

[383] Cl. Rej., at paras. 124-125.

[384] Tr. Day 2, (Gharavi), 21:20-25.

[385] Resp. C-Mem., at para. 149; Cl. Reply, at para. 560.

[386] Resp. C-Mem., at para. 149; Cl. Reply, at para. 560.

[387] **CL-121**, *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, dated 14 November 2005, at para. 157.

in *Vivendi*, there may be circumstances where both contract and a treaty are breached by the same act of the State.[388]

257. In this context, arbitral authorities have distilled two kinds of contract-related conduct which could constitute treaty breaches, or at least ingredients of treaty breaches by States.

258. ***First***, States may breach their obligations under investment treaties when their conduct in relation to the contract departs from that expected of an ordinary contracting party. This may occur, for instance, where the State has used its powers as sovereign to interfere with the contract, something which an ordinary contracting party would not be able to do. In *Impregilo v. Pakistan*, a tribunal rejected a jurisdictional objection to the effect that the claims asserted by the claimant were purely contractual claims. As that tribunal observed:

> *"the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of Contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty."*[389]

259. Indeed, there are several cases, such as *Biwater v. Tanzania*[390] and *Caratube v. Kazakhstan,*[391] where tribunals have found that a State's conduct relating to its contract – including

[388] **CL-120**, *Compania De Aguas Del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, dated 3 July 2002, at para. 95.

[389] *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, dated 22 April 2005, at paras. 260-261 (*reproduced in* **RL-81,** *Biwater Gauf (Tanzania) Ltd v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, dated 24 July 2008, at para. 458).

[390] **RL-81,** *Biwater Gauf (Tanzania) Ltd v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, dated 24 July 2008, at para. 460.

[391] **CL-97**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award, dated 27 September 2017, at para. 939.

when it breaches the contract – can qualify as a treaty breach where the State acts in its sovereign capacity.

260. The Tribunal notes in this respect that where a State relies on a contractual right or provision to support its conduct, it does not necessarily prevent a finding of a treaty breach. For instance, in *Vigitop v. Hungary,* in determining whether a termination of a resort-development concession contract amounted to expropriation, the tribunal found that the fact that Egypt had "purported to exercise a contractual right when terminating the Concession Contract does not exclude *per se* the possibility that this conduct at the same time amounted to an expropriation."[392]

261. ***Second***, States may also breach their obligations under investment treaties when they exercise their contractual rights in a manner that is pretextual or otherwise violative of their obligations under investment treaties. As an example, in *Hydro v. Albania,* the tribunal rejected an objection to the admissibility of claims that were allegedly "purely contractual claims," because the claimant had argued that the acts and omissions it impugned "form[ed] part of a complex concerted effort by the Albanian government to harm their investments."[393]

b) Application of the Relevant Test to the Facts of the Case

262. In applying this test, as the Tribunal is called upon to do here, the Tribunal must give weight to the fact that this distinction between contract and treaty claims plays a part in both the jurisdictional and merits analysis of treaty claims, including in this one. When this distinction is invoked as a jurisdictional objection, tribunals have applied a cautious approach and rightly so.[394]

263. For instance, in *Siemens v. Argentina,* Argentina argued that the claimant's claims were contractual and therefore the tribunal had no jurisdiction to consider them. The tribunal held that "the dispute as formulated by the [c]laimant is a dispute under the Treaty […] the [Tribunal] is not

[392] **RL-216**, *Vigitop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, dated 1 October 2014, at paras. 88, 313.

[393] **RL-160**, *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, dated 24 April 2019, at para. 591.

[394] **RL-79**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, dated 3 August 2004, at para. 180; **RL-78**, *Muhammet Çap & Bankrupt Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No. ARB/12/6, dated 4 May 2021; **RL-11**, *Mr. Kristian Almås and Mr Geir Almås v. The Republic of Poland*, PCA Case No. 2013-13, dated 27 June 2016; **RL-73**, *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No. ARB/11/28, dated 10 March 2014.

required to consider whether the claims under the Treaty made by Siemens are correct [...]. The Tribunal simply has to be satisfied that, if the Claimants' allegations would be proven correct, then the Tribunal has jurisdiction to consider them."[395]

264. Accordingly, for purposes of jurisdiction, the Tribunal need not satisfy itself that the Respondent's conduct in relation to the Concession Agreement *is* a breach of the BITs; it only needs to satisfy itself that – *as pleaded by the Claimants* – the Respondent's conduct *could* violate the BITs.

265. With that test in mind, the Tribunal notes the following:

a. On the Claimants' case, the Respondent breached its obligations under the BITs through conduct outside that expected of an ordinary contracting party. For instance, the Claimants base their claim on several irregularities associated with the conduct of the bailiff, who it suggests was acting at the behest of the Respondent leading up to the physical seizure of the Terminal.[396]

b. While the Claimants also impugn the Respondent's conduct relating to the contract, there are allegations that the Respondent exercised its rights under the Concession Agreement as a pretext, and (i) either as part of a larger design to favor [redacted];[397] or (ii) to pursue a conversion of the Durres Port into a marina and residential complex.[398]

266. In light of the above considerations, the Tribunal rejects the Respondent's objection that the Claimants' claims lie outside the jurisdiction of the Tribunal on account of being purely contractual claims incapable of constituting treaty claims.

[395] **RL-79**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, dated 3 August 2004, at para. 180.

[396] Cl. Mem., at paras. 181-82; Cl. Reply, at paras., *e.g.,* 572, 583; Cl. PHB, at paras. 31, 161, 163, 170.

[397] Cl. Mem., at paras. 6, 27, 197; Cl. Reply, at para. 69; Cl. PHB, at paras. 13, 15, 65, 95-6, 105.

[398] Cl. Reply, at para. 577.

C. *No Prima Facie Violation Objection*

1. Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

276. As discussed above, the Respondent argues that the Claimants have not established the *prima facie* violation of the BITs. On its argument, the Tribunal has no jurisdiction because the claims made are not capable of constituting a violation of the BITs.

277. While there are nuanced differences between the precise approach taken by tribunals in applying the *prima facie* violation standard for the purpose of establishing jurisdiction, there appears to be broad agreement in treaty awards on the following. The task of tribunals in examining such an objection is limited to determining whether the facts as pleaded are *capable* of

[410] Cl. Reply, at para. 599. *See also,* Cl. Rej., at para. 138; Cl. PHB at paras. 24-35, 57-85.
[411] Cl. Rej., at paras. 132-134.
[412] Cl. Rej., at para. 133.
[413] Cl. Rej., at paras. 135-136.

falling within the provisions of the treaty or constituting a treaty breach; not that they are *likely to* establish such a breach.[414] As the tribunal in *Pan American v. Argentina* held, the purpose of a tribunal's enquiry at this stage must be to determine "whether, in the way in which [the claim] is stated, it fits into the jurisdictional framework designed by the relevant arbitration clause."[415]

278. Accordingly, the Tribunal need not conduct an enquiry into the facts; at least not an extensive one. Rather, the Parties agree that, for the purpose of applying this test, the Tribunal is bound by the facts as alleged by the Claimants.[416] Here, as noted above, the Claimants have made a number of claims that are independent of the categorization of the Respondent's conduct as contractual claims under the Concession Agreement.[417] The fact that the Albanian courts have decided the contractual elements under the Concession Agreement does not – automatically and on a *prima facie* basis – preclude this Tribunal from finding the Respondent in breach of its treaty obligations.

279. In sum, for the reasons set out above, this objection is dismissed.

D. No Substantial Contribution Objection

1. Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

289. The Respondent argues that the Tribunal does not have jurisdiction *rationae materiae* because the Claimants have not made a qualifying investment under the ICSID Convention and the BITs.

290. Each of these instruments refers to, or defines, an "investment" in the following ways. The UK-Albania Treaty in Article 1(a) provides, in relevant part:

> *"'investment' means every kind of asset and in particular, though not exclusively, includes:*
>
> *a) movable and immovable property and any other property rights such as mortgages, liens or pledges;*
>
> *b) shares in and stock and debentures of a company and other form of participation in a company;*
>
> *c) claims to money or to any performance under contract having a financial value;*
>
> *d) intellectual property rights, goodwill, technical processes and know-how;*
>
> *e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*
>
> *A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement."*[432]

291. Similarly, the US-Albania BIT in Article 1(d) defines an investment to mean:

> *"(d) 'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by that*

[432] **CL-1**, UK-Albania BIT, at Article 1(a).

national or company, and includes investment consisting of taking the form of:

i. a company;

ii. shares, stock, partnership interests, and the other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company;

iii. contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;

iv. tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges;

v. intellectual property including:

a. copyrights and related rights,

b. patents,

c. rights in plant varieties,

d. industrial designs,

e. rights in semiconductor layout designs,

f. trade secrets, including know-how and confidential business information,

g. trade and services marks, and

h. trade names; and

vi. rights conferred pursuant to law, such as licenses and permits."[433]

[433] **CL-1**, US-Albania BIT, at Article 1(d).

292. The ICSID Convention in Article 25 does not contain an express definition of "investment" but provides that:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*

293. As discussed above, the Parties agree that a substantial contribution is a factor to be considered for the definition of a protected investment, but they disagree on the exact role this factor should play:

a. On the one hand, the Claimants, as discussed above, suggest that a substantial contribution is one of several criteria which an investment could possess but does not necessarily need to.[434] In support, the Claimants rely, among other decisions, on *Biwater Gauff v. Tanzania,* where the tribunal considered that "a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID."[435]

b. On the other hand, the Respondent views the existence of substantial contribution as a necessary condition for an investment. It further points to cases where tribunals have found that an investor who failed to pay for the shares acquired is considered to not to have made an investment.[436]

294. The Tribunal does not need to make a finding as to the necessity (or otherwise) of demonstrating a substantial contribution to prove that a qualifying investment was made, because

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[434] *See above,* at para. 286.

[435] **RL-81**, *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, dated 24 July 2008, at para. 316.

[436] Resp. C-Mem., at para. 188; **RL-13**, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB.09/8, Award, dated 17 October 2013, **RL-32**, *Quiborox and Non-Metallic Minerals v. Bolivia*, ICSID Case No. ARB/06/2, Award, dated 27 September 2012; **RL-102**, *Capital Financial Holdings Luxembourg SA v. Republique du Cameroun*, ICSID Case No. ARB/15/18, Award, dated 22 June 2017.

it is, in any case, satisfied that a substantial contribution has in fact been made by each of the Claimants and any such (alleged) requirement to show substantial contribution has been met in this case. The Tribunal will address the contributions of the Claimants DKS/DCT, the Claimant MCTC and the Claimant Altberg in turn below.

a) Contribution of DKS/DCT

295. There is broadly no dispute between the Parties that DCT invested a minimum of USD 8 million in the Terminal.[437] [redacted]

296. The Respondent's argument in this regard is not that DCT and DKS failed to make an investment, but that they "removed whatever they had brought to the project" and the majority of the assets that were in-kind were in cranes, which were under lien and have subsequently been sold at an auction.

297. The Respondent's argument is therefore premised on the position that where an investor, after making an investment, removes assets it purchased as part of its investment, it cannot be considered as having made a contribution.[440] The Tribunal does not agree with this position in the present circumstances. The Tribunal's task is to ascertain whether a qualifying investment was "made," and thus whether DKS and DCT "made" a contribution at the time of their investment. It is irrelevant that *after* the investment was made, *after* they had operated the Terminal for over six years, and *after* the disputed measures were taken, the Claimants decided to sell their investments in various equipment. Equally, it is irrelevant that some of the physical assets towards which the

[437] Cl. Reply, at paras. 607-610 (referring to **C-42**, Board Resolutions, dated 18 and 19 August 2016, and SPA between MCTC and Altberg, dated 23 August 2016; **C-36**, DPA's Minutes of the Meeting, dated 23 May 2018; **C-26**, Final Report on DCT from PIU, dated 22 July 2019); Resp. C-Mem., at para. 221.

[redacted]

[440] Resp. C-Mem., at para. 194; **RL-104**, *Tradex Hellas SA v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, dated 29 April 1999; **RL-105**, *Société Civile Immobilière de Gaëta v Republic of Guinea*, ICSID Case No. ARB/12/36, dated 21 December 2015.

Claimants made a contribution were *later*[441] placed under lien. This does not change the fact that a contribution was made at the time relevant to assess the existence of an investment, either under the ICSID Convention or the US-Albania BIT.

298. In light of the above, the Tribunal is satisfied that the Claimants DKS and DCT made substantial contributions which can be taken into account for the purpose of assessing the existence of a protected investment under the ICSID Convention and the US-Albania BIT.

b) Contribution of MCTC

299. The Claimants argue that MCTC made a cash transfer of approximately USD 9 million to [redacted] to purchase the shares in DKS.[442] The Respondent questions several aspects of this transaction and states that (i) the shares allegedly stayed with the seller, [redacted] for more than a year despite the payment and were transferred only subsequently and that (ii) there is no proof that MCTC made the contribution in its own name.[443]

300. The Tribunal must proceed on the basis of the evidence before it to determine whether a contribution was made. That evidence includes a [redacted] Whether the actual transfer of the DKS shares from [redacted] to MCTC was delayed, and why, is irrelevant in this context, since the Tribunal's inquiry is whether a substantial contribution (i.e., a payment) was made by MCTC. Once the existence of such a contribution – as an objective fact – has been confirmed, the Tribunal need not go any further. Finally, the Tribunal has not seen any cogent evidence for the Respondent's allegation that MCTC did not make the above-referred payment in its own name. [redacted]

[441] Resp. C-Mem., at para. 195 ("*After* the termination of the Concession Agreement, they registered a lien […].") (emphasis added).

[442] Cl. Mem., at para. 15; **C-41**, SPA between [redacted] and MCTC, dated 23 December 2014.

[443] Resp. C-Mem., at paras. 191-193.

[redacted]

301. In light of the above, the Tribunal is satisfied that the Claimant MCTC made a substantial contribution which can be taken into account for the purpose of assessing the existence of a protected investment under the ICSID Convention and the US-Albania BIT.

c) Contribution of Altberg

302. As discussed above, the Claimants argue that Altberg made various payments in relation to the purchase of its shares in DKS.[446] The Respondent does not dispute this but argues instead that the acquisition was not made in good faith.[447] However, the question of whether a contribution was *made*, is independent of whether it was made in good faith. For present purposes, the Tribunal is satisfied that the Claimant Altberg made a substantial contribution which can be taken into account for the purpose of assessing the existence of a protected investment under the ICSID Convention and the UK-Albania BIT. The Tribunal addresses the Respondent's objection relating to the alleged violation of good faith in the making of Altberg's investment in Section V.G below.

* * *

303. In sum, for the reasons set out above, the Tribunal is satisfied that the Claimants made sufficient contributions which can be taken into account for the purpose of assessing the existence of a protected investment under the ICSID Convention and the BITs. Accordingly, the Tribunal finds that the definitions of investment under the ICSID Convention and the BITs have been satisfied by the Claimants and that this objection is dismissed.

E. Objection that Claimants MCTC, DCT and DKS Cannot Bring a Claim as Albania Denied Benefits of US-Albania BIT

1. Respondent's Position

[redacted]

[446] **C-234**, SWIFT Receipt from Altberg to MCTC, dated 21 September 2016; **C-238**, SWIFT Receipt from Altberg to MCTC, dated 28 December 2016.

[447] Resp. C-Mem., at paras. 211-213.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

315. As discussed above, the Respondent argues that it was entitled to invoke, and did validly invoke, the denial of benefits to MCTC under the US-Albania BIT on 10 November 2021.

316. The Tribunal begins by recalling the denial of benefits provision under the US-Albania BIT. Article XII(b) of the US-Albania BIT provides:

> *"Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and*
>
> *(a) the denying Party does not maintain normal economic relations with the third country; or*
>
> *(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized."*[472]

317. Thus, to be able to deny benefits of the US-Albania BIT to MCTC, the Respondent must prove that MCTC (i) was owned or controlled by a national of a third country; and (ii) has no substantial business activities in the United States (i.e. in the territory of the Party under whose laws it is constituted or organized).

318. As to the first requirement, the Tribunal notes that there is unchallenged evidence, [redacted] that at least between June and July 2015, [redacted], a Turkish national, was the sole shareholder and director of MCTC.[473] The Respondent, rightly, points out that there is no evidence before the Tribunal to conclude that the [redacted] did not continue as MCTC's sole shareholder and director since June-July 2015, nor has the Claimant asserted otherwise.[474] The Respondent further argues that "there is ample reason to believe" that "MCTC is owned and controlled by [redacted]."[475] The Claimants also confirm expressly in their Post-Hearing Brief that [redacted] is the "ultimate foreign beneficiary," of the

[472] **CL-2,** US-Albania BIT, at Article XII(b).

[473] Resp. C-Mem., at para. 204.

[474] Resp. C-Mem., at para. 204.

[475] Resp. Rej., at para. 228.

Claimants, including MCTC.[476] While the Tribunal notes that the Respondent's argument appears to be that both [redacted] and [redacted] own and control MCTC, or did so at all relevant times, the Tribunal need not settle this factual controversy. Both [redacted] and [redacted] are Turkish nationals.[477] The Claimants have neither denied that MCTC is under Turkish control and ownership, nor have they identified an alternative source of control.

319. Since Turkey is not a party to the US-Albania BIT, it qualifies as a "third country" under Article XII of the US-Albania BIT. On this basis, the first condition for a denial of benefits – that MCTC be under the control or ownership of nationals of a "third country"– is met here.

320. The Tribunal now discusses whether the second requirement, i.e., the absence of substantial business activities of MCTC in the United States, is satisfied (**Section a)**), and if so, whether the Respondent exercised in timely manner its right to deny benefits to MCTC (**Section b)**). The Tribunal then explains the consequences of its findings with regard to the Claimants DKS and DCT (**Section c)**).

a) Substantial Business Activities of MCTC

321. To determine whether MCTC had substantial business activities in the United States at the relevant time, the Tribunal starts first by assessing the evidence on record relating to MCTC's business activities (**Section (1)**). Then the Tribunal discusses the date at which the existence or otherwise of MCTC's substantial business activities in the United States is to be assessed and provides its conclusion regarding the substantiality of MCTC's business activities as of that date (**Section (2)**).

[476] Resp. PHB, at para. 198 ("In fact, as pleaded by the Respondent itself, the investment always had the ***same ultimate foreign beneficiary***, which demonstrates that the investment was under BIT protection") (referring to Tr. Day 1, (Rubins KC), 102:9-15: "And that is particularly true in the present case because the ultimate beneficial owner of all this, so DKS, [redacted], MCTC and Altberg, ***is actually*** [redacted] ***himself. That's not been denied by the Claimants***, but where the Claimants and their ultimate beneficial owner make changes to the shareholding among their companies […].") (emphasis added).

[477] The Respondent has repeatedly referred to them as such, and the Claimants have not objected to such characterization, instead noting that the Claimants all had the "same ultimate foreign beneficiary," Resp. Rej., at para. 228; Resp. C-Mem., at para. 204.

(1) Evidence of MCTC's Business Activities

322. The Tribunal canvasses below the evidence regarding MCTC's alleged business activities:

[redacted]

323. As discussed above, the Parties make several arguments in relation to the alleged absence of MCTC's business activities.

[redacted]

[redacted]

[redacted]

324. Based on the above, the Tribunal finds that:

a. The evidence before the Tribunal indicates that MCTC undertook some business activities between 27 August 2010 and 7 October 2013. The Tribunal notes, however, that there is no evidence on record of MCTC's business activities at any point after 7 October 2013, and therefore no evidence of MCTC's business activities after its investment in DKS on 29 December 2014.

b. There is also no evidence that MCTC owned any assets in the United States at the time when (i) the Claimants sent their Notice of Dispute (11 May 2020) or filed the Request (7 September 2020); (ii) ICSID registered the dispute (23 September 2020); or (iii) the Respondent first invoked the denial of benefits clause (i.e., at the time of its Request for Bifurcation (10 November 2021)).

325. The Tribunal must now determine if the evidence of MCTC's activities is sufficient to indicate that MCTC had "substantial business activities" in the United States for the purpose of Article XII(b) of the US-Albania BIT.

(2) Date of Assessment of Substantial Business Activities

326. The Parties are in disagreement as to which moment in time is relevant to assess the alleged non-existence of substantial business activities for the purpose of Article XII(b) of the US-Albania BIT:

a. The Respondent takes the position that the date of the filing of the Notice of Dispute is the relevant date for assessment of the non-existence of substantial business activities.[483]

b. The Claimants do not provide a specific date that they consider relevant for the date

[redacted]

[483] The Respondent argues that "[t]he Claimants do not mention any specific date. However, the Respondent maintains that ***the date of the Notice of Dispute is the relevant date***, but the Claimants appear to disagree with that" (emphasis added).

of assessment but argue that tribunals have "analyzed business activities more broadly with respect to the relevant date."[484]

327. The Tribunal must carry out the analysis of Article XII(b) of the US-Albania BIT, including its analysis of what the date of assessment of the existence of substantial business activities should be, based on the principles of interpretation of the Vienna Convention on the Law of Treaties, 1969 ("**VCLT**").[485] The Tribunal therefore starts with the text of the treaty (**Section (a)**), before identifying its object and purpose and in interpreting in their light, Article XII of the US-Albania BIT (**Section (b)**). The Tribunal then considers existing authorities on the question of the date at which substantial business activity requirements featuring in various treaties is to be applied (**Section (c)**).

(a) Text of US-Albania BIT

328. As a starting point, the Tribunal notes that there is little by way of guidance on the date of assessment in the text of Article XII of the US-Albania BIT. The Tribunal does note, however, that this provision speaks of the absence of the substantial business activities in the present tense: it requires that the investor against whom denial of benefits can be invoked "***has*** no substantial business in the territory of the Party under whose laws it is constituted or organized."

(b) Object and Purpose of the Treaty

329. The Preamble of the US-Albania BIT states, *inter alia,* the following in relation to its object and purpose:

a. the State Parties desired, through the US-Albania BIT, to "promote greater economic cooperation between them;"

b. an "agreement upon the treatment to be accorded [to] such investment will stimulate the flow of private capital and the economic development of the Parties;" and

c. a "stable framework for investments will maximize effective utilization of

[484] Cl. Reply, at para. 659, Resp. Rejoinder, at fn. 878.

[485] **CL-60,** Vienna Convention on the Law of Treaties, dated 23 May 1969.

economic resources and improve living standards."[486]

330. The Letter of Submittal, by which the US Department of State submitted the treaty for executive approval of the President of the United States reads:

> *"Article XII(b) permits each Party to deny the benefits of the Treaty to a company of the other Party if the company is owned or controlled by non-Party nationals and if the company has no substantial business activities in the Party where it is established.*
>
> *Thus, the United States could deny benefits to a company which* ***is*** *a subsidiary of a shell company organized under the laws of the Republic of Albania if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of the Republic of Albania that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with, the Republic of Albania."*[487]

331. The Letter of Submittal thus does not identify an object or purpose of the treaty that is relevant to this analysis but notes in respect of the denial of benefit provision that its aim is to avoid investments by "shell companies" that have no "real and continuous link" with the country of their incorporation.

332. While the Letter of Submittal does not specify – at least clearly – when the substantial business activities requirement must be assessed, the Tribunal notes that three aspects are particularly worthy of consideration.

333. ***First***, the Letter of Submittal comports with the text of the US-Albania BIT in that it also uses the present tense when referring to the purpose that lack of substantial business activities provision serves: "the company which ***is*** a subsidiary," "maintain***s*** its central administration," "***has*** a real and continuous link."

334. ***Second,*** the Letter of Submittal indicates that the policy objective of Article XII is to allow the State to respond to concerns about the use of the US-Albania BIT by third State national-

[486] **CL-2**, Letter of Submittal, US-Albania BIT, at Article XII.
[487] **CL-2**, Letter of Submittal, US-Albania BIT, at Article XII.

controlled entities that either do not have substantial business or are controlled by nationals with whose State the host State has no diplomatic relations.

335. ***Third,*** the reference in the Letter of Submittal to the requirement that a State "***has*** *a* real and continuous link" to the home State of the investor, appears to indicate that when assessing the existence or otherwise of "substantial business requirements," the enquiry may not have to be restricted to whether on that date there was substantial business activity; but rather that as on the relevant date of assessment (whatever that might be), the entity in question "has a real and continuous link." A "continuous" link requirement, it appears to the Tribunal, necessarily requires a backward-looking assessment of the past activities of the entity.

336. While the Tribunal takes guidance from the above analysis of the object and purpose of the US-Albania BIT, it is not convinced that these indications are of sufficient clarity to allow the Tribunal to rule definitively on the date at which the denial of benefits is required to be assessed. However, the Tribunal notes that while the above analysis does not sufficiently clarify *when* the assessment is to be carried out, it does clarify to some degree *what* that assessment entails: an analysis of the existence or otherwise of a "real and continuous" link with the home State of the investor.

(c) Authorities on the Date of Assessment of Substantial Business Activities

337. The Tribunal notes that, in general, there is a paucity of authorities discussing the date for assessment of the existence or otherwise of the substantial business activities of an entity in the home States.

a. In *GCM v. Colombia,* the tribunal discussed three possible dates as important for the assessment of the existence of substantial business activities: the date at which the request for arbitration was issued, the date at which the denial of benefits clause was invoked, and the date at which ICSID registered the claim.[488] While the tribunal did not decide which date among these three was the relevant date for assessment, it did find that these three dates were "possibly relevant for the analysis," and that substantial business

[488] **RL-114**, *GCM Mining Corp (formerly Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, dated 23 November 2020, at para. 139.

activities existed on all those dates.[489]

b. In *Big Sky v. Kazakhstan,* a case on which the Claimants rely,[490] the question of the relevant date of assessment of substantial business activities was discussed in more detail. The tribunal held:

> *"For this purpose, it does not logically follow that the only relevant date for examining such activities would be the date of a request for arbitration. It is quite a common characteristic of investment treaty arbitrations that by the time a request for arbitration is filed, a claimant investor is fairly or completely inactive aside from the arbitration itself, in large part because of the negative business effects it attributes to a host State. Because of this, if the only relevant date was the start of an arbitration, then, in theory, a respondent State could assure itself of protection under the denial of benefits clause as long as it took such significant action against a claimant-investor as to completely rid it of any current business activities (e.g., a complete and total expropriation). This simply cannot be the proper analysis under such a clause, which is why tribunals have analyzed business activities more broadly with respect to the relevant date."*[491]

c. The Respondent criticizes this decision and argues that it is unpersuasive because it is unclear how the host State that invokes the denial benefits clause can cause the expropriation or stoppage of business of the foreign investor in the home State.[492]

d. The Respondent relies on the decision in *Ulysseas v. Ecuador.*[493] There the tribunal found that "the date on which the conditions for a valid and effective denial of advantages are to be met is the date of the Notice of Arbitration […] this being the date on which the Claimant has claimed the BIT's advantages that Respondent intends to deny."[494] However,

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[489] **RL-114**, *GCM Mining Corp (formerly Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, dated 23 November 2020, at para. 139.

[490] **CL-127**, *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award; Cl. Reply, at paras. 658-660.

[491] **CL-127**, *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, dated 24 November 2021, at para. 276.

[492] Resp. Rej., at para. 233.

[493] Resp. C-Mem., at paras. 202-204.

[494] **RL-45***, Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Interim Award, dated 28 September 2010, at para. 174 (with reference to a prior procedural order which is not publicly available).

in that case, the tribunal did not need to decide on the question of the existence, or otherwise, of substantial business activities, because the respondent was unable to demonstrate that the entity in question was controlled by nationals of a third State (which was a requirement under the applicable treaty).

e. The Respondent also relies on the decision in *Guararachi v. Bolivia.*[495] There the tribunal found that the "denial can and usually will be used whenever the investor decides to invoke one of the benefits of the BIT. It will be on that occasion that respondent State will analyze whether the objective conditions for denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defence."[496] However, this case did not decide that the date at which the conditions must be met is the date of notice of arbitration. The quoted remark is in relation to the date on which a respondent can *invoke* the denial of benefits provision, not the date on which the conditions must be met.

f. In *Littop v. Ukraine* (referred to by the Respondent, but in another context[497]) the tribunal found that the claimant did not have substantial business activities in Cyprus. While the tribunal did not address the relevant date for assessment in detail, it noted that even though the claimants had provided evidence of certain agreements entered into between the claimants and some third parties, "those agreements were concluded only in 2010 which is 3 years *after* claimants first acquired the Ukrnafta shares."[498] The tribunal's analysis focused significantly on the period immediately after the acquisition of shares that constituted the claimant's investment in Ukraine.[499]

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[495] Resp. C-Mem., at paras. 202-208.

[496] **RL-44**, *Guaracachi America Inc and Rurelec Plc v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, dated 31 January 2014, at para. 378.

[497] Resp. C-Mem., at paras. 197, 205.

[498] **RL-43**, *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, dated 4 February 2021, at para. 630 (emphasis in the original).

[499] **RL-43**, *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, dated 4 February 2021, at para. 634.

338. Based on the above, the Tribunal notes that there appears to be no reported decision concerning a situation where the entity in question had business activities prior to making the investment but had no activities following the date of investment.

339. However, based on the above-canvassed authorities, relevant dates for the assessment of substantial business activities may include:

a. the date at which the investment was made and/or the period immediately following (see *Littop*);

b. a date immediately prior to alleged measures of the host State (see *Big Sky*);

c. the date at which the request for arbitration was issued (see *GCM, Ulysseas*);

d. the date at which ICSID registered the claim (see *GCM*); and/or

e. the date at which the denial of benefits was invoked (see *GCM, Guararachi*)

340. The Tribunal is mindful that these cases were rendered under differently-worded treaties and thus do not necessarily apply – with complete congruence – to a case under Article XII of the US-Albania BIT. However, the above analysis gives the Tribunal comfort that these dates are typically considered to be possibly relevant for the assessment of the non-existence of the substantial business activities under denial of benefit clauses. In the present case, the Tribunal need not determine specifically which one or more of these dates must be chosen under Article XII of the US-Albania BIT.

341. That is because it is satisfied that the date(s) of assessment of the existence or otherwise of the substantial business activities requirements must lie within this range of dates. And, as stated above, the latest evidence on record concerning MCTC's business activities dates from 7 October 2013, i.e., about 14 months *before* MCTC's investment.[500] There is therefore no evidence that, at *any* of the dates identified above, MCTC had business activities, substantial or otherwise, in the

[500] *See above,* at para. 324.

United States.[501] Accordingly, the Tribunal is satisfied that MCTC had no business activities at any possible relevant date for the purposes of Article XII(b) of the US-Albania BIT.

342. In sum, for the reasons set out above, the Tribunal finds that both conditions required to permit the Respondent to deny benefits under Article XII(b) of the US-Albania BIT are met with respect to MCTC. Whether it validly denied these benefits is addressed in the next section.

(3) Timeliness of Respondent's Denial of Benefits

343. The final point of disagreement between the Parties relates to the timeliness of the Respondent's invocation of the denial of benefits clause. Having decided that the Respondent was entitled to deny the benefits of the US-Albania BIT to MCTC, the Tribunal must now determine if it validly exercised that entitlement.

344. The Respondent sought to invoke the denial of benefits provision under the US-Albania BIT in respect of MCTC on 10 November 2021, along with its application for bifurcation of the proceedings.[502] The Claimants argue, referring in particular to *NextEra v Spain*, that States are under an obligation to exercise the denial of benefits as soon as possible; and the Respondent failed in its obligation to do so in a timely manner.[503] They assert that the Respondent was on notice of MCTC's claims under the BIT from 4 June 2015.[504] The Respondent denies that its invocation of the denial of benefits was untimely.[505]

345. The Tribunal begins with the uncontroversial proposition that pursuant to Article 31(1) of the VCLT, Article XIII of the US-Albania BIT is to be interpreted and applied in accordance with the "ordinary meaning" of its terms, in the "context" in which they occur and in light of the Treaty's "object and purpose."[506]

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[501] Given this finding, the Tribunal need not discuss the Parties' rival contentions on whether MCTC's business activities before 7 October 2013 qualify as "substantial" or were located in the United States. Even if they were, it would not affect the Tribunal's conclusion given that they pre-date any of the relevant assessment dates.

[502] Resp. Req. Bif., at para. 41.

[503] *See above,* at para. 312.

[504] *See above*, at para. 312

[505] *See above*, at para. 308.

[506] **CL-60**, VCLT at Article 31(1) that "[a] treaty shall 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."

346. ***First***, starting with the textual analysis, the Tribunal notes that neither Article XIII nor any other provisions of the US-Albania BIT set out a time limit for invoking the denial of benefits. As detailed above, Article XIII of the US-Albania BIT simply provides that "[e]ach Party reserves the right to deny to a company of the other Party the benefits of this Treaty" under certain conditions, but is silent about the timeframe in which such right must be exercised.[507] The conditions contained in Article XIII of the US-Albania BIT are non-temporal in nature.[508]

347. ***Second***, concerning the context, object and purpose, as evident, denial of benefits provisions typically allow States to deny the protection of a treaty to investors who would otherwise be eligible for protection. While there is significant variance in the wording of denial of benefits clauses featured in treaty provisions, the overall structure, and evident purpose, is often similar. Several, if not most, denial of benefits provisions only affect entities that are owned or controlled by nationals of third States (i.e., not the States that are parties to the investment treaty in question). And even then, the provisions apply only to a smaller sub-set of such entities: those that do not have a substantial business connection to their place of incorporation, or those that are controlled by nationals of those States with whom the contracting State parties either do not maintain diplomatic or economic relations. Article XII of the US-Albania BIT, as discussed above, proceeds in the same way and is oriented towards the same purpose, since it premises the exercise of any denial of benefit on the requirements that (i) nationals of a third country own or control the entity in question; and (ii) said entity has no substantial business activities in the territory under whose laws it is constituted or organized (or said third country does not maintain normal economic relations with the Contracting State).

348. The above discussion concerning the purpose of provisions such as Article XII of the US-Albania BIT, does not – at least, dispositively – answer the query as to the time by which the Respondent was required to deny the benefits. However, it does provide the necessary context for an analysis of that question. It indicates that States should be allowed a practical opportunity to assess whether or not in a given case they are entitled to exercise their right to deny benefits (and,

[507] **CL-2**, US-Albania BIT, at Article XII(b).

[508] *See above,* at para. 317.

if so, whether they wish to exercise them). A denial of benefits provision is of little use if States are not – in a pragmatic sense – allowed to invoke it where the conditions are met.

349. To invoke a denial of benefits provision, the State must be aware, or at least in a position to be aware, that there is an investor seeking or likely to seek protection under the treaty that contains a denial of benefits clause. Only then is it possible for a State to assess whether said investor may be owned or controlled by nationals of third States, and whether other conditions such as the lack of substantial business activities in the territory of its home State could be met. As a practical matter, the State in question may learn of one or more of these facts before a dispute is commenced, but it is equally likely, if not more likely, that the State will not be aware of these facts until the proceedings are commenced.

350. It is not necessary – in the Tribunal's opinion – to frame the debate on the time for invocation of the denial of benefits in terms of invocations being "retroactive" or "prospective."[509] The better view, and one that more accurately describes the mechanism of denial of benefits provisions, is that an offer to arbitrate contained in a treaty may be *conditional* upon a State's right to deny the benefits under the provisions of that treaty where the applicable conditions are met. When an investor commences arbitration, by accepting an offer of arbitration contained in a treaty, it accepts the offer with the *condition* that – where the requirements are met – the State may exercise its right to deny benefits.

351. Investors are aware – in advance – of the possibility of a state denying benefits under certain conditions. States, on the other hand, must be in a position to gather information about investors and the operations of those who control them, to be able to deny them benefits. Tribunals have acknowledged – as a practical matter – that it is unreasonable to expect a State to learn of all the facts required to decide whether benefits can be denied to an investor unless the State's attention is drawn to those facts. As the *GCM v. Colombia* tribunal has held, it would be an

[509] **RL-114**, *GCM Mining Corp (formerly Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, dated 23 November 2020, at para. 130; **RL-23,** *Liman Caspian Oil BV and NCL Dutch Investment BV v. The Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Excerpts of Award, dated 22 June 2010, at para. 225 ("With regard to the question of whether the right under Article 17(1) of the ECT can only be exercised prospectively, the Tribunal considers that the above-mentioned notification requirement – on which the Parties agree – can only lead to the conclusion that the notification has ***prospective but no retroactive effect***") (emphasis added).

impossible burden for the State to be required to put in place a dynamic system that monitors who the investors are, which entities and nationals own them, and examine their activities in another State in order to determine whether a denial of benefits objection can be made prior to commencement of a claim.[510]

352. Considering the logistical burdens described above, and as a general matter, the Tribunal is hesitant to imply a time limit for invoking a denial of benefits that is not found in the BIT. In interpreting a provision identical to Article XIII of the US-Albania BIT, the tribunal in *GCM* noted that "it would have been easy for the Contracting Parties to specify a deadline by which such choice must be made […] the fact that they did not do must be given considerable weight."[511] On this basis it found that tribunals cannot "read into such texts additional requirements (either on States or on investors) that the State Parties have not chosen to impose."[512] The Tribunal agrees with that approach; and will not readily read in a temporal limitation on the right to exercise a denial of benefit.

353. In this regard, the Tribunal finds it relevant to discuss the decision in *NextEra v. Spain* referred to by the Claimants.[513] In that case the claimant notified Spain of possible treaty claims under the ECT, three years before it commenced the claim. Spain was aware that the relevant conditions for the invocation of the denial of benefits provision under Article 17 of the ECT, such as control by third State nationals, were met in respect of the claimant. Despite this knowledge, Spanish authorities and senior members of the government provided certain assurances to the claimant, without indicating their intention to invoke the denial of benefits provision under the

[510] **RL-114**, *GCM Mining Corp (formerly Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, dated 23 November 2020, at para. 129 ("In the Tribunal's view, there is little need to enter into this debate. States have a choice whether to incorporate in their treaties express limits on when any denial of benefits must be invoked. While it may be interesting to debate whether they should do so – which would involve balancing a number of considerations – ultimately that is a policy question that is not for tribunals to resolve.").

[511] **RL-114**, *GCM Mining Corp (formerly Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, dated 23 November 2020, at para. 127.

[512] **RL-114**, *GCM Mining Corp (formerly Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, dated 23 November 2020, at para. 127.

[513] **RL-155**, *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, dated 12 March 2019.

ECT. It is only in these circumstances that the tribunal found that Spain had lost the right to rely on the denial of benefits provision.[514]

354. None of the factual indicia on which the *NextEra* tribunal relied are present here. In the Tribunal's view, MCTC did not indicate its intention to rely on the US-Albania BIT before filing its Request in May 2020. While there is correspondence on which the Claimants rely to the effect that [redacted] had indeed referred to treaty protection as early as 2014,[515] that reference was made at a time when MCTC was not an investor in DKS and DCT. It was not – and possibly could not – have been made under the US-Albania BIT because it is unclear if [redacted] or [redacted] would be entitled to its protection. The letter specifically refers to a "Reciprocal Investment Protection Agreement signed in 1992,"[516] which cannot be a reference to the US-Albania BIT.

355. At the same time, the Tribunal acknowledges that jurisdictional objections under the ICSID Convention can ordinarily be raised until the filing of the counter-memorial. Pursuant to Rule 41 of the Arbitration Rules:

> *"(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time."*[517]

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[514] **RL-155**, *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, dated 12 March 2019 at para. 264 ("It was clear to the government that it was dealing with an American corporation, but it was also made clear that this investment was operated through a Dutch company. The details of Claimants' ownership were available in public registers and Respondent must be taken to be aware of the status of Claimants. ***The contacts between the NextEra Energy group and the Spanish government both written and in person were extensive, up to and including the prime ministerial level. Encouragement and reassurances were provided to NextEra*** without any suggestion that Spain would invoke Article 17(1) of the ECT and deny the benefits of the treaty to Claimants.") (emphasis added).

[515] **R-89**, Letter from [redacted] to the Ministry, dated 14 July 2014.

[516] **R-89**, Letter from [redacted] to the Ministry, dated 14 July 2014, at p. 3.

[517] Arbitration Rules (2006), at Rule 41(1).

356. The temporal limitation in Rule 41 of the ICSID Rules is met here, since the Respondent made its objections on 10 November 2021, i.e., well before filing its Counter-Memorial on 6 June 2022.

357. In sum, for the reasons set out above, the Tribunal finds that the Respondent validly – and in a timely manner – exercised its right to deny benefits to MCTC pursuant to Article XII of the US-Albania BIT. The Tribunal therefore finds that it lacks jurisdiction over the Claimant MCTC.

b) Consequences of the Tribunal's Findings for DCT/DKS

358. As noted above, the Respondent argues that if MCTC was validly denied benefits of the US-Albania BIT, such denial would also deprive DKS and DCT of their standing to make claims before this Tribunal.[518] The Respondent argues that DKS and DCT lose the status of being a "covered investment" – which, as will be discussed below in addressing the last of the Respondent's jurisdictional objections, is a necessary condition for them to claim standing – if MCTC is denied benefits under the US-Albania BIT. In particular, the Respondent argues that – upon the successful invocation of the denial of benefits clause against it – "MCTC cannot be considered a US national under" the US-Albania BIT.[519]

359. The Tribunal does not follow this argument. The Respondent presents no authority for its submission that once an entity is denied the benefits of a treaty, it ceases to be a "national" of a State under that treaty. In the Tribunal's view such an interpretation finds no support in the text of the US-Albania BIT or in arbitral authorities relating to denial of benefits provisions.

360. The Tribunal notes instead that Article XII(b) of the US-Albania BIT may only be applied against "a company of the other Party." Article 1(b) of the US-Albania BIT defines the term "a company of a Party" and sets out only one objective requirement for an entity to qualify under it, i.e., that the "company [is] constituted or organised under the laws of that Party." MCTC fulfils this requirement since it is incorporated in the United States. It fulfilled that requirement at the date of its incorporation and continues to do so today.[520] There is nothing in the US-Albania BIT

[518] Resp. C-Mem., at para. 201.

[519] Resp. C-Mem., at para. 210.

[520] The Tribunal notes that MCTC was stricken – on two occasions - from the Delaware corporate register between 1

that makes qualification as a "company of a Party" contingent on whether or not benefits of the BIT have been denied to it.

361. In any event, the Tribunal notes that Article XII of the US-Albania BIT is framed to provide *investor*-specific denial of benefits and does not permit the Respondent to deny benefits to *investments.* Without implying that the approach discussed in the foregoing paragraphs would necessarily differ if the US-Albania BIT permitted the Respondent to deny benefits to investments, the Tribunal notes that in contrast to Article XII of the US-Albania BIT provisions such as Article 17 of the ECT provide both *investor*-specific denials (under Article 17(1)) and *investment*-specific denials (Article 17(2)).

362. Overall, the Tribunal notes that DKS and DCT have claimed independent standing to bring claims in this arbitration, and the basis for their standing should be examined independently of MCTC – as the Tribunal has done below in respect of them in Sections V.G and V.H below.

F. Objection that Claimant MCTC Lacks Standing

1. Respondent's Position

[redacted]

March 2014 and 26 August 2014 and then between 1 March 2017 and March 2020. **R-29**, State of Delaware - Certificate of Incorporation of Metal Commodities Foreign Trade Corp., dated 9 November 2009.

[redacted]

[redacted]

[redacted]

[redacted]

2. Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

372. In deciding that the Respondent validly invoked the denial of benefits clause in respect of MCTC, the Tribunal has found above that it does not have jurisdiction over MCTC's claims in this arbitration. Accordingly, it is not necessary for the Tribunal to make a finding in respect of this objection to MCTC's standing raised by the Respondent.

G. Objection that Claimant Altberg Violated International Principles of Good Faith in the Making of its Investment

1. Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

383. In challenging the Tribunal's jurisdiction over the Claimant Altberg as a matter of good faith, the Respondent's argument is two-fold. It argues that Altberg:

a. committed an abuse of rights in accessing treaty jurisdiction by acquiring a stake in DKS in 2016 at the time when the current dispute was already foreseeable;[559] and

b. is disentitled from making claims because its investment was made in an attempt to evade creditors, and thus made in violation of international principle of good faith, and therefore was "sham transaction" between entities controlled by [redacted].[560]

384. While both parts of the argument relate to an alleged breach of an overarching obligation of good faith, the Tribunal considers it useful to address them separately.

a) Abuse of Rights

385. As several international tribunals have recognized, where an investor acquires an investment when a dispute is foreseeable and does so in order to secure itself treaty access, the tribunal may, under the abuse of rights doctrine, deny jurisdiction over its claims.[561] Accordingly, for the Respondent to succeed on this objection, it must demonstrate that Altberg (i) acquired its investment at a time when the present dispute was sufficiently foreseeable (the Tribunal discusses the precise standard below); and (ii) made the investment in order to secure for itself treaty access otherwise unavailable to it. The Tribunal discusses these requirements in turn.

386. ***First***, concerning the foreseeability requirements, tribunals have proposed various formulations for the standard of knowledge a claimant must have at the time of making the investment for a dispute to be "foreseeable." The Parties disagree as to that standard.[562] Relying

[559] Resp. C-Mem., at paras. 217-220; Resp. Rej., at paras. 237-245.

[560] Resp. C-Mem., at paras. 217-220; Resp. Rej., at paras. 248-250.

[561] **RL-46**, *Philip Morris Asia Ltd v. The Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, dated 17 December 2015, at para. 554; **RL-103**, *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No ARB/08/13, Award, dated 16 July 2012, at paras. 402-403; **RL-116**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, dated 1 June 2012, at paras. 2.99-2.100.

[562] Resp. C-Mem., at paras. 214-218; Cl. Reply, at para. 546.

on *Philipp Morris v. Australia,* the Respondent argues that a dispute is foreseeable when there is a "reasonable prospect that a measure which may give rise to a treaty claim will materialize."[563] Relying on *Pac Rim v. El Salvador,* the Claimant argues that a dispute is only foreseeable when there is a "very high possibility" of it arising.[564] Without attempting to settle this controversy, the Tribunal notes that while these articulations of what makes a dispute foreseeable provide helpful guidance, this is a question sensitive to the facts of every case. Whether a dispute is foreseeable or not depends on several factors, including the nature of the dispute and the entity against whom an objection of this nature is being assessed.

387. In this case, it is common ground between the Parties that Altberg became an indirect investor in DKS and DCT in August 2016.[565] It is also uncontroversial that the Ministry had already made the Termination Application seeking judicial termination of the Concession Agreement on 3 April 2015, and it was clear by then that the parties to the Concession Agreement were in dispute over their respective rights and obligations thereunder.[566] Moreover, as far back as July 2014, [redacted] had referenced various legal options against the Respondent and noted that the fact that the investments in DCT and DKS had treaty protection.[567] Accordingly, the Tribunal finds that, on any view and under either of the standards proffered by the Parties, a dispute in respect of the Concession Agreement was foreseeable to Altberg in 2016 at the latest.

388. The Tribunal is not convinced by the Claimants' argument that the majority of the measures it now complains of are measures it could not have foreseen.[568] The applicable test here is not whether any or all of the *specific* measures in question were foreseeable; it is whether the dispute as a whole was foreseeable. As the Tribunal has found above, that is the case here.

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[563] Resp. C-Mem., at paras. 214-218 (citing **RL-46**, *Philip Morris Asia Ltd v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, dated 17 December 2015).

[564] Cl. Reply, at para. 546 (citing **RL-116**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, dated 1 June 2012, at para. 2.99).

[565] **C-42**, Board Resolutions, dated 18 and 19 August 2016, and SPA between MCTC and Altberg, dated 23 August 2016; Resp. C-Mem., at para. 216; Cl. PHB, at para. 198.

[566] **C-163**, Ministry's Request for Termination of the Concession Agreement, dated 3 April 2015; Cl. Reply, at para. 275; Resp. C-Mem., at para. 216.

[567] **R-89**, Letter from [redacted] to the Ministry, dated 14 July 2014, at p. 3.

[568] Cl. Reply, at paras. 545-557.

389. The Tribunal is also not convinced by the Claimants' argument that the fact that DCT made further investments, after being acquired by Altberg, affects the Tribunal's analysis on whether a dispute was foreseeable or in existence when Altberg made its investment.[569] A dispute that is foreseeable does not become less foreseeable depending on what a party decides to do with the knowledge of the foreseeable dispute. In *ConocoPhillips v. Venezuela,* which the Claimants reference in this regard looked at the continuing investments as an indicator against treaty abuse, but it did so to infer the "intention" of the claimant investors (which is the second limb of the analysis, discussed below), and not to find that a dispute that was otherwise foreseeable became less so on account these subsequent investments.[570]

390. In any event, and unlike the facts in *ConocoPhillips,* DCT was required – under the Concession Agreement – to continue making investments throughout the period of concession, including after 2016.[571] The Tribunal would therefore hesitate to draw conclusions from the fact that DCT continued to invest after Altberg acquired it, given that there was a contractual obligation to do so, and did not *choose* to make a further investment.

391. Accordingly, for the reasons set out above, the Tribunal is satisfied that the present dispute was foreseeable to Altberg in 2016 when it acquired its investment in DCT/DKS.

392. ***Second***, having determined that the dispute was foreseeable, the Tribunal must now determine if Altberg's investment in DCT and DKS was sufficiently or predominantly motivated by its desire to seek treaty access.[572] The Tribunal is not convinced that there is sufficient evidence before it to reach this conclusion for the following reasons:

a. There is no direct evidence on whether or not Altberg was aware of the treaty access it would achieve, and the extent to which any such knowledge played a part in its decision

[569] Cl. Reply, at paras. 548-550.

[570] **CL-48**, *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 Merits dated 3 September 2013; Cl. Reply, at para. 538.

[571] **R-32**, Concession Agreement, dated 22 June 2011, at Clause 8.4; **FL-6**, Concession Agreement - Annex II - DCT Investments Proposal, dated 22 June 2011.

[572] **RL-46**, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, dated 17 December 2015, at para. 584; **CL-59**, *Pac Rim Cayman LLC v. The Republic of El Salvador,* ICSID Case No. ARB/09/12, Submission of the United States of America, dated 20 May 2011, at para. 2.

to invest in DKS/DCT.

b. Further, the context in which the overall transaction occurred also militates against such a finding. In *Philip Morris,* one of the few cases where a similar objection was successfully invoked, there was an internal reorganization under which a group entity that did not have treaty access secured such access in respect of an investment.[573] Without such reorganization the investment in question would not have had any treaty protection. Even then the tribunal enquired whether the desire to seek such treaty access was the "main and determinative, if not sole, reason for the restructuring."[574]

c. The facts here are markedly different. Prior to Altberg's investment, both DCT and DKS were protected investments in the hands of MCTC and were protected under the US-Albania BIT. While there are differences between the US-Albania BIT and UK-Albania BIT, both provide broadly comparable standards of protection and there is no basis to assert that there are manifestly and significantly more favorable protections under the UK-Albania BIT as compared to the US-Albania BIT. This is therefore not a case where an investment has been made to secure better treaty access. Further, as the Tribunal discusses below, DKS and DCT are, and remain, entitled to bring claims under the US-Albania BIT notwithstanding the fact that MCTC ceased to be a shareholder in DKS on 23 August 2016.[575]

393. Given this context, and for the reasons set out above, the Tribunal has no objective basis to imply that securing access to the UK-Albania BIT was the driving force behind Altberg's decision to invest in DKS and DCT.

394. In sum, therefore, the Respondent's abuse of rights objection fails.

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[573] **RL-46**, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, dated 17 December 2015, at para. 584.

[574] **RL-46**, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, dated 17 December 2015, at para. 584.

[575] *See below,* at paras. 455-456.

b) Creditor Evasion

395. The Respondent further claims that Altberg should be denied treaty protection because, in making its investment, it violated international good faith doctrine since the transaction was an attempt to evade creditors.

396. The Tribunal notes that there is significant disagreement between international tribunals on the precise scope, and implications, of the good faith doctrine in investment law. In particular, it is unclear whether there is a free-standing requirement that investments must be made in made in good faith and in compliance with a State's laws: some tribunals have found such a requirement to exist,[576] while others have found that absent express treaty text such a requirement cannot be implied.[577] Some tribunals have also doubted whether – even in the existence of a legality requirement – this would be a jurisdictional issue;[578] while others have found that the consequence of non-compliance with a legality requirement would result in the loss of jurisdiction.[579]

397. However, the Tribunal does not need to enter into this debate because it is unconvinced that – on the facts proven before it – such a doctrine would even apply. The only evidence before the Tribunal is an order of the US District Court of Nevada (the US Court Order).[580] [redacted]

[redacted]

[576] **RL-18**, *Phoenix Action v. Czech Republic,* ICSID Case No. ARB/06/5, at para. 100-; **RL-238**, *Worley International Services Inc. v Republic of Ecuador,* PCA Case No 2019-15, Final Award, 22 December 2023, at para. 304.

[577] **RL-96**, *Metal-Tech Ltd v the Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, dated 4 October 2013, at para. 127 ("The Tribunal does not share the view expressed for instance in Phoenix pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention").

[578] **CL-111**, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan* (I), SCC Case No. 116/2010, Award, dated 19 December 2013, at paras. 756-757.

[579] **RL-238**, *Worley International Services Inc. v Republic of Ecuador,* PCA Case No 2019-15, Final Award, dated 22 December 2023, at paras. 303-307.

[580] **R-3**, US Court Order, dated 6 April 2017.

[redacted] It is clear that the US Court Order – like any temporary injunction – was based on a limited and urgent review of the facts underlying it.[582] The transfer between MCTC and Altberg or the motivations behind such transfer were not issues that the US Court Order had to determine or the Court was concerned with in great detail.

398. In any event, even if this finding were final in nature (as opposed to the temporary nature of an injunction), it is not clear whether this would be a matter that would prevent the Tribunal from exercising jurisdiction over Altberg. It is not clear whether the moving of assets from one jurisdiction to another, *before* an order preventing the sale is notified to an entity, constitutes a violation of a defined good faith standard.

399. Accordingly, for the reasons set out above, the Tribunal also rejects this part of the Respondent's good faith objection.

H. Objection that Claimants DKS and DCT do not Meet Nationality Requirements (Jurisdiction Ratione Personae*)*

1. Respondent's Position

[redacted]

[582] **R-3**, US Court Order, dated 6 April 2017, at p. 7.

[redacted]

[redacted]

2. Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

3. Tribunal's Analysis

407. DCT and DKS have made claims under the US-Albania BIT before this Tribunal that derives its jurisdiction from the US-Albania BIT, UK-the Albania BIT, and the ICSID Convention.

[597] Cl. Reply, at paras. 637-638; Cl. Rej., at paras. 174, 180.

[598] Cl. Reply, at para. 640.

[599] Cl. Reply, at para. 641 (citing **CL-58**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, dated 2 July 2018, at paras. 307, 317).

[600] Cl. Reply, at paras. 639-643 (citing **CL-58**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, dated 2 July 2018, at paras. 307, 317).

To determine whether the Tribunal has jurisdiction *rationae personae* over these two entities, the Tribunal must:

a. assess whether DKS and DCT can establish jurisdiction under the US-Albania BIT and the ICSID Convention, as US-controlled entities; or

b. if not, whether DKS and DCT can invoke the MFN clause in the UK-Albania BIT to establish jurisdiction as UK-controlled entities.

408. The Tribunal first recalls the facts relevant to the shareholding in, and control over, DKS and DCT (**Section a)**), followed by an analysis of the relevant nationality requirements under the US-Albania BIT and the ICSID Convention (**Section b)**).

a) Control over DKS and DCT

409. As a preliminary matter, the Tribunal recalls the facts relevant to questions of control over DKS and DCT, namely that:

a. on 23 December 2014, [redacted] sold its 100% shareholding in DKS to MCTC;[601]

b. on 23 August 2016, MCTC sold its 100% shareholding in DKS to Altberg;[602] and

c. at all relevant times, DCT remained a wholly owned subsidiary of DKS.

410. Accordingly, there are two distinct periods of control:

a. From 23 December 2014 until 23 August 2016, DKS and DCT were controlled by MCTC (a company organized under the laws of the United States) and during that time, among other things, the following events that the Claimants characterize as breaches of the BITs, as discussed above, took place:

[601] **C-41**, SPA between [redacted] and MCTC, dated 23 December 2014.

[602] **C-42**, Board Resolutions, dated 18 and 19 August 2016, and SPA between MCTC and Altberg, dated 23 August 2016.

(i) on 22 January 2015, the Respondent issued the Notice of Default;[603] and

(ii) on 3 April 2015, the Respondent filed the Termination Application.[604]

b. From 23 August 2016 onwards, DKS and DCT came under the control of Altberg (a company organized under the laws of the United Kingdom) and the following further events that the Claimants characterize as breaches of the BITs, took place:

(i) on 13 March 2017, the Tirana Court of First Instance issued the Termination Decision;[605] following this, on 12 February 2019, the Court of Appeal upheld the Termination Decision;[606] and

(ii) on 3 February 2020, the Respondent seized the Terminal.[607]

411. On 28 December 2020, at the time this arbitration was commenced, i.e., the Request was issued, DKS and DCT remained under Altberg's control.

b) Nationality Requirements under the ICSID Convention and the US-Albania BIT

412. Both the ICSID Convention and the US-Albania BIT contain conditions that an investor must meet to establish standing to make claims in this arbitration. The Tribunal starts with an analysis of the ICSID Convention.

413. Article 25 of the ICSID Convention identifies the categories of persons over whom an ICSID tribunal may have jurisdiction. Article 25(1) of the ICSID Convention provides:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a* ***national of another Contracting State****, which the parties to the dispute consent in*

[603] **C-23**, Letter from the Ministry to DCT, Notice of Default, dated 22 January 2015. *See above,* at para. 133-134.
[604] **C-163**, Termination Application, dated 3 April 2015. *See above,* at para. 138.
[605] **C-11**, Termination Decision, dated 13 March 2017, at p. 33. *See above*, at para. 143.
[606] **C-31**, Decision No. 370 of Tirana Court of Appeals, dated 12 February 2019.
[607] **C-38**, Record of bailiff actions during execution, dated 3 February 2020.

> *writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*[608]

414. Article 25(2) of the ICSID Convention defines the term "national of another Contracting State" employed in Article 25(1) of the Convention and provides that it shall include:

> *"(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute* ***on the date on which the parties consented*** *to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute* ***on that date*** *and which, because of foreign control,* ***the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention****."*[609]

415. Thus, judicial persons qualify as "nationals of another Contracting State," as used in Article 25(1) of the ICSID Convention if they had the nationality of

a. an ICSID Contracting State other than the respondent State on the date of consent to arbitration (according to Article 25(2)(a)); or

b. the party to the dispute on the date of consent to arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention (according to Article 25(2)(b)).

416. In relation to category (a), neither DKS nor DCT have the nationality of an ICSID Contracting State other than the respondent State on the date of consent to arbitration. Both these entities were incorporated under – and exist in – Albanian law. DKS was incorporated as a

[608] ICSID Convention, at Article 25(1) (emphasis added).

[609] ICSID Convention, at Article 25(2) (emphasis added).

company under Albanian law in 1993.[610] DCT was similarly incorporated in 2011.[611] They were Albanian companies at the time of the Request on 7 September 2020.[612] They therefore do not meet the requirements of Article 25(2)(a) of the ICSID Convention. This is common ground amongst the Parties.[613]

417. Rather, DKS and DCT claim standing under category (b) described above. They must satisfy two conditions to establish standing under the ICSID Convention.

a. DKS and DCT must have had – at the time arbitration was commenced – the nationality of the Respondent, i.e., Albania.

b. DKS and DCT must show that the "parties have agreed" that they should be treated "because of foreign control" as "national" of the United States for the purpose of the Convention.

418. The first of these conditions is met, as set out above.[614]

419. As to the second condition, the Tribunal finds it useful to split the condition into two strands: (i) the existence of an agreement to treat DKS and DCT as nationals of the United States (sometimes referred to as the subjective requirement) (**Section (1)**); and (ii) the existence of foreign control (sometimes referred to as the objective requirement) (**Section (2)**). The second condition is only met if both these strands are fulfilled cumulatively.

(1) Agreement to Treat DKS and DCT as Nationals of the United States

420. As stated above, Article 25(2)(b) of the ICSID Convention requires that "parties" agree on the nationality of the entities sought to be brought under ICSID jurisdiction. The "parties" to

[610] It was initially established under a different name which was changed to DKS in 2003. *See,* **C-43**, Kantier Detar Durres Gdansk Board Decision, dated 10 February 2003.

[611] **C-5**, DCT Registration Status.

[612] **C-53**, Decision No. 5979 of Tirana Court of First Instance, 6 December 1998, at p. 1; **C-5**, DCT Registration Status.

[613] Cl. Reply, at para. 621; Resp. C-Mem., at para. 176.

[614] *See above,* at para. 416.

which the provision refers are the parties to the dispute in question in this case (i.e., the Claimants and the Respondent), not the parties to the ICSID Convention or any related instrument or treaty.[615]

421. To establish this agreement, the Claimants rely on Article IX(8) of the US-Albania BIT which provides:

> *"For purposes of Article 25(2)(b) of the ICSID Convention and this Article, a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, shall be treated as a company of the other Party."*[616]

422. In turn, a "covered investment" is defined in Article II of the US-Albania BIT to mean "an investment of a national of a company of a Party in the territory of the other party."[617] Further the phrase "company of a Party" is defined in Article I(b) as "company constituted or organized under the law of that Party."[618]

423. A provision in an investment treaty does not, itself, qualify as an agreement for the purpose of Article 25(2)(b). [619] This *offer* of the Host State to treat a host-state incorporated company as a foreign national needs to be accepted by an investor before the investor can make a claim under it.[620]

424. The Tribunal has enquired of the Parties when an agreement arising out of Article IX(8) of the US-Albania BIT was perfected for the purposes of Article 25(2)(b) of the ICSID Convention. This was the first question in the Tribunal's List of Questions.[621] The Claimants take the position that the agreement was perfected as soon as the US-Albania BIT came into force, on 4 January 1998.[622] The Respondent takes the position that this agreement has never been perfected.[623]

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[615] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1325.
[616] US-Albania BIT, at Article IX(8).
[617] US-Albania BIT, at Article I(e).
[618] US-Albania BIT, at Article I(b).
[619] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1325.
[620] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1325.
[621] Tribunal's List of Questions, 1.1.1. *See also*, Cl. PHB, at paras. 187-200; Resp. PHB, at paras. 91-100.
[622] Cl. PHB, at para. 191.
[623] Resp. PHB, at para. 91.

425. As the Tribunal has stated above, a provision such as Article IX(8) of the US-Albania BIT, without more, does not constitute an agreement on nationality for the purpose of Article 25(2)(b) of the ICSID Convention. This is not least because a treaty provision is not an agreement between the investor and the respondent State, who are the "parties" to which Article 25(2)(b) of the ICSID Convention refers. Applied in this case, it would be absurd to suggest that in 1998 when the US-Albania BIT was signed, two entities that were not parties to the treaty (including DCT which did not even exist on that date), entered into an "agreement" with Albania regarding nationality.

426. An agreement for the purposes of Article 25(2)(b) of the ICSID Convention comes into existence when the *offer* set out in Article IX(8) of the US-Albania BIT is accepted. For this to occur an investor must, first, be covered by, or qualify under, the offer, i.e., meet the requirements of Article IX (8) of the US-Albania BIT, and second, accept the offer by bringing claims. DCT and DKS must thus establish that (i) they are covered by the offer in Article IX(8) of the US-Albania BIT and (ii) they accepted such an offer.

427. ***First***, it is clear from the text of the provision that the offer in Article IX(8) of the US-Albania BIT is open to those entities that were a "covered investment" immediately before the "occurrence of the event or events giving rise to an investment dispute." Accordingly, the date for assessment set out in Article IX(8) of the US-Albania BIT is the date "immediately before the occurrence of the event or events giving rise to an investment dispute."[624] Indeed, the Respondent accepts that for the purposes of Article IX(8) of the US-Albania BIT the date immediately before "the occurrence of the event or events giving rise to an investment dispute" is the relevant date of assessment.[625]

428. Since DKS and DCT were owned by MCTC (a company incorporated in the United States) between 23 December 2014 to 23 August 2016, they were both a "covered investment" for that period. It was during this time that the first "event or events giving rise to an investment dispute" occurred, notably the Notice of Default, issued on 22 January 2015. Accordingly, because DKS and DCT were a "covered investment" for the period "immediately before the occurrence of the

[624] The Tribunal notes that this provision – and specifically this date – is a feature in several other treaties, including the ECT, as well as various bilateral investment treaties entered into by the United States (including in particular with Argentina).

[625] Resp. PHB, at para. 97.

event or events giving rise to an investment dispute," the offer of agreement to be treated as a US-national under Article IX(8) of the US-Albania BIT was open to both DKS and DCT.

429. ***Second***, this offer was accepted when DKS and DCT commenced arbitration by filing the Request in September 2020. Even though the fact that DKS and DCT were required to be a covered investment for the period *prior* to the events giving rise to the dispute as a condition of the offer under Article IX(8) of the US-Albania BIT, nothing in Article IX(8) of the US-Albania BIT indicates that it was a *continuing* requirement that needs also to be met at the date of acceptance of the offer.

430. Accordingly, the Tribunal finds that both DKS and DCT have demonstrated that there exists an agreement to treat them as nationals of the United States for the purposes of Article 25(2)(b) of the ICSID Convention.

(2) Foreign Control of DKS and DCT

431. Having found that DKS and DCT satisfy the requirement that an agreement for the purposes of Article 25(2)(b) of the ICSID Convention exists in their respect, they must also satisfy the requirement that this agreement was "because of foreign control." The phrase "because of foreign control" in Article 25(2)(b) of the ICSID Convention has been interpreted as containing an "objective requirement" to prove such foreign control.[626] This requirement is "objective" because it must be proven – as a fact and not by agreement – that foreign control sufficient to qualify under the ICSID Convention exists. In the words of the authors of the leading *Schreuer's Commentary on the ICSID Convention*:

> *"These cases make it abundantly clear that foreign control at the time of consent is **an objective requirement** which must be examined by the tribunal in order to establish jurisdiction. Whereas an*

[626] **RL-38**, *TSA Spectrum de Argentina SA v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, dated 19 December 2008, at para. 160 ("The Tribunal has found above that in the application of the second part of Article 25(2)(b) it is necessary to pierce the corporate veil and establish whether or not the domestic company was objectively under foreign control."); **RL-39**, *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, dated 25 September 1983, at para. 14(ii); **RL-189**; *Eskosol SpA in Liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Respondents' Application under Rule 41(5), dated 20 March 2017, at para. 90 ("This is merely the start of the inquiry, however, because the test for Article 25(2)(b) of the ICSID Convention also has an objective component that is not necessarily satisfied merely because of the parties' subjective agreement.").

> *agreement on foreign nationality may be readily inferred from a consent agreement, no such inference is possible with regard to foreign control. […]* ***Foreign control must actually exist and cannot be construed by the parties or implied from an agreement between the parties****."*[627]

432. However, foreign control – like any control – must be determined with reference to a date. The Tribunal therefore needs to determine the date on which such foreign control for the purposes of Article 25(2)(b) of the ICSID Convention must have existed. The Tribunal will start this analysis by assessing whether Article 25(2)(b) of the ICSID Convention provides a date for such an assessment (**Section (a)**). It will then discuss whether any such date would be mandatory or whether the parties may agree on a different date, and whether the Parties in the present case have indeed done so in light of Article IX(8) of the US-Albania BIT (**Section (b)**).

(a) Date of Assessment Under Article 25(2)(b) of the ICSID Convention

433. The Tribunal put the question to the Parties concerning the date of assessment of "foreign control" under Article 25(2)(b) of the ICSID Convention. In the Tribunal's List of Questions, the Tribunal inquired in particular:

> *"When is the relevant moment in time under Art. 25(2)(b) of the ICSID Convention for a tribunal to assess 'foreign control'? Taking into account principles of interpretation under the [VCLT] and relevant authorities […] [i]s it at 'the date on which the parties consented to submit such dispute to […] arbitration'?"*[628]

434. In response, the Claimants took the position that "pursuant to a good faith" interpretation of "both the ICSID Convention and the US-Albania BIT," the date to assess foreign control should be the date at which the "parties have agreed" to treat investors who are foreign-controlled as nationals of another State for the purposes of the ICSID Convention. The Claimants argue that that date is 4 January 1998, the date at which the US-BIT came into force.[629]

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[627] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1347 (emphasis added).

[628] Tribunal's List of Questions, Question 1.1.2.(i).

[629] Cl. PHB, at para. 192.

435. The Respondent, on the other hand, argued that the relevant date is the date of consent. It refers to the decision in *United Utilities v. Estonia* to argue that, consistent with a general rule in international law, the date of consent is the relevant date at which to assess the existence of foreign control.[630] The Respondent also points out that "date of consent is the only date that appears in Article 25(2)(b), and it appears twice."[631]

436. In interpreting this provision, the Tribunal relies again on the principles enshrined in the VCLT. It starts with interpreting the ordinary meaning of the text, considering the negotiating history, and the relevant context.

437. ***First***, the Tribunal starts with the text of Article 25(2)(b) of the ICSID Convention which it reproduces below:

> *"any juridical person which had the nationality of a Contracting State other than the State party to the dispute* ***on the date on which the parties consented*** *to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute* ***on that date*** *and which, because of foreign control,* ***the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention****."*[632]

438. This provision contains a reference to only one date: the "date on which the parties consented" to submit to ICSID jurisdiction. The nationality of the juridical person is also reckoned as "on that date." However, it is not clear whether foreign control must also be reckoned on the same date (i.e., the date at which the parties consented to ICSID arbitration) since the reference to that date is not repeated expressly when it comes to foreign control.

439. Schreuer's Commentary on the ICSID Convention notes in the same vein that:

> *"The* ***situation is less clear when it comes to the critical date for the foreign control*** *[…]. The words 'on that date' related to the 'nationality of the Contracting State party to dispute. But they do not relate to the subsequent words dealing with foreign control […]*

[630] Resp. PHB, at para. 153 (citing **RL-188,** *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No ARB/14/24, Award, dated 21 June 2019.).

[631] Resp. PHB, at para. 153.

[632] ICSID Convention, at Article 24(2)(b) (emphasis added).

> *Therefore,* ***a strictly grammatical interpretation leaves open the question at what time foreign control over the local company must have existed****."*[633]

440. ***Second***, the negotiating history of the ICSID Convention might be a helpful tool to interpret Article 25(2)(b). However, the negotiating history does not clarify the position of the assessment date. As *Schreuer's Commentary on the ICSID Convention* notes: "[d]uring the Conventions' drafting, there was some concern about a change of control over the locally established company (History, Vol II, pp. 287, 445) but ***no definite solution was offered***."[634]

441. ***Third***, the Tribunal also considers the context in which the ICSID Convention was negotiated. While the context does not provide an indication one way or another, the Tribunal notes that in the overall context of adjudication, some reference date *must* exist. It would be meaningless for the Tribunal to assess whether foreign control existed in the abstract without reference to a date. As noted by the Respondent,[635] the only date mentioned in Article 25(2)(b) of the ICSID Convention is the date of consent and that date should accordingly be considered as the date at which the existence or otherwise of foreign control must be reckoned. Moreover, the date of consent is often considered as the most relevant for assessing jurisdictional elements in general.[636]

442. In light of the above, the Tribunal considers that the most reasonable interpretation of Article 25(2)(b) of the ICSID Convention is that, in principle, the date of consent is the relevant date of assessment of foreign control. This, however, leaves open the question whether such date is mandatory or indeed can be displaced by the parties' agreement.

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[633] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1410 (emphasis added).

[634] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1410 (emphasis added).

[635] Resp. C-Mem., at paras. 178-182.

[636] **RL-110**, *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No ARB/97/3, Decision on Jurisdiction, dated 14 November 2005 ("[I]t is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted.").

(b) Date of Assessment In Light of Article IX(8) of the US-Albania BIT

443. Having determined that, in principle, the relevant date of assessment of foreign control under Article 25(2)(b) of the ICSID Convention is the date on which the parties consented to submit to ICSID jurisdiction, the Tribunal must now discuss whether this date is mandatory, or whether it can be displaced by the parties' agreement. In the present instance, as noted above, Article IX(8) of the US-Albania BIT makes reference to another date (i.e., immediately before the occurrence of event or events giving rise to the disputes) for establishing US control over DKS and DCT.[637]

444. The Tribunal sought the Parties' views on the interplay between these two dates. In the Tribunal's List of Question, the Tribunal enquired:

a. "Whether the date of assessment of foreign control under Article 25(2)(b) of the ICSID Convention (assuming it is the date on which the parties consented to submit to ICSID jurisdiction) is "a mandatory provision of the ICSID Convention or can parties agree on another date (such as e.g. in Article IX(8) of the US-Albania BIT)?"[638]

b. "If parties can agree on another date, is such other date an additional date (i.e., foreign control must exist at the time of consent and on the other date) or an alternative date (i.e., foreign control must only exist on the other date)?"[639]

c. "If foreign control is required on both the date of consent and the other date, is it sufficient that foreign control is established with any Contracting State (which is not the State party to the dispute), or does it have to be the same Contracting State (i.e., here: the United States)?"[640]

445. The Respondent takes the following position on these three points:

a. The Respondent argues that the existence of foreign control under Article 25(2) is

[637] *See above,* at paras. 421-427.

[638] Tribunal's List of Questions, question 1.1.2.(ii).

[639] Tribunal's List of Questions, question 1.1.2.(iii).

[640] Tribunal's List of Questions, question 1.1.1.(iv).

a mandatory requirement, noting that "parties cannot modify the conditions for ICSID jurisdiction, which were agreed between all ICSID Contracting States, by concluding an investment treaty to which only two of them acceded."[641]

b. The Respondent argues that because the requirement to establish foreign control as on the date of consent is mandatory, any other date agreed by the parties or provided for in an underlying treaty must function as an *additional* date. It argues that "the subjective requirements codified in investment treaties do not displace the objective requirements imposed for access to ICSID jurisdiction."[642]

c. As to the nationality of foreign control, the Respondent argues that because Article 25(2)(b) of the ICSID Convention is "triggered by the parties' agreement and conditioned by it, the locally incorporated company must be under foreign control as defined in the consent document (here, the United States Treaty)."[643] It therefore takes the position that foreign control for the purposes of both the US-Albania BIT and the ICSID Convention should be US-control.

446. The Claimants' position on these three questions is as follows:

a. The Claimants' primary position is, as already noted above,[644] that the relevant date to assess foreign control under the ICSID Convention was the date of perfection of the agreement as to nationality, i.e., the entry into force of the US-Albania BIT on 4 January 1998.[645] The Tribunal has dealt with this point above.[646]

b. However, according to the Claimants, even if the Tribunal applied the date of consent to arbitration as the date for assessing foreign control, such a requirement would

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[641] Resp. PHB, at para. 93.

[642] Resp. PHB, at para. 94 (citing **RL-38**, *TSA Spectrum de Argentina SA v. Argentine Republic* (ICSID Case No ARB/05/5) Award, dated 19 December 2008, at para. 156; **RL-100**, *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Award, dated 31 May 2017, at para. 370; **RL-32**, *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. The Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction, dated 27 September 2012, at paras. 211-214).

[643] Resp. PHB, at para. 95.

[644] *See above,* at para. 424.

[645] Cl. PHB, at para. 191.

[646] *See above,* at para. 430.

not be mandatory under the ICSID Convention, and "the contracting parties to the US-Albania BIT could agree to amend the same in bilateral relations, as they in fact did via the US-Albania BIT, and that this bilateral agreement would prevail over Article 25(2)(b) of the ICSID Convention."[647]

c. As an ultimate note, the Claimants argue that even if foreign control at the date of consent was a mandatory rule, no consequential issues would arise in the present case, since Altberg, a UK national, wholly owned both DKS and DCT at that time.[648]

447. ***First***, the Tribunal notes that there is little authority on the question whether the date of consent to arbitration (which is, in principle, the relevant date under Article 25(2)(b) to assess foreign control, as discussed above[649]) is mandatory or can be displaced by the parties choosing another date.

448. The tribunal in *Eskosol v. Italy* noted (without ultimately deciding) that the absence of an express reference to this date in Article 25(2)(b) of the ICSID Convention can "be said to suggest no intention by the Convention's drafters to mandate foreign control as of the date of consent, instead leaving temporal issues – like the definition of 'foreign control' itself – to discussion between the parties."[650]

449. Indeed, *United Utilities v. Estonia* is the only case concerning a situation where the tribunal was required to – and did – make an enquiry into the existence of foreign control at a time prior to the consent of arbitration (under the ECT date for assessment of foreign control is date before the "dispute" arises) and then also at the date of consent.[651] The *United Utilities* tribunal found that it was required to assess the existence of foreign control on both dates; noting that the local entity was "controlled by [the foreign entity] at the relevant points in time."[652] However, the tribunal

[647] Cl. PHB, at para. 191.

[648] Cl. PHB, at para. 194.

[649] *See above,* at para. 442.

[650] **RL-189**; *Eskosol SpA in Liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Respondents' Application under Rule 41(5), dated 20 March 2017 at para. 94.

[651] **RL-188,** *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, dated 21 June 2019.

[652] **RL-188**, *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB 14/24, Award, dated 21 June 2019, at para. 411.

further noted that assessment was uncontroversial in that case, particularly because both on the date prescribed under the ECT and the date of consent to arbitration the entity was under the same control.[653] The position therefore remains unclear.

450. In the Tribunal's view, it is somewhat challenging to assert that the parties to the ICSID Convention recognized the date for the assessment of foreign control as *mandatory*, but nonetheless chose to articulate that date in an *implied* way. As set out above, there is no express indication in Article 25(2)(b) of the ICSID Convention that the date of assessment of foreign control is the date of consent. The Tribunal only arrived at this result by way of an interpretive analysis.[654] In those circumstances, the Tribunal does not find it compelling to understand this date as mandatory. Moreover, nothing in the text of Article 25(2)(b) of the ICSID Convention, its negotiating history, and context, as analyzed above,[655] indicates that the parties could not agree on a different date for the assessment of foreign control.

451. In light of the above, the Tribunal is satisfied that, while the relevant date for assessing foreign control under Article 25(2)(b) of the ICSID Convention is in principle the date on which the parties consented to submit to ICSID jurisdiction, nothing prevents the parties to a particular dispute from agreeing on a different date. In the case at hand, the Parties indeed agreed on such a different date through the offer in Article IX(8) of the US-Albania BIT, accepted by the Claimants, i.e. the date "immediately before the occurrence of event or events giving rise to the disputes". In reaching the agreement to treat DKS and DCT as nationals of the United States for the purposes of Article 25(2)(b) of the ICSID Convention, as set out above in Section V.E., the Parties did so with reference to the date contained in Article IX(8) of the US-Albania BIT.

452. ***Second***, the Tribunal further asked the question of the Parties whether, if the State parties agreed on a different date, that date should be considered as an *additional* date or a date *alternative* to the date of consent. In essence, the question is whether this Tribunal needs to assess foreign control (i) at the date of consent *and* at the date "immediately before the occurrence of event or

[653] **RL-188**, *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB 14/24, Award, dated 21 June 2019, at para. 420.

[654] *See above,* at paras. 433-442.

[655] *See above,* at paras. 441, 447-455.

events giving rise to the disputes" or (ii) only at the date "immediately before the occurrence of event or events giving rise to the dispute."

453. Ultimately, the Tribunal finds that it need not answer this question, since foreign control is established on both dates, as further explained below. Importantly, as noted in *Schreuer's Commentary on the ICSID Convention*, "[t]he ***exact nationality of foreign control is not material*** as long as there is control by nationals of 'another Contracting State' or even of several Contracting States)."[656] As the Claimants have argued, "even if foreign control was required at the time of commencement of the arbitration proceedings under Article 25(2)(b) of the ICSID Convention […] the same would be satisfied by the fact that that DKS and DCT were wholly owned by the UK company Altberg at the time of commencement of the arbitration proceedings."[657]

454. Accordingly, DKS and DCT were under foreign control of ICSID Convention contracting States both (i) at the date contained in Article IX(8) of the US-Albania BIT – because "immediately before the occurrence of event or events giving rise" to the present dispute DKS and DCT were under MCTC's control, and MCTC is a company organized under the laws of the United States, a ICSID Convention contracting State, as detailed above[658]; and (ii) at the date of consent – because at that time DKS and DCT were under Altberg's control, and Altberg is a company established under the laws of the United Kingdom, another ICSID Convention contracting State, as also detailed above.[659]

455. In sum, for the reasons set out above, the Tribunal finds that both DCT and DKS meet the nationality requirement under Article 25(2)(b) of the ICSID Convention and Article IX(8) of the US-Albania BIT. Having made this finding, the Tribunal need not discuss whether the Claimants could rely on the MFN provision in the UK-Albania BIT.

[656] **RL-190**, Schreuer's Commentary on the ICSID Convention, Vol. I, at para. 1436 (emphasis added).
[657] Cl. PHB, at para. 194.
[658] *See above,* at para. 410.a.
[659] *See above,* at para. 410.b.

I. Conclusion on Jurisdiction

456. Having addressed the Respondent's various objections to the Tribunal's jurisdiction, the Tribunal finds that it has:

a. no jurisdiction over the Claimant MCTC, since the Respondent validly denied benefits to MCTC;

b. jurisdiction over the Claimant Altberg under the ICSID Convention and the UK-Albania BIT; and

c. jurisdiction over the Claimants DKS and DCT under the ICSID Convention and the US-Albania BIT.

VI. LIABILITY

457. In this proceeding, the Claimants allege that the Respondent has committed various breaches of the BITs. The Tribunal will first provide an overview of the Claimant's claims (**Section A**) and recall the various substantive provisions and applicable law relevant to the assessment of the Claimants' claims (**Section B**). Following this, the Tribunal addresses some predicate issues raised by the Parties and relevant to the assessment of the merits of the Claimants' claims, i.e., the Parties' positions on the burden of proof relating to various issues (**Section C**) and the Parties' requests for adverse inferences (**Section D**). The Tribunal then discusses the rival contentions and findings relating to the Claimants' claim that the Respondent breached the procedural protections provided for under the various standards under the BITs (**Section E**), and the substantive protections provided for under the BITs (**Section F**).

A. Overview of the Claimants' Claims

1. Claimants' Memorial

458. In their Memorial, the Claimants made three categories of claims.

a. According to the Claimants, the Respondent breached the *substantive* protections contained in the fair and equitable treatment ("**FET**") standard, the full protection and

security standard ("**FPS**"), protection against arbitrary and discriminatory conduct (also commonly referred to as the non-impairment standard (the "**Non-impairment standard**") as well as customary international law in respect of its conduct relating to the Claimants' investments. The Claimants argue that these standards require State conduct to meet what they call "cumulative conditions of legality."[660] These conditions, the Claimants argue, are that the measures (i) must be implemented in pursuit of a genuine public purpose; (ii) should not be taken in an arbitrary and non-discriminatory manner; and (iii) should "to the extent necessary" be proportional."[661] The Claimants argue that the Respondent has breached this standard by conduct that fell foul each of these cumulative requirements.[662]

b. The Claimants further allege that the Respondent breached the *procedural* protections contained under the FET standard and the prohibition of unlawful expropriation, in respect of its conduct relating to the Claimants' investments.[663] The Claimants argue that there exists an obligation to act "in accordance with due process of law" and the Respondent breached this obligation.[664]

c. Finally, the Claimants submit that the Respondent unlawfully expropriated the Claimants' investments.[665]

2. Claimants' Reply

459. In their Reply, the Claimants maintained the three categories of claims: that the Respondent had breached (i) the substantive protections under the BITs;[666] (ii) the procedural protections contained within them;[667] and (iii) had unlawfully expropriated their investments.[668]

[660] Cl. Mem., at paras. 184-191.
[661] Cl. Mem., at paras. 184-191.
[662] Cl. Mem., at para. 191.
[663] Cl. Mem., at paras. 215-230.
[664] Cl. Mem., at para. 217.
[665] Cl. Mem., at paras. 231-236.
[666] Cl. Reply, at paras. 396-417.
[667] Cl. Reply, at paras. 418-432.
[668] Cl. Reply, at paras. 433-437.

460. In addition, the Claimants also articulated – as a response to the Respondent's jurisdictional objection relating to the contractual nature of the claims – a claim for breach of the so-called umbrella clause contained in Article 2(2) of the UK-Albania BIT and of a similar obligation that the Claimants argue is incorporated into the US-Albania BIT by way of the MFN provision contained in Article II(1).[669] They reiterated the same argument in the Rejoinder on Jurisdiction.[670] Subsequently, at the Hearing, the Claimants withdrew their claim relating to breach of the umbrella clause.[671] The Tribunal therefore does not discuss this claim further.

3. Claimants' PHB

461. In their Post-Hearing Briefs, the Claimants argued two categories of claims: (i) that the Respondent committed several "standalone" violations of the due process requirement contained in the FET and expropriation standard;[672] and (ii) that the Respondent committed similar "standalone" violations of the substantive components of the FET and expropriation standard.[673] The Claimants argue these two categories of claims, in most instances, without differentiating between the various standards that provide for the procedural and substantive obligations they allege the Respondent breached.

462. The Tribunal will address the Claimants' arguments on liability in keeping with the sequence adopted by the Claimants in their Post-Hearing Brief i.e., alleged breaches of procedural protections (Section E) and alleged breaches of substantive protections (Section F), but for the avoidance of doubt, notes that it has taken into account the Claimants' arguments as presented in the entirety of their submissions.

B. Applicable Law

463. The Tribunal notes that this arbitration involves alleged breaches of two investment treaties. They apply in respect of different Claimants in different ways and for different periods of time. The Claimant Altberg claims protection under the UK-Albania BIT as a covered investor

[669] Cl. Reply, at paras. 585-597.
[670] Cl. Rej., at paras. 95-94, 119-122.
[671] Tr. Day 2, (Gharavi), 21:22-24.
[672] Cl. PHB, at paras. 24-91.
[673] Cl. PHB, at paras. 92-160.

since 23 August 2016. The Claimants DKS and DCT, as discussed above, make claims under the US-Albania BIT.[674] The Tribunal sets out below the general standards of protection under these BITs.

1. Unlawful Expropriation

464. Article 5 of the UK-Albania BIT provides:

> *"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*
>
> *Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Part own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of other Contracting Party who are owners of those shares."*

465. Article III of the US-Albania BIT provides:

> *"1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures*

[674] *See above,* at para. 407.

tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3).

2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was take ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less that the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

a. the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

b. interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment."

2. Fair and Equitable Treatment

466. Article 2(2) of the UK-Albania BIT provides:

"Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contacting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other

Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

467. Article II(3) of the US-Albania BIT provides:

"Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable that that required by international law.

Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition covered investments."

C. Burden of Proof

468. The Tribunal notes that whether expressly or otherwise, the Claimants have made repeated references to an alleged obligation of the Respondent to prove certain facts.[675] In particular, the Claimants seem to suggest in several paragraphs of their Reply that the Respondent is under an obligation to "cumulatively demonstrate" that its conduct meets the conditions of legality the Claimants identified (discussed above) and failed to do so.[676] The Tribunal recalls the burden of proving that the Respondent has breached its obligations under the BITs lies with the Claimants. It is an uncontroversial principle in international law and investment treaty arbitration that the claimant must prove its claims.[677]

469. Further as a response to the Respondent's argument that the Claimants had failed to identify and provide concrete reasoning as to how the Respondent breaches its treaty obligations, the Claimants argue that it does not need to "bore" the Tribunal with "extensive academic developments on the nature, content, and meaning of otherwise standard BIT protections."[678]

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[675] Cl. Reply, at paras. 336, 348.

[676] Cl. Reply, at paras. 336, 348.

[677] **RL-122**, *Grand River Enterprises Six Nations, Ltd, et al v. United States of America,* UNCITRAL, Award, dated 12 January 2011, at para. 103; **RL-119**, *OOO Manolium Processing v. The Republic of Belarus*, PCA Case No 2018-06, Final Award, dated 22 June 2021, at para. 564; **RL-120**, *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, dated 9 November 2004, at paras. 163-166.

[678] Cl. Reply, at para. 346.

470. The Tribunal agrees with the Claimants to the extent they argue that they need not prove the existence or the content of the Respondent's obligations under international law. However, it is incumbent on the Claimants to prove which of the measures taken by the Respondent – and which aspects of those measures – constitute a breach of which obligations of the Respondent under the BITs. In other words, the *application* of the legal standards to proven facts is within the Claimants' sphere of responsibility. This is because it is only when the Claimants provide a characterization of a given State measure and identify which obligation is allegedly breached and in what way, that the Respondent can have a fair opportunity to respond, and the Tribunal has sufficient information to engage with the case set out by the Parties.

D. Adverse Inferences

471. Both sides have requested the Tribunal to draw adverse inferences from the other's alleged failure to produce responsive documents during the document production process or more generally as part of the proceedings. In the Claimants' case, they have also sought adverse inferences arising out of the Respondent's failure to proffer [redacted], the now-retired former Chairman of the PIU, as witness.[679]

472. The Claimants request adverse inferences be drawn against the Respondent, namely that:[680]

a. the Respondent's process leading to the issuance of the Notice of Default, and the decision to seize the Terminal were not motivated by genuine public purpose;[681] and

b. the Respondent's decision to issue the Notice of Default and its Termination Application were prompted by the dilution of [redacted]'s shareholding in DCT.[682]

473. The Claimants seek these adverse inferences based on what they allege to be the Respondent's failure to produce documents relating to the decision-making process leading to the issuance of the Notice of Default.[683] In response, the Respondent argues that the drawing of

[679] Tr. Day 1, (Gharavi), 23:8-24.
[680] Cl. Reply, at paras. 14-18, 20; Cl. Rej. Juris, at para. 105; Tr. Day 1, (Gharavi), 16:23 – 17:23.
[681] Cl. Reply, at para. 21; Cl. PHB, at paras. 95-106.
[682] Cl. Reply, at para. 270; Cl. Rej., at para. 105.
[683] Cl. Reply, at paras. 14-18, 20; Cl. Rej. Juris, at para. 105; Tr. Day 1, (Gharavi), 16:23 – 17:23.

advance inferences is only possible when several conditions are met, per the so-called *Sharpe* test.[684] The Respondent argues that these conditions are not met in this case because (i) there is extensive evidence to rebut the inference sought; (ii) there is no *prima facie* evidence of the inference sought; (iii) the inference would be at odds with the existing evidence relating to the conduct of the Respondent who refrained from intervening in any disputes between [redacted] and DKS and the Notice of Default was issued on account of DCT's mismanagement of the Terminal.[685]

474. The Respondent also itself makes a request for the following adverse inferences to be drawn against the Claimants, namely that the Claimants lacked any intention to properly manage the Terminal for the duration of the Concession Agreement, and that they were instead intent on selling their rights to a third party, called [redacted].[686] The Respondent seeks this inference based on what it alleges is the Claimants' failure to produce the Claimants' communications with [redacted], as prospective purchaser of the Terminal.[687]

475. In this context, the Tribunal notes that while the Respondent pointed to the fact that [redacted] had not been called to give evidence as witnesses,[688] it did not make an application for adverse inference based on such an absence.

476. The Tribunal does not consider it useful, in the abstract, to make a finding on the requests for adverse inferences, without the context in which each request for such inferences has been put forth. Here, for example, the Claimants request the Tribunal to draw several inferences from the same alleged failure by the Respondent to provide adequate documentation or to produce certain witnesses.[689] In each case, the Tribunal must consider the request to draw adverse in relation to the inference identified by the Party seeking it, and the other attendant evidence on the factual

[684] The Respondent argues that these factors include: (i) evidence must be proven to exist and available with the non-disclosing party, (ii) the requesting party has presented all the evidence that would support the inference sought, (iii) the requested inference must be reasonable and consistent with the evidence, (iv) there is prima facie evidence of the inference sought and (v) the non-disclosing party is informed of, and has the opportunity to respond to its obligation to present evidence rebutting the adverse inference being sought, Resp. PHB, at para. 36.

[685] Resp. PHB, at para. 37.

[686] Resp. Rej., at para. 36.

[687] Resp. Rej., at paras. 36-37.

[688] Tr. Day 1, (Kasalowsky), 81:1-12.

[689] *See below,* at paras. 161-162.

issue in respect of which the inference is sought. The Tribunal has therefore considered the Parties' requests for inferences in Section VI.D below, if and when they arise.[690]

E. Breaches of Procedural Protections

477. The Claimants argue that there exists a self-standing obligation of due process.[691] They submit that this obligation of due process is derived from: (i) the prohibition against unlawful expropriation provided for under both BITs, and (ii) the FET standards set out in the BITs, "be it by virtue of the MFN clauses included therein, or under international law more generally, including customary international law."[692]

478. For the Claimants, this self-standing obligation to provide due process: (i) includes the obligation to provide advance notice before the Respondent takes any adverse measure against the Claimants;[693] (ii) includes the obligation to provide a meaningful opportunity to cure any defaults;[694] and (iii) requires the Respondent to comply with due process following the termination of the Concession Agreement.[695] The Claimants allege – as discussed in more detail below – that the Respondent breached these due process obligations.

479. The Respondent denies the existence of any such self-standing due process requirement under international law.[696] It also denies that any due process violations in relation to the issuance of the Notice of Default or any consequences arising out of the Claimants' breach of the Concession Agreement, since they have all been reviewed by Albanian courts. The Respondent stresses that the Claimants have not alleged any defect in the judicial process itself.[697] It further

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[690] *See below*, at para. 630.a (regarding the Claimants' request for adverse inference relating to the absence of documents concerning the decision-making process leading to the issuance of the Notice of Default) and para. 630.b (regarding the Claimants' request for adverse inference relating to the Respondent's alleged failure to produce [redacted] as a witness). The Tribunal has not found it germane to its award to consider the question of whether the Respondent's request for drawing an adverse inference in relation to the alleged intention of the Claimant to sell the rights to the Concession Agreement to APM is valid or not.

[691] Cl. Mem., at paras. 4, 11, 197, 217-220. S*ee, e.g.*, Cl. Reply, at paras. 420, 431, 431.4; Cl. PHB, at paras. 30-35, 47, 52.

[692] Cl. Mem., at para. 217; Cl. PHB, at paras. 30-35, 92, 163-164.

[693] Cl. Mem., at paras. 7, 11, 27, 218-19; Cl. Reply, at paras. 29, 42, 320, 322, 575.4.

[694] Cl. Mem., at paras. 198, 218, 220; Cl. Reply, at para. 431; Cl. Rej., at para. 138.3; Cl. PHB, at para. 57.

[695] Cl. Me., at paras. 300-304; Cl. Reply, at para. 383, Cl. PHB, at paras. 52-54.

[696] Resp. C-Mem., at para. 271; Resp. Rej., at paras. 297, 308.

[697] Cl. Mem., at paras. 179 -236.

argues that the Claimants have not articulated what positive obligations were incumbent on the Respondent's authorities, and how any such obligations were violated.[698]

480. The Tribunal discusses the precise violations alleged by the Claimants below and discusses further the Parties' disagreement as to the relevant legal standard and the existence of the relevant facts below. At this stage, the Tribunal makes no finding as to the existence or otherwise of the alleged self-standing obligation of due process, or the content of any such obligation. That is because, as the Tribunal explains below, even applying the legal standard that the Claimants argue exists, the Tribunal is unable to conclude that the Claimants have established on facts that such alleged standard was breached.

481. The Tribunal notes that the Parties have made extensive submissions relating to the attribution of the conduct of the Ministry, the Working Group, DPA, the bailiff, and the Albanian courts, to the Respondent.[699] For the purpose of the discussion on the merits, the Tribunal starts with the assumption that the acts of the above identified entities are attributable to the Respondent. The Tribunal will consider issues of attribution, where necessary, once and if it finds that an internationally wrongful act was committed. The Tribunal prefers this approach also because whether a given wrongful act is attributable to the Respondent may also depend on the context in which the State action is taken.

482. The Tribunal addresses below the Claimants' arguments that the Respondent was under an obligation to:

a. provide DCT advance notice prior to taking certain measures, and failed to comply with that obligation (**Section 1**);

b. provide sufficient and particularized reasons to the Claimants in relation to the adverse measures it took against it, and failed to comply with that obligation (**Section 2**);

c. provide a meaningful opportunity to cure the defects in the Claimants' performance of the Concession Agreement, and failed to comply with that obligation (**Section 3**); and

[698] Resp. C-Mem., at para. 282.

[699] Cl. Mem., at paras. 326-371; Cl. PHB, at paras.163-186. *See also*, Resp. Rej., at paras. 253-260.

d. comply with its due process obligations in relation to its conduct following the issuance of the Termination Decision (**Section 4**).

1. Failure to Provide Advance Notice

a) Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

490. The Claimants argue that the Respondent has breached their alleged self-standing right to due process by failing to provide DCT adequate notice prior to issuing the (i) the Notice of Default; and (ii) filing the Termination Application.

491. As discussed above, the Claimants argue that the Respondent was obliged to provide it with "advance notice of any adverse measures to be taken against the investment."[716] The Claimants rely on two cases – *Bear Creek* and *Siag* – to argue that this right to due process exists. Without commenting on whether such a free-standing right exists, the Tribunal notes that in those cases, the tribunals found a breach of the due process obligation in relation to failure to provide notice of expropriatory acts. Even on the most liberal interpretation of the alleged self-standing right to be provided advance notice that the Claimants assert exists, advance notice is required only before an *adverse measure* is taken. Even if the Tribunal were to consider that such a self-standing due process right arises outside the of context expropriatory acts, it must at a minimum materially adversely affect the investment. The Claimants do not – and could not possibly – claim that there must be advance notice of every State action in relation to their investments.

492. Against this background, and assuming that a self-standing right to due process exists, for the Claimants to prevail on their claim they must prove that (i) the issuance of the Notice of Dispute and/or the Termination Application were adverse measures of sufficient severity that the Respondent was under an obligation to provide notice of them; and (ii) the Respondent failed to provide such notice.

493. The Tribunal starts by recalling the overall scheme of the Concession Agreement which forms the contractual basis of the Parties' relationship (**Section (1)**), before discussing the alleged

[714] Resp. C-Mem., at para. 283.

[715] Resp. C-Mem., at paras. 283-285.

[716] Cl. PHB, at para. 24; **CL-110**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, dated 30 November 2017; **CL-5,** *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, dated 1 June 2009.

due process violations arising out of the alleged failure of the Respondent to provide notice of (i) the issuance of the Notice of Default; and (ii) the filing of the Termination Application (**Sections (2)** and **(3)**, respectively).

(1) Overall Scheme under the Concession Agreement.

494. The Tribunal starts by recalling some provisions of the Concession Agreement in relation to the Parties' respective rights and obligations. Expectedly, the Concession Agreement delineates the rights and obligations of its parties, as well as the consequences of non-compliance by a party of its obligations under the Concession Agreement. The Concession Agreement was meant to be a long-term contract, and therefore contained provisions that provided DCT with various safeguards in the event the Respondent alleged non-compliance with DCT's obligations.

495. In broad terms, the Concession Agreement could be terminated for default by DCT but only where certain conditions were met, and the following procedure followed:

a. ***First,*** the Concession Agreement in Article 15.1 identified breaches or "events of default" that would entitle the Respondent to issue a notice for the default; this included in Article 15.1.7 [redacted][717]

b. ***Second***, the Respondent would have to issue a notice of default notifying DCT of its alleged non-compliance.[718]

c. ***Third***, the issuance of a notice of default would trigger a 60-day cure period within which (i) the parties may negotiate and try to come to an agreement; and (ii) DCT would have the obligation to remedy its non-compliance, pursuant to Article 15.5 of the Concession Agreement.[719]

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[717] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.1.7.

[718] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.4 ("[redacted]").

[719] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.5 ([redacted]").

d. ***Fourth,*** if the non-compliance has not been remedied, the Respondent has the right to take steps to terminate the Concession Agreement.[720] However, pursuant to Article 16.3 it is not entitled to do so without first seeking a court order to terminate the Concession Agreement.[721]

496. Crucially, through various provisions, the Concession Agreement provided that the Respondent had to comply with the above procedure, including securing a judicial order, before it could be relieved of its obligations under the Concession Agreement. Article 15.6 provided that "[[722] After the expiry of the cure period, if a party considered itself to have the right to terminate, the party was obliged under Article 16.4 not to '

."[723]

497. Against this background, the Tribunal discusses below whether the Respondent was (assuming the alleged due process standard that the Claimants allege exists) under an obligation to grant notice prior to issuing either the Notice of Default or filing the Termination Application, and whether such an obligation was breached.

[720] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.3.1 ("), and at Article 15.7 (").

[721] **R-32**, Concession Agreement, dated 22 June 2011, at Article 16.3 (" .").

[722] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.5.

[723] **R-32**, Concession Agreement, dated 22 June 2011, at Article 16.4.

(2) Failure to Provide Notice of the Issuance of Notice of Default

498. As discussed above, the issuance of the Notice of Default was the first of a series of steps that the Respondent was obligated to take before the Concession Agreement could be terminated.[724] No prior notice requirement is expressly included in the Concession Agreement.

499. As also explained above, the Notice of Default did not suspend the obligations of the Parties.[725] In fact, the Concession Agreement specifically provided for the Parties' rights to continue as is until judicial termination occurs. Against this background, the Tribunal does not consider it reasonable to imply – under the BITs – an obligation to provide a notice of the Notice of Default. Accordingly, even if there was a self-standing obligation of due process, it would not encompass an obligation to provide notice of the intent to issue a contractual notice of default.

500. In any event, there is significant evidence before the Tribunal that the Respondent did indeed provide advance notice, and that the Ministry and DPA had long discussed the various alleged defaults with DCT prior to issuing the Notice of Default on 22 January 2015:[726]

[redacted]

[724] *See above,* at paras. 494-497.

[725] *See above,* at para. 496.

[726] For the avoidance of doubt, the following subsections only list the correspondence issued by the Respondent and not the Claimants' response. The Claimant's responses are addressed in Section VII.E.3 below, at paras. 530, 535-539.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

501. It is apparent from the above, that the salient – if not all – issues which led to the Notice of Default were discussed with, and known to, the Claimants well before the Notice of Default was issued. In particular, [redacted] DPA expressly referred to the legal consequences of continued non-compliance with the Concession Agreement.[742]

502. Thus, in light of the above, the Tribunal finds that DPA and the Ministry acted with reasonable vigilance enquiring about DCT's compliance with its obligations under the Concession Agreement and warning it of the legal consequences of any non-performance. The issuance of the Notice of Default was therefore neither abrupt nor without warning or notice.

[738] **R-87**, Letter from the Ministry to [redacted], dated 29 July 2014, at p. 1.

[739] **R-87**, Letter from the Ministry to [redacted], dated 29 July 2014; **C-109**, Report of Epoka University, dated June 2014; **C-110**, Report of the Polytechnic University of Tirana, dated 27 June 2014.

[740] **C-112**, Letter from DPA to DCT, dated 30 July 2014.

[741] **C-112**, Letter from DPA to DCT, dated 30 July 2014, at p. 2 (emphasis added).

[742] **C-19**, Letter from DPA to DCT, dated 29 May 2014, at p. 1; **C-112**, Letter from DPA to DCT, dated 30 July 2014, at p. 2.

(3) Failure to Provide Notice of the Termination Application

503. The Claimants further argue that the Respondent was obliged to provide advance notice prior to filing the Termination Application.[743] The Respondent argues that it was under no such obligation and in any case would have met such an obligation if it were to exist.[744]

504. The Tribunal notes the following sequence of events:

[redacted]

505. The Tribunal recalls here its scope of review of this conduct. The Tribunal is not acting as a tribunal under the Concession Agreement or attempting to pass judgement on DPA's compliance

[743] Cl. Mem., at paras. 7, 223-225; Cl. Reply, at paras. 6, 339.5, 416; Cl. PHB, at paras. 30-31.

[744] Resp. C-Mem., at paras. 280-286; Resp. Rej., at paras. 309-313.

[redacted]

with the provisions of the Concession Agreement. Instead, the Tribunal is viewing the dispute/Concession Agreement from the perspective of the allegedly self-standing due process standard that the Claimant argues the Respondent was obliged to follow. As noted above, the alleged due process standard on which the Claimants rely would *not* require the State to provide advance notice of actions that bring adverse consequences on an investor or their investments.[751] While it is common ground that there *was* a meeting of the Parties following the issuance of the Notice of Default and before the Termination Application, the Parties disagree on what was said in that meeting, and in particular whether a promise of further talks was made by the DPA or the Ministry before it would file its Termination Application.[752] The Tribunal has reviewed the available documentary and witness evidence on this point and sets out its conclusions below.

[redacted]

[redacted]

[751] *See above,* at para. 491.

[752] Resp. PHB, at para. 26; Cl. PHB, at para. 30.

[753] Resp. Rej., at para. 295 ("First, from a factual perspective, the ***official minutes*** of the 18 February 2015 show [redacted] never promised that a further meeting with DCT would take place." (emphasis added))

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

514. In light of the above, the Tribunal concludes that there is no conclusive evidence that PIU at the 18 February 2015 Meeting promised a further meeting, and that without such a further meeting the Respondent would be prevented from exercising its contractual right under the Concession Agreement to seek judicial termination thereof.

515. In sum, for the reasons set out above, the Tribunal finds that the Respondent did not act abruptly or without notice when filing the Termination Application.

2. Failure to Provide Particularized and Sufficient Reasons

a) Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

c) Tribunal's Analysis

520. The Claimants make two arguments in relation to their claim, i.e., that (i) none of the grounds on which the Respondent relied in its Notice of Default falls within the grounds for termination listed in the Concession Agreement; and (ii) the defaults alleged in the Notice of Default were baseless, and on this basis the Respondent breached its due process obligation under the BITs.

521. In enquiring whether the Respondent has breached its obligation to provide reasons – if, and to the extent, such an obligation exists – the Tribunal must proceed with caution. While the Tribunal must review the overall conduct and determine whether (under the standard that the Claimants allege exists) the Respondent provided adequate reasons before taking adverse measures against DCT, it cannot open a full-fledged enquiry into whether the Respondent and DCT *complied* with their contractual obligations under the Concession Agreement.

522. Article 20 of the Concession Agreement expressly provides that [redacted]"[775] Accordingly, (i) whether the Notice of Default complied with the Concession Agreement; (ii) what consequences arise if it did not; and (iii) whether the defaults identified were made out as a matter of fact, are all matters of Albanian law and for the Albanian courts to decide. It is not open for this Tribunal to make findings in relation to the Parties' compliance with their contractual obligations under the Concession Agreement.

523. In any event, two levels of the Albanian judiciary found that the Respondent complied with the Concession Agreement in seeking its termination, and that the breaches on which it relied were well-founded: the Tirana Court of First Instance did so on 13 March 2017,[776] and the Tirana Court of Appeal confirmed this on 2 February 2019.[777] The Claimants have not alleged that these

[redacted]

[775] **R-32**, Concession Agreement, dated 22 June 2011, at Article 20.

[776] **C-11**, Termination Decision, dated 13 March 2017.

[777] **C-31**, Decision No. 370 of Tirana Court of Appeal, dated 12 February 2019.

proceedings were fundamentally unfair or deficient in a manner that these court decisions can or should be disregarded. Certainly, this Tribunal cannot – under the guise of reviewing compliance by the Respondent of its alleged due process obligations – act as an appellate court over the findings made by the Albanian judiciary.

524. With this in mind, the Tribunal proceeds to deal with the two arguments made by the Claimants.

525. The Claimants' first argument is that the Respondent breached its due process obligations because the Notice of Default did not refer to any grounds listed in Article 15 of the Concession Agreement, and for that reason fell short of complying with the obligation to provide reasons. The Tribunal does not agree, for several reasons.

[redacted]

b. [redacted]

[778] **C-23**, Notice of Default, dated 22 January 2015.

[779] Cl. PHB, at para. 40.

[redacted]

[redacted]

c. Further, the Tribunal notes – but is unable to follow – the Claimants' argument that the "lack of particularization and substantiation" is even more "blatant" on account of the lack of sufficient evidence as to the Respondent's internal decision-making process and absence of evidence from [redacted].[784] By definition, a claim that the Respondent failed to *provide* sufficient reasons prior to taking adverse action against DCT, can only depend on correspondence or communication exchanged between the Respondent and DCT. It is not clear how further evidence of *internal* decision-making before the Notice of Default was issued would at all be relevant.

526. The Claimants' second argument, that the defaults alleged in the Notice of Default were baseless, also cannot be accepted. As the Tribunal has noted just above, both the Tirana Court of First Instance and the Tirana Court of Appeal have found that there *were* adequate grounds for the Respondent to terminate the Concession Agreement.[785] This Tribunal cannot re-open that contractual question.

527. In reaching its views, the Tribunal is also comforted by the overall context in which the allegation is made. The Tribunal recalls that the Notice of Default was only the first of a series of steps taken before the Concession Agreement was terminated. It is therefore unclear if, even if the Claimants' allegations relating to the deficiencies in providing reasons in relation to the Notice of Default were made out, that this would breach any obligation to provide reasons before taking adverse measures against the Claimants. Prior to "adverse measures" being taken (i.e., the Concession Agreement being terminated) the Respondent set out its reasons first to the Claimants in the Notice of Default, and then to the Tirana Court of First Instance as part of its Termination

[redacted]

[784] Cl. PHB, at para. 41.

[785] *See above*, at para. 525.b; **C-31**, Decision No. 370 of Tirana Court of Appeal, dated 12 February 2019, at p. 48; **C-37**, Decision No. 94 of Tirana Court of First Instance, dated 7 August 2019.

Application. After considering evidence and submission of all parties, including DCT, the Albanian courts have provided their own reasoned view as to the termination of the Concession Agreement.

528. In sum, for the reasons set out above, the Claimants have not established a failure on the part of the Respondent to provide particularized and sufficient reasons in the Notice of Default.

3. Failure to Afford a Meaningful Opportunity to Respond and Cure

a) Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

535. The Claimants rely on three assertions to support their claim that the Respondent has failed to provide DCT a meaningful opportunity to respond and cure the defects identified: that the Respondent (i) did not engage with DCT during the 18 February 2015 Meeting; (ii) failed to respond to requests for further meetings or the explanations provided by DCT following the

[801] Resp. PHB, at para. 26; **R-183**, PIU minutes of the meeting, dated 18 February 2015.

[802] Resp. PHB, at para. 26.

[803] Resp. PHB, at para. 27; **R-183,** PIU minutes of the meeting, dated 18 February 2015.

[804] Resp. PHB at para. 27.

18 February 2015 Meeting, [redacted];[805] and (iii) only accepted to meet after it had filed the Termination Application.

536. In determining whether the Respondent failed to afford to DCT a meaningful opportunity to respond to it and cure the alleged defects in DCT's performance of the Concession Agreement, the Tribunal must assess whether – considering the totality of the circumstances – an adequate opportunity was afforded to DCT to respond to the concerns raised by the Respondent and cure, where possible, the defects identified by it.

537. The Tribunal starts by noting that there is no dispute that the Notice of Default was served on DCT. By design, that Notice of Default provided a 60-day cure period under the Concession Agreement.[806] As far as the right to respond to the positions taken by the Respondent is concerned, it is clear from the record that DCT was afforded the opportunity to respond, and did indeed respond, to the assertion that grounds existed to seek the terminate of the Concession Agreement.

538. ***First***, the fact that DCT raised responsive arguments – and the arguments themselves – have been noted and considered in detail by the Tirana First Instance Court is highly relevant here. In particular, DCT made pleadings in relation to the various grounds on which the termination was sought including:

[redacted]

[805] Cl. PHB, at paras. 52, 170.1.

[806] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.5 ([redacted]).

[redacted]

539. ***Second***, as to the particular instances in respect of which the Claimants argue the Respondent breached its alleged obligation to afford a meaningful opportunity to respond to and cure the defects identified by the Respondent:

[redacted]

540. In sum, for the reasons detailed above, the Tribunal finds that the Respondent has not provided cogent evidence that DCT was not given a meaningful opportunity to cure its alleged breaches of the Concession Agreement.

[redacted]

[812] *See above,* at paras. 507-508.

[813] **C-27**, Letter from DCT to MTI, dated 4 February 2015; **C-161**, Letter from DCT to MTI, dated 9 February 2015; **C-28**, Letter from DCT to MTI, dated 12 February 2015.

4. Failure to Afford Due Process after the Termination of the Concession Agreement

541. Below the Tribunal discusses the Claimants' claim that the Respondent failed to accord DCT the alleged self-standing due process right in relation to various steps taken by the Respondent following the Termination Decision, and its confirmation by the Tirana Court of Appeal including. In this context, the Claimants refer to the setting up of the Working Group (**a)**), the alleged suspension of the Working Group (**b)**), the alleged lack of executive title to enforce the Termination Decision (**c)**), and alleged irregularities in the conduct of the bailiff (**d)**).

a) Setting-Up of the Working Group

(1) Claimants' Position

[redacted]

[redacted]

[redacted]

(2) Respondent's Position

[redacted]

(3) Tribunal's Analysis

547. To determine if the setting up and functioning of the Working Group breached the Respondent's due process obligations as articulated by the Claimants, the Tribunal must place the Working Group in the wider context of this case. [redacted]

[redacted]

[818] Resp. C-Mem., at para. 115, referencing **C-35**, Letter from MIE to DCT, dated 6 June 2019.

[819] Resp. C-Mem., at para. 281.

[820] Resp. C-Mem., at para. 281.

[821] Resp. C-Mem., at paras. 282-283.

[redacted]

[redacted]

549. The crux of the Claimants' argument is that the Working Group was in some way a device for the Respondent to clothe with legality the termination of the Concession Agreement that was, they say, unlawful. The Tribunal is unable to agree with the Claimants' argument because – as noted above – the Working Group was purely an intra-governmental body, comprising of governmental employees, and tasked with coordinating the transfer and physical handover of the terminal *after* the Concession Agreement was terminated. The Claimants have not demonstrated what due process rights DCT had in respect of the establishment of the Working Group, and how any such due process obligation could have been breached. Overall, the establishment of the Working Group or its conduct is irrelevant to the determination of whether the termination of the Concession Agreement was lawful. The Tribunal, in reaching its conclusions as to the lawfulness of the termination of the Concession Agreement, has not placed reliance on the existence or working of the Working Group and has accordingly not considered them factors that may have the effect of legitimizing – after the fact – the termination of the Concession Agreement.

550. Accordingly, the Tribunal finds that the Claimants have not established due process violations arising out of the Respondent's measures in setting up the Working Group.

b) Suspension of the Working Group

(1) Claimants' Position

[redacted]

[redacted]

[redacted]

(2) Respondent's Position

[redacted]

(3) Tribunal's Analysis

553. In respect of this claim, as discussed above, the Claimants complain that they suffered a due process violation because the Working Group continued to work despite the Notification No. 5670 Stay Order. As evidence for the continued working of the Working Group they refer to two documents: [redacted] For the reasons set out below, the Tribunal finds that these documents and the fact that bailiffs entered the Terminal do not indicate that the Claimants suffered a due process violation.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c) Lack of Legal Title

(1) Claimants' Position

(2) Respondent's Position

[redacted]

(3) Tribunal's Analysis

562. As a preliminary point, as noted above,[853] the Respondent made a threshold objection in its Post-Hearing Brief arguing that that this was a claim newly introduced at the Hearing which could have been made only with the Tribunal's permission under Rule 40 of the ICSID Rules. The Tribunal is not convinced by the Respondent's argument that the Claimants have presented a new *claim* within the meaning of Rule 40 of the ICSID Rules. Rather, the Claimants have presented a new *argument* within their pre-existing claim of an alleged breach of the Respondent's due process obligations. Given that the Respondent has now had an opportunity to respond to this new argument (which it did in its Post-Hearing Brief), the Tribunal is satisfied that this argument may be heard and turns now to consider it.

[redacted]

[853] *See above,* at para. 559.

563. ***First***, the Tribunal notes that the Claimants have not provided any evidence as to the content of Albanian law to support their argument that the Termination Decision was not enforceable. The Claimants rely on two sources of evidence for this alleged position under Albanian law: [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

564. ***Second***, the Tribunal has sufficient evidence before it to conclude that Albanian law treats decisions confirmed by the courts of appeal, such as the Termination Decision, as final and enforceable.

[redacted]

[redacted]

[redacted]

566. On this basis, the Tribunal is satisfied that the Termination Decision constituted an enforceable title. The Tribunal therefore does not need to address the Claimants' argument arising from the alleged lack of enforceable title in relation to the Working Group, the takeover of the Terminal or otherwise.

d) Irregularities in the Bailiff's Conduct

(1) Claimants' Position

[redacted]

[redacted]

(2) Respondent's Position

[redacted]

[redacted]

(3) Tribunal's Analysis

576. The Claimants argue that in taking over the Terminal, the bailiff's actions breached procedural obligations owed to DCT. As discussed above, the Claimants ground this claim on their allegations that: (i) the bailiff lacked legal title and entitlement to seize the Terminal; (ii) the bailiff failed to properly serve the notice of execution; and (iii) the bailiff proceeded to take over the Terminal despite being aware of the Interim Decision that ordered a stay on the enforcement of the Termination Decision.[885]

577. ***First***, the Tribunal has already decided above that the Claimants' argument relating to a lack of title has no merit under Albanian law.[886] Accordingly, the Tribunal need not discuss further the Claimants' arguments on any irregularity arising out of the alleged lack of legal title.

578. ***Second***, to provide the proper factual context to the Parties' arguments and to the Tribunal's reasoning, the Tribunal recalls the following:

[redacted]

[882] Resp. PHB, at para. 41; **R-120**, Notice on the Durres bailiff's office, dated 21 November 2019; **R-122**, Notice of the Durres bailiff's office, dated 4 December 2019; **C-170**, Record of bailiff actions during execution, dated 12 December 2019; **R-123**, Record of the meeting between DCT, the Ministry and DPA, dated 12 December 2019; **R-124**; Decision No. 05/1145 of the Durres bailiff's office, dated 23 December 2019; **R-125**, Notice of the Durres bailiff's office, dated 16 January 2020; **R-200**, Letter from the Durres bailiff's office to DCT, the Ministry and DPA, dated 27 January 2020; **R-119**, Notice of the Durres bailiff's office, dated 31 January 2020.

[883] Resp. PHB, at para. 41.

[884] Resp. PHB, at para. 41.

[885] **C-39**, Decision No. 12 of Durres' Administrative Court of First Instance, dated 3 February 2020.

[886] *See above,* at paras. 564-566.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

579. In light of the above, the Tribunal finds that there was a long sequence of interactions between the bailiff and DCT over a period of approximately three months (i.e., from November 2019 to early February 2020) regarding the proposed enforcement actions. It is unusual that a bailiff would seek to serve an official document giving notice of the impending execution on a Sunday, as was the case here. However, the Tribunal has not been made aware of any rule under Albanian law that would render such service unlawful or ineffective. [redacted] testimony confirms that [redacted] On this basis, the Tribunal has no grounds to find that the bailiff failed to properly serve the notice of execution. In an overall assessment of the context and other contemporary communications, there is no doubt that DCT was aware that an execution action was impending.

580. ***Third***, turning to the last alleged irregularity, namely that the bailiff was aware of the Interim Decision issued on 3 February 2020 and nonetheless proceeded to take over the Terminal, the Tribunal notes that this is factually contested. According to the Claimants, around 1 pm on

[903] Tr. Day 2, (Khan, Kallcaku), 138:2 – 140:10.
[904] Tr. Day 2, (Khan, Kallcaku), 138:2 – 140:10.
[905] Tr. Day 2, (Khan, Kallcaku), 139:21 – 140:10.
[906] Tr. Day. 2, (Khan, Kallcaku), 138:2 – 140:10.

3 February 2020, the Durres Court of First Instance issued the Interim Decision staying the proposed takeover of the Terminal.[907]

581. In this respect, the Tribunal has two contrasting accounts of the events surrounding the bailiff's intervention:

[redacted]

582. In light of the above, the Tribunal is not convinced that there is sufficient evidence to indicate that the bailiff knew of the issuance of the Interim Decision when proceeding with the enforcement actions on 3 February 2024. The Respondent's account appears to be the more logical conclusion to draw from the available evidence.

583. In any event, the Tribunal also notes that the Durres Court of First Instance (i.e., the same court that issued the Interim Decision on 3 February 2020), subsequently was led to review the

[907] Cl. Mem., at para. 178 referring to **C-39**, Decision No. 12 of Durres' Administrative Court of First Instance, dated 3 February 2020.

[redacted]

bailiff's conduct. [redacted]

584. In conclusion, for the reasons set out above, the Tribunal is satisfied that the bailiff's actions were not irregular or breached procedural obligations owed to DCT.

e) Rushed Taking of the Terminal to Prevent the Claimants from Pursuing Legal Remedies

(1) Claimants' Position

[redacted]

[redacted]

(2) Respondent's Position

[redacted]

(3) Tribunal's Analysis

588. As discussed above, the Claimants argue that that the Respondent rushed to seize the Terminal to prevent the Claimants from pursuing their legal remedies.

589. ***First***, according to the Claimants, "the only plausible explanation" for the Respondent to seize the Terminal when it did, was that that it wanted to deprive DCT of the opportunity to have the Supreme Court hear DCT's Supreme Court Suspension Request.[922] In essence, the Claimants argue that the Respondent took over the Terminal to ensure that the transfer was completed before the Supreme Court became functional again.[923] However, the Tribunal notes that the Claimants have only alleged – but not proven – that this was the motivating factor behind the seizure of the Terminal. The Tribunal has not been presented with sufficient evidence to this effect, and therefore cannot simply assume that such motivation existed.

[918] Resp. PHB, at paras. 38-39.
[919] Resp. PHB, at para. 39.
[920] Resp. PHB, at para. 40.
[921] Resp. PHB, at para. 40.
[922] Cl. PHB, at para. 82.
[923] *See above,* at para. 569.

590. ***Second***, the Tribunal does not consider that the Claimants' seizure of the Terminal can be considered "rushed," on any account.

591. ***Third***, the Tribunal notes that the Respondent might even have an obligation to act expeditiously when it comes to proceeding with enforcement actions in relation to State property.

[925] **C-216**, Letter from the State Attorney-General, dated 13 March 2019; **C-215**, Letter from the Ministry to the State-Attorney General, dated 25 February 2019; **C-214**, Letter from the State Attorney-General, dated 15 February 2019.

[redacted]

592. ***Fourth***, the Tribunal further notes that, on the Claimants' own case, it had become public knowledge by November 2019 that the Supreme Court would resume functioning.[927] It is therefore not immediately evident that an application made about three months later indicates undue haste on the part of the Respondent.

593. ***Fifth***, and finally, as the Tribunal discusses below, the Supreme Court heard DCT's Supreme Court Suspension Request, rejected it, and took an approach which indicates that it would have rejected the application even if it heard it prior to the takeover of the Terminal.[928] The interplay between the timing of the resumption of the Supreme Court and the transfer of the Terminal accordingly had no practical impact on DCT. Whether the Terminal transfer took place *before* the Supreme Court ruled on the Supreme Court Suspension Request, or there*after*, the transfer would not have been enjoined. There is therefore no injury arising out of any alleged "rushed" takeover of the Terminal.

594. In conclusion, for the reasons set out above, the Tribunal is satisfied that the Respondent did not "rush" to seize the Terminal to prevent the Claimants from pursuing legal remedies

f) Effect of Non-Functioning of the Supreme Court

(1) Claimants' Position

[redacted]

[redacted]

[927] Cl. PHB, at para. 8.

[928] *See below,* at para. 601.

[redacted]

[redacted]

(2) Respondent's Position

[redacted]

[redacted]

(3) Tribunal's Analysis

599. To put in their proper context the Parties' rival contentions as to the Claimants' claims that the Respondent independently breached its obligation to maintain a functional Supreme Court, the Tribunal recounts below the salient facts relating to the relevant factors and events:

[redacted]

[redacted]

[redacted]

[redacted] [redacted][redacted] [redacted]

[redacted] [redacted][redacted]

[redacted] [redacted][redacted] [redacted]

[redacted] [redacted][redacted]

[redacted] [redacted][redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

600. From the events discussed above, the Tribunal draws a number of conclusions.

601. ***First***, the Supreme Court, when considering the Supreme Court Suspension Request, filed about ten months prior, proceeded as if it was hearing the request *when filed*.[949] The Supreme Court's decision assumed that the facts as set out in the request were current and did not rely in its reasoning on any notion that the relief requested had become moot because the Terminal had already been taken over and the application could have been infructuous or moot.[950]

602. ***Second***, because the Supreme Court decided that under Albanian law the grounds for suspension of the Tirana Court of Appeal's decision were not met, and because the Claimants have not alleged – at least in time – an irregularity with the Supreme Court's decision or made a timely denial of justice claim,[951] the Tribunal must accept the Supreme Court's finding that on its authoritative interpretation and application of Albanian law, and an impartial appreciation of the facts, the Claimant would not have been entitled to any relief.[952]

603. ***Third***, to the extent that the Claimants argue that the *delay* in reaching that decision caused them prejudice, it is not clear how such prejudice would arise, both from a practical as well as procedural perspective.

a. Because the Supreme Court applied the facts that existed when the application was filed and not when it was issued, the Claimants cannot reasonably suggest that the passage of time had any impact on the *merits* of the Supreme Court Suspension Request (i.e., there is no basis to conclude that the Supreme Court would have held differently had DCT been in possession of the Terminal when the Supreme Court issued its ruling).[953] The Supreme

[948] **R-109**, Judgement No 70/382 of the Supreme Court, dated 28 September 2020, at para.14.
[949] *See above,* at para. 601.
[950] **R-108**, Judgement No 4/220 of the Supreme Court, dated 11 May 2020, at para. 14.
[951] *See above*, at paras. 70-71.
[952] *See below*, at para. 697.
[953] *See above*, at para. 601.

Court applied the *same* test on the *same* facts, but at a *different* time.

b. Because the Supreme Court denied any relief – and there are no grounds to impeach the process of reaching that decision – the delay made no practical difference. In other words, DCT cannot show that it would have been better off having its the Supreme Court Suspension Request denied in May 2019 than in May 2020. In either case, DCT would not have obtained interim relief.

604. ***Fourth***, the Supreme Court authoritatively confirmed that the Tirana Court of Appeal correctly applied Albanian law when dismissing the Court of Appeal Suspension Request, because DCT had already filed the Supreme Court Suspension Request.[954] As a corollary, the Respondent played no role in the Claimants' decision to *first* file the Supreme Court Suspension Request, *before* filing the Court of Appeal Suspension Request; and the Claimants are therefore bound by *their* choice.

605. ***Fifth***, it is also clear that at the time DCT filed the Supreme Court Suspension Request, there was – at a minimum – a possibility that the Supreme Court either would not be functional, or, if it were functional, that it would not be expeditious in granting relief. This is because, as was public knowledge at that time, only a limited number of Supreme Court justices were available, as a consequence of the European Commission imposed reform efforts.[955] DCT must be presumed to be aware at the same time that the Court of Appeal – to which a similar suspension request could be, and eventually was, made – was functional and empowered to consider a suspension request.

606. Accordingly, for the reasons set out above, the Tribunal finds that the Claimants have not established a breach of the Respondent's obligations under the BITs arising out of the temporary non-functioning of the Supreme Court.[956]

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[954] *See above*, at para. 159.

[955] *See above*, at para. 599; **R-209**, "On the state of the Court files until the end of the first quarter of 2019," giykataelarte.gov.al, dated 29 March 2019.

[956] For the sake of clarity, as to the Claimants' argument that the Supreme Court heard other applications more quickly that the Suspension Request, the Tribunal discusses this as a breach of the substantive obligation of the Respondent not to discriminate against the Claimants below. *See below*, at paras. 648-651.

* * *

607. In sum, for the reasons set out above, the Tribunal finds that the Claimant has failed to establish that the Respondent has breached any of the procedural protections under the BITs the Claimants refers to. Accordingly, the Claimants' claims in relation to the procedural protections under the BITs must be dismissed.

F. Breaches of Substantive Protections

608. As noted above,[957] in their Memorial, the Claimants argued that the Respondent failed to comply with three *substantive* conditions of legality for State conduct: (i) the pursuit of a genuine public purpose; (ii) acting in good faith, transparently, without arbitrariness or discrimination; and (iii) proportionality.[958] On the Claimants' case:

a. As to the alleged public purpose requirement, the Respondent failed to identify a public purpose to justify the "adverse actions and/or omissions" against the Claimants and their investments.[959] These measures – allegedly taken without reference to public purpose – include: (i) the issuance of Notice of Default, which was issued a week after the meeting of DCT's shareholders to dilute [redacted]'s shareholding; (ii) the refusal to engage with DCT during the 18 February 2015 Meeting; (iii) filing the Termination Application, securing the Termination Decision and defending it before the Tirana Court of Appeal; (iv) rushing to seize the Terminal on 3 February 2020, without awaiting the final ruling on DCT's Supreme Court Suspension Request; and (iv) the issuance of Notification No. 5670 and Order No. 234 concerning the Working Group. [960]

b. As to the alleged requirement of good faith, consistency, non-arbitrariness, non-discrimination, and compliance with legitimate expectations, the Respondent is said to have breached these standards by: (i) failing to cite, or be motivated by, public purpose; (ii) continuing to seek the termination of the Concession Agreement despite the fact that DCT provided various explanations following the issuance of the Notice of Dispute and

[957] *See above,* at para. 458.
[958] Cl. Mem., at paras. 184-191.
[959] Cl. Mem., at paras. 192-200.
[960] Cl. Mem., at paras. 192-200.

despite praising DCT in a meeting between DCT and DPA held on 23 May 2018, for having made "better investments than other concessionaires;" and (iii) failing to engage with DCT following the cure period and by proceeding to file the Termination Application.[961]

c. As to the alleged proportionality requirement, the Claimants argue that the Respondent breached this standard by (i) failing to cite, and to be motivated by, a public purpose; (ii) not considering the explanations and evidence provided by the Claimant; and (iii) seeking the termination of the Concession Agreement despite having praised DCT during a meeting between DCT and DPA held on 23 May 2018.[962]

609. The Claimants argued separately that each of the above requirements (i.e., the public purpose requirement, the good faith requirement, the requirement to act without discrimination or arbitrariness and in compliance with legitimate expectations) were also breached because the Respondent: (i) failed to allow the use of the G7 Crane without there being a risk of damage; (ii) delayed the approval of the installation of the MH 5150 crane; and (iii) delayed approving the installation of additional power outlets at the Terminal.[963]

610. In their Reply, the Claimants – in response to the Respondent's argument that the Claimants had failed to establish that the above-stated "conditions of legality" exist and how they applied to the facts[964] – argued that these conditions of legality are apparent from the authorities (discussed below in relation to each condition of legality on which the Claimants base their claim).

611. In their Post-Hearing Brief, the Claimants alleged that the Respondent has breached these conditions of legality (i) by carrying out a taking on "pretextual and arbitrary grounds"[965] other than in pursuit of a genuine public interest; (ii) by failing to act transparently, consistently and in good faith;[966] (iii) by discriminating against the Claimants and acting with prejudice against

[961] Cl. Mem., at paras. 201-205.
[962] Cl. Mem., at paras. 206-212.
[963] Cl. Mem., at paras. 213.1-213.4.
[964] Resp. C-Mem., at para. 268.
[965] Cl. PHB, at Section B.1.
[966] Cl. Mem., at paras. 42, 180, 201, 204, 213; Cl. Reply, at paras. 338, 339.2, 383, 411; Cl. PHB, at paras. 109, 117.

them;[967] and (iv) by acting in a "non-proportional and arbitrary basis."[968] In addition, the Claimants argued that the Respondent has acted in breach of their legitimate expectation and failed to compensate them for the assets taken.[969]

612. Given the fact that the Claimants have argued that the substantive protections the Respondent has allegedly breached arise out of *both* the FET and expropriation standard, it is more efficient to address them together, thus following the manner the Claimants have chosen to argue their case. Accordingly, the Tribunal addresses the claims as to substantive violations in the following manner. The Tribunal will address in turn whether the Respondent:

a. breached the BITs by engaging in arbitrary and pretextual conduct, and not in furtherance of a genuine public purpose (**Section 1**);

b. failed to act transparently, consistently and in good faith (**Section 2**);

c. discriminated against the Claimants and acted with prejudice towards them (**Section 3**);

d. acted disproportionately and in an arbitrary manner (**Section 4**);

e. acted in breach of the Claimants' legitimate expectations (**Section 5**); and

f. has unlawfully expropriated the Claimants' investment by failing to provide them adequate compensation (**Section 6**).

1. <u>Claim that the Respondent Engaged in Arbitrary and Pretextual Conduct, and not in Furtherance of a Public Purpose</u>

a) Claimants' Position

[redacted]

[967] Cl. PHB, at Section B.2.

[968] Cl. PHB, at Section B.3.

[969] Cl. Mem., at paras. 183, 200-214, 230, 236, 268, 286, 294, 308; Cl. PHB, at paras. 160, 184, 199.8.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

620. The Tribunal starts by noting the Parties' disagreement as to the existence of a free-standing requirement that State conduct must necessarily be motivated by a "public purpose." The *ADC v. Hungary* decision, on which the Claimants rely, concerned a claim for expropriation. In that case, in response to the claimant's argument that Hungary's measures were not taken in furtherance of a public purpose, Hungary argued that in adopting the legislative measure it had

[redacted]

made express reference to the "strategic interests of the state."[998] The tribunal rejected Hungary's argument that merely referencing the strategic interests of the State would not establish that the measure in question was taken in furtherance of a public purpose.[999] While the Tribunal sees no reason to disagree with the notion that mere reference by a State to a public purpose, without more, is insufficient to meet the public purpose requirement to justify an expropriation, the Tribunal does not understand the *ADC v. Hungary* tribunal to have implied that there exists a general duty requirement that all State conduct – whether resulting in a taking or not – be subject to a strict requirement that it is taken in pursuit of public interest.[1000]

621. The Tribunal recognizes that whether a given measure is taken in furtherance of public interest forms – or could form – a relevant consideration when assessing the lawfulness of various standards of protection and the various defenses that parties can raise. However, the Tribunal is hesitant to conclude that there exists an overarching and independent obligation that *all* State conduct must be in the pursuit of public interest. It is true that conduct motivated by bad faith *may* give rise to a claim for a breach of the FET standard or any of the allied standards; but that is not the same as a blanket rule that a State is under an obligation under the BITs or international law to always act in furtherance of an identified public purpose. Overall, however, the Tribunal does not need to take a definitive view on this point. As discussed below, even if there was an overarching and standalone obligation to act in furtherance of public interest, in the Tribunal's view, the evidence establishes that this obligation was met by the Respondent in this case.

622. The Tribunal now considers the particular instances of alleged breaches of the Respondent's alleged obligation to act in public interest.

623. ***First***, with respect to the claim that the Respondent acted without being guided by public purpose in issuing the Notice of Default, filing the Termination Request and resisting DCT's

[998] **CL-19**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October 2006, at para. 392.

[999] **CL-19**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October 2006, at para. 431.

[1000] **CL-19**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October 2006, at paras. 432-433.

appeal against the Termination Decision, the Tribunal finds that the Claimants have not demonstrated such lack of public purpose.

624. The Tribunal starts with an assessment of the overall context of the dispute, which involves a long-term concession agreement over the only container Terminal in the largest port of Albania.[1001] The Respondent therefore had a legitimate interest in ensuring the safe and proper operation of the Terminal. As set out in the Tribunal's discussion of the alleged breaches by the Respondent of its procedural obligations: [redacted] The Tribunal has also found that the Respondent did not act with undue haste in taking over the Terminal.[1006] The Respondent considered it to be in its legitimate interest to terminate the Concession Agreement. As also determined by the Albanian courts, the Respondent had the right to terminate the Concession Agreement and exercised that right in compliance with the Concession Agreement.[1007]

625. As to the Claimants' allegation that the Respondent's measures were pretextual and intended to favor [redacted], the Tribunal finds this claim to be unsupported by the evidence available, and indeed contravened by existing evidence. As discussed in further detail below,[1008] the Tribunal finds that the evidence does not establish that the Respondent imposed [redacted] as a

[1001] Resp. C-Mem., at para. 266.

[redacted]

[1006] *See above,* at para. 590.

[1007] *See above,* at paras. 149, 522-523.

[1008] *See below,* at paras. 631, 632.

shareholder. There is also no evidence as to the link between the Respondent and [redacted], or even an assertion as to what relations exist between the two for the former to take action to favor the latter. Moreover, the Notice of Default was issued based on a [redacted] that was issued *prior* to the dilution of [redacted]'s shareholding.[1010]

626. These facts, when considered against the backdrop of the overall importance of the Durres Port, and the need to ensure that the Terminal is properly operated, do not allow the Tribunal to reach a conclusion that the Respondent issued the Notice of Default, or contested DCT's appeal against the Termination Decision, without being guided by a public purpose.

627. ***Second***, with respect to the argument that the Respondent did not sufficiently identify or refer to a public purpose motivating its actions, the Tribunal does not agree with the Claimants' view that there exists an obligation on the Respondent to continually identify a public purpose for all its conduct. Even if there exists a free-standing obligation to act in furtherance of a public purpose, that obligation cannot extend to requiring a State to *continually identify* that public purpose towards which its conduct is aimed. Rather, the public purpose may be expressly identified, but it may equally be implied by the context, the nature of activities and other relevant facts relating to State conduct. There cannot be a requirement for a State to expressly identify the public purpose it seeks to achieve for each measure it takes in related actions.

628. This discussion also relates closely to the Tribunal's discussion on the question of burden of proof, addressed above.[1011] The Respondent is not under an obligation to *disprove* the Claimants' allegations; it is not required to *demonstrate* the existence of a public purpose, or for that matter, the existence of the other three alleged conditions of legality. Rather, it is for the Claimants to show that the purpose was other than a public purpose.

629. ***Third***, with respect to the argument that the Respondent breached the requirement of acting in the public purpose through the acts of its judiciary, the Tribunal recalls – as it has done above in relation the procedural breaches – that it does not, and cannot, sit in appeal over the decisions

[redacted]

[1010] Given the factual findings on this issue, the Tribunal need not assess the validity of the Respondent's argument as to the effect (or otherwise) of the improper motivation when exercising contractual rights.

[1011] *See above,* at paras. 468-470.

of the Albanian courts.[1012] No timely denial of justice claims have been made in this proceeding to assail the findings of the Albanian courts, nor is there any reason to find that the proceedings were not fairly conducted.[1013] The Tribunal must therefore accept that the Respondent's termination of the Concession Agreement was a legitimate exercise of its rights under that agreement. In this context, the Tribunal has no basis to find that that Albanian courts did not operate guided by a public purpose. It is self-evident that the purpose guiding any court is the dispensation of justice and that involves, in cases of commercial disputes, upholding conduct that complies with contracts and providing consequences for breaches of the contracts.

630. ***Fourth***, with respect to the argument that the Respondent breached the requirement of acting in furtherance of public purpose because there is no evidence of the considerations involved in decision making, the Tribunal notes that this is one of the adverse inferences that the Claimants invites the Tribunal to draw.[1014]

a. As to the request based on the absence of relevant documents, the Tribunal notes that following its order for the Respondent to produce documents relating to the decision-making process leading to the Notice of Dispute, the Respondent has produced [redacted].[1015] The Tribunal acknowledges that there are possibly gaps in the paper trail that could ordinarily have been created in the process of making the decision to issue the Notice of Default. The Tribunal does not find it necessary to determine whether the Respondent is right in arguing that Albanian governmental procedure and record-keeping does not work in the same way as "in Frankfurt or in Zurich."[1016] However, it is not the case that there is a complete absence of any documentation in relation to that decision, or more precisely, the public purpose underlying the decision. There is a long chain of correspondence starting shortly after DCT took over the Terminal indicating that DCT was made aware of the non-compliance of its obligations under the Concession

[1012] *See above,* at para. 523.

[1013] *See above,* at para. 523.

[1014] *See above,* at para. 472.

[redacted]

[1016] Tr. Day 1, (Rubins KC), 130:7-9.

Agreement.[1017] This overall context makes the public purpose evident.

b. As to the absence of [redacted], the former chairman of PIU who has now retired, as witness in the present arbitration, the Tribunal does not find that the Respondent should suffer an adverse inference because it chose not to, or was not able to, secure his presence. During the Hearing, the Claimants have referred to the alleged ease of producing [redacted] due to the small population of Tirana, and the fact that in a prior investor-State dispute the Respondent produced a retired civil servant.[1018] Neither fact requires the Tribunal to draw an adverse inference in this case. The absence of a person who was not under the employ of the Respondent is not a ground for adverse inferences, and especially a specific inference that the Respondent acted without public purpose.

c. The Tribunal notes, as argued by the Claimants, that in cases such as *Bank Melli v. Bahrain* and *Dayanni v. Korea*, tribunals have drawn adverse inferences arising out of failure of States to provide documents relating to their decision-making process. In *Dayyani,* the tribunal drew an adverse inference in relation to the question of attribution of the concerned entity's (KAMCO) acts to the Korean state.[1019] In *Bank Melli,* the tribunal drew adverse inferences as to the reasons for the State's decision to send a certain investee entity into administration.[1020] However, in both cases, the adverse inferences *comported with*, and did not depart from, other evidence available to the relevant tribunals. In the present case, there is evidence in relation to the reasons for which the Ministry decided to seek the termination of the Concession Agreement [redacted]. And more importantly, the reasons and their legitimacy of the Termination Application have been considered by the Albanian courts who have found that DCT had committed material defaults under the Concession Agreement and was therefore liable to suffer termination of

[1017] *See above,* at para. 500.

[1018] Tr. Day 1, (Gharavi), 22:1 – 23:21.

[1019] **CL-84**, *Mohammad Reza Dayyani, et al. v. The Republic of Korea*, PCA Case No. 2015-38, Award, dated 5 June 2018, at para. 375.

[1020] **CL-85**, *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award, dated 9 November 2021, at paras. 662-666.

[redacted]

the Concession Agreement.[1022] In this context, the Tribunal cannot conclude, based on a request for adverse inferences, that the Respondent did not act in furtherance of a public purpose.

631. ***Fifth***, with respect to the claim that [redacted] was imposed on DCT and in doing so the Respondent did not act in furtherance of a public purpose, the Tribunal finds that there is no sufficient evidence that [redacted] was "imposed" on DCT.

[redacted]

[redacted]

[1022] **C-11**, Termination Decision, dated 13 March 2017, at pp. 26-27.

[redacted]

632. Accordingly, the Tribunal finds that there is no compelling evidence that the Respondent imposed [redacted] on DCT. The evidence suggests – at best – that the Respondent was concerned that contrary to the Bid, [redacted] – the technical partner with the expertise who had previously committed to holding 49% in DCT – in fact held less than 1%. The Respondent thus made the handover of the Terminal subject to the induction of another technical partner to operate DCT along with DKS.

633. In sum, for the reasons detailed above, the Claimants have not demonstrated that the Respondent acted without being guided by a public purpose. In reaching this decision, the Tribunal takes no view on the existence of a free-standing obligation that all State conduct must be guided by an identified public purpose, as pleaded by the Claimants.

2. Claim that the Respondent Acted in a Non-Transparent, Inconsistent Manner and in Breach of Good Faith

a) Claimants' Position

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

637. The Tribunal notes at the outset that it does not need to decide whether there exists a general obligation of good faith or transparency on states in relation to all of their conduct because, even if such an obligation existed, it would not have been breached in this case. The evidence before the Tribunal does not support such a claim. As the Tribunal has found above, (i) the Respondent engaged repeatedly with DCT in respect of various operational issues and breaches of the concession agreement;[1036] (ii) the Albanian courts have confirmed that the Respondent was within its rights to seek termination of the Concession Agreement;[1037] (iii) there is no evidence (or even a cogently formulated-allegation) that the proceedings before the Tirana Court of First Instance or the Tirana Court of Appeal were deficient;[1038] and (iv) the evidence does not establish that the Respondent required or imposed [redacted]'s involvement in DCT.[1039] Accordingly, the Claimants have not established, on the facts, a breach of the alleged obligation to act in good faith or transparently on the part of the Respondent.

3. Claim that the Respondent Discriminated and Acted with Prejudice against the Claimants

a) Claimants' Position

[redacted]

[redacted]

1036 *See above,* at para. 500.

1037 *See above,* at paras. 522-523.

1038 *See above,* at para. 523.

1039 *See above,* at para. 632.

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

642. The Tribunal addresses the particularized instances of alleged discriminatory or prejudicial conduct of the Respondent below. The Claimants argue that the Respondent had "the substantive obligation of not discriminating against the Claimants, as recognized in the BITs," which obligation is a "fundamental component of the substantive protections afforded to investors"[1050] While the Claimants do not articulate the precise legal test or legal standard for a State's obligation to act in a non-discriminatory manner, the Tribunal considers the Claimants' arguments by reference to the FET standard, as generally understood.

643. ***First***, as to the claim that the Respondent acted discriminatorily by terminating the Concession Agreement despite calling DCT one of the best concessionaires [redacted]

[redacted]

[1050] Cl. PHB, at paras. 118-119 referring to **RL-88**, *Waste Management, Inc v Mexico*, Award, dated 30 April 2004, at para. 98 and **CL-9**, *Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at paras. 609-610.

[redacted] the Tribunal does not consider there to be a basis to conclude that such a remark, made in the context of a meeting with the DPA and DCT, is sufficient to found a claim that the Ministry was acting with prejudice against DCT. In any event, as the Respondent has alleged (and the Albanian Courts have found) DCT committed several breaches of the Concession Agreement, which gave rise to the Ministry's right to terminate the Concession Agreement.

644. The Tribunal also does not consider there to be sufficient basis to conclude that because DCT was complimented by the deputy director of DPA, the Respondent – in terminating the Concession Agreement – was discriminating against DCT vis-a-vis "other less skilled concessionaires that receive an objectively more lenient treatment for their shortcomings."[1052] The Claimants have provided no evidence of the conditions in which other comparable concessionaries (assuming they exist) operate, the alleged breaches by them that the Respondent allegedly excused, and how these compare to the breaches alleged against the Claimants, which were confirmed as breaches by the Albanian courts. In the absence of these critical facts, the Tribunal cannot conclude that the Respondent acted in a discriminatory manner relative to its treatment of other similarly placed concessionaries.

645. ***Second***, as to the claim that the Respondent discriminated against the Claimants in respect of fees charged to it, but not charged to another entity, called [redacted], the Tribunal does not consider that the Claimants have sufficiently articulated and proven their claim. In fact, the Claimants clarified at the Hearing in response to a question from the Tribunal that they had not articulated any claim for discrimination other than the fact that the other concessionaires had not terminated under circumstances similar to that of DCT.[1053] In their Post-Hearing Brief, the Claimants simply referred to this conduct (of allegedly selective charging of fees) as an example of discriminatory conduct but only referred to the minutes of a meeting between DCT and DPA which notes a

[redacted]

[1052] Cl. PHB, at para. 123.

[1053] Tr. Day 1, (Scherer), 70:16-20 ("Second, I think in the submissions there were some references to discrimination, I don't think that has been detailed, so I also just want to make sure that there is no breach in any way that would rely on discrimination"); Tr. Day 1, (Gharavi), 71:18-72:14 ("On discrimination, you are right, other than to say what I said today is that according to Albania's own submission, by way of contemporaneous documents dating from 2018, documents that are from Albania, and the positions conveyed by two civil servants of Albania, we were better than all concessionaries, yet there is no trace of termination of any other concessionaries and we believe that is also a discrimination. But other than that, you are right, ***we have not put forward further particulars***.") (emphasis added))

statement from DCT that "we know that you will have a lawsuit with [redacted], who does not pay the fees as they say it is not in the tariff book, while we will pay from the first moments this process has begun."[1054] The Tribunal cannot meaningfully rely on this unilateral statement (in respect of which no direct response from the DPA is on record), and without further particulars as to the entity [redacted], including the circumstances in which it operates and the terms of any contract [redacted] may have with the Respondent.

646. ***Third***, as to the claim that in issuing and confirming the Termination Decision the Albanian courts acted in a discriminatory manner, the Tribunal recalls its discussion above that it is not appropriate for it to sit in appeal over the decisions of Albanian courts, including the Termination Decision.[1055] In any event, it is not clear how the decisions of the Albanian courts could be considered "discriminatory" or acting with "prejudice" given that the Claimants have neither identified a comparator to DCT which in similar circumstances was provided better treatment nor demonstrated that the Termination Decision was entirely implausible and manifestly incorrect.

647. ***Fourth***, as to the claim relating to the applications for suspension heard by the Supreme Court before it temporarily ceased to function, the Tribunal notes that the Claimants make two arguments: (i) that the Respondent committed a breach of its substantive obligations because the Supreme Court failed to hear the Supreme Court Suspension Request; and (ii) that, as a consequence, the Claimants were deprived of the chance of a successful application with this having a "material impact" on DCT's ability to resist the termination of the Concession Agreement.[1056]

648. The Tribunal notes the Claimants' argument that, despite having been filed after the Claimants' Supreme Court Suspension Request, certain *other* allegedly similar suspension requests were considered. However, the Claimants have not demonstrated that the particulars required to prevail on this claim exist here. The Tribunal has insufficient detail as to the nature of these comparator requests, the decision-making process that went into the listing of those requests, and whether there was any legitimate rationaleee that could justify the finding of discrimination in

[1054] **C-36**, DPA's Minutes of the Meeting held on 23 May 2018, at p. 5.
[1055] *See above,* at para. 629.
[1056] Cl. PHB, at paras. 86-91.

the listing process. [redacted] Considered in the overall context, including that, because the Supreme Court had to stop functioning, there would necessarily be some requests that are heard before others, the Tribunal cannot conclude that the Respondent discriminated against the Claimants.

649. The Parties disagree on whether the applications were indeed *granted* by the Supreme Court.[1058] [redacted]

650. The Tribunal need not settle this controversy because even if certain applications for suspension were *granted*, as already noted above, that would not be sufficient to make out a claim for discriminatory conduct by the Albanian courts.[1060]

651. The Tribunal notes that, in any case, applications for injunction are highly fact-sensitive and no conclusions can meaningfully be drawn from such applications being granted in other cases. Further, the Tribunal notes, as explained above, that (i) DCT's Supreme Court Suspension Request was duly heard when the Supreme Court resumed functioning; and (ii) the Supreme Court adopted the same approach it would have adopted, had it examined the Supreme Court Suspension Request shortly after the request was filed.[1061]

652. In sum, for the reasons set out above, the Tribunal is not satisfied that the Respondent discriminated, or acted with prejudice, against the Claimants.

[redacted]

[1058] Cl. PHB, at paras. 86-91; Resp. PHB, at paras. 59-63.

[redacted]

[1060] *See above,* at para. 648.

[1061] *See above,* at para. 601.

4. Claim that the Respondent Breached the Claimants' Legitimate Expectations

a) Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

659. As a preliminary point, the Tribunal recalls some well-established principles relating to protection of legitimate expectations under the FET standard. While the details of any legitimate expectation standard are subject to debate and depend on the specific wording in the relevant BIT, it is well-established that to demonstrate a breach of the FET standard on account of breach of legitimate expectations, the Claimants typically would need to establish that: (i) there was an expectation arising out of representations made by the Respondent in relation to its future conduct; (ii) such expectation was reasonable considering the conduct of the State at the time the investment was made; (iii) the Claimants each relied on this expectation at the time of making their investments, and (iv) the Respondent acted inconsistently with these legitimate expectations.[1081]

660. As detailed in the summary above, the Claimants' case on the legitimate expectations they had, and how they were breached, has evolved as the proceedings progressed.[1082] However, despite questions from the Tribunal at the Hearing,[1083] the Claimants' claim on legitimate expectations remains vague and mostly unparticularized. In particular, the Claimants have only referred to their alleged expectations in general terms, and not identified for each Claimant which alleged expectations it held at the time it made the protected investment. This alone, in the Tribunal's view, is sufficient to dismiss the Claimants' legitimate expectation claim.

661. Nonetheless, the Tribunal will address each of the alleged expectations in turn.

[1080] Resp. Rej., at para. 295.

[1081] **RL-15**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No ARB/05/8, Award, dated 11 September 2007336; **RL-210**, *Impregilo SpA v. Argentine Republic*, ICSID Case No ARB/07/17, Award, dated 21 June 2011, at paras. 290-298.

[1082] *See above,* at paras. 653-655.

[1083] Tr. Day 1, (Scherer), 70:18 -71:4 ("And finally, you mention here breach of legitimate expectations; in that context, I think it would be helpful to distinguish between the four investors, the four Claimants, given that I think it's a fairly uncontroversial proposition that the legitimate expectations are to be assessed at the moment of the investment, and here we have four investors with arguably alleged different moments of investment in time. So I think it might be helpful to get -- if that is part of the breaches that the Claimants allege, to get a better understanding on these distinctions.").

(1) Expectation Relating to Protection of "Commercial Reasoning" in Relation to the Cooperation Agreement

662. As discussed above, the Claimants argued for the first time in their Post-Hearing Brief that the Respondent had failed to protect the "commercial reasoning" based on which [redacted], then the sole shareholder of DKS, had accepted to enter into the Cooperation Agreement giving up its leasehold rights over the Terminal.[1084] The Claimants argue that this expectation was breached because the Respondent "refused to engage, unreasonably delayed investments, pretextually terminated the Concession Agreement, and rushed to seize DCT's investments without title and in breach of any notion of due process."[1085]

663. ***First***, even on the Claimants' own case the alleged legitimate expectations, if any, are those of [redacted] – and not the Claimants. The Cooperation Agreement was entered into by [redacted], not the Claimants.[1086] The Claimants have provided no evidence for their assertion that they were "***expecting*** that their initial negotiations would hold and this, protect the commercial reasoning that guided the initial decision to surrender the indefinite leasehold."[1087] Absent proof that the Claimants could or did rely on representations made long before they had made their investments, there can be no claim for breach of legitimate expectations on this account.

664. ***Second***, and in any event, even if the Claimants had shown that they had an expectation that the Respondent would "protect the commercial reasoning" behind the Cooperation Agreement, the Tribunal would not have found that those expectations were either legitimate or have been frustrated by the Respondent. While the Claimants do not specifically describe the "commercial reasoning" they suggest that the Respondent failed to protect, it is apparent to the Tribunal that the Cooperation Agreement involved an exchange of rights between [redacted] and the Ministry, by which [redacted] agreed to give up its leasehold rights and the Ministry promised to ensure that [redacted] would be allowed to carry out various technical and other studies, and then either (i) award [redacted] the concession to operate the Terminal or (ii)

[1084] Cl. PHB, at paras. 149-150.

[1085] Cl. PHB, at para. 149.

[1086] **C-12**, Cooperation Agreement between the Ministry and DKS, dated 31 August 2009.

[1087] Cl. PHB, at para. 148 (emphasis added).

be guaranteed a minimum 51% interest in the Concession Agreement.[1088] As various tribunals have held, the expectation that a party will comply with its contractual obligations is not necessarily protected as an expectation under international law;[1089] that is not the function of the doctrine of legitimate expectations under international law.

665. ***Third***, there is no evidence before the Tribunal to indicate that any of the Claimants made investments relying on any expectation that the Respondent would protect the "commercial reasoning" underlying the Cooperation Agreement – an agreement to which no Claimant was a party. The Claimants have not presented any documentary or other evidence to show that Claimants relied on their expectation relating to the negotiations of the Cooperation Agreement in making their investments.

(2) Expectation Relating to Access to the Supreme Court

666. The Tribunal finds that the Claimants have not established the existence of a legitimate expectation that the Supreme Court would remain functional at "all material times." While the Tribunal notes that it is unusual for a higher court in a country to cease to function (albeit temporarily), it cannot be assumed that a State cannot reform its judiciary without breaching the legitimate expectations of foreign investors. Further, the Claimants have not provided any evidence of their reliance on any representation that the Supreme Court would continue to function at all times. While it may have been reasonable for DCT to expect that *some* judicial remedies would be available to it all times (and that expectation would have been met because the Court of Appeal remained functional throughout and able to hear a suspension request, absent a pending application to the Supreme Court), the Tribunal cannot readily infer the existence of a legitimate expectation that the Supreme Court in particular would always remain functional.

[1088] **C-12**, Cooperation Agreement between the Ministry and DKS, dated 31 August 2009, at Article 3.

[1089] **RL-15**, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No ARB/05/8, Award, dated 11 September 2007, at para. 344; **RL-27***, Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*. (ICSID Case No ARB/07/24) Award, dated 18 June 2010, at para. 335; **RL-210**, *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award, dated 21 June 2011, at para. 292; **RL-211**, *Rasia FZE and Jospeh K Borkowski v Republic of Armenia*, ICSID Case No ARB/18/28, Award, dated 20 January 2023, at para. 642.

(3) Expectation Relating to the Involvement of the Council of Ministers and the Prime Minister

667. The Claimants argue that they legitimately expected the Council of Ministers and the Prime Minister to ensure the "Claimants' legitimate expectations to receive a fair and good faith assessment, and moreover in accordance with due process."[1090] The Claimants argue that the non-involvement of the Council of Ministers or the Prime Minister constitutes a breach of their legitimate expectation.

668. ***First***, the Claimants have not demonstrated any evidence as to the existence of such an expectation or the reasonableness of any such expectation. The fact that (i) the Council of Ministers was involved in the approval and implementation of the Concession Agreement and (ii) that the Prime Minister had directly contacted DCT and DKS at various points in time does not create a reasonable expectation of their continued involvement.[1091] As with any State, the allocation of roles and responsibilities of the various organs and officials comprising the government are the State's prerogative. In any event, there is no evidence that any of the Claimants relied on this alleged expectation in making their investments.

669. ***Second***, this alleged legitimate expectation that the Council of Minister and the Prime Minister would either prevent or remedy an alleged lack of good faith assessment or adherence to due process, cannot be sustained where the Tribunal finds that the Claimants *did* receive a good faith assessment of its explanations as to its defaults, as discussed,[1092] and *were* afforded due process even without such involvement, as detailed above.[1093]

[1090] Cl. PHB, at para. 151.

[1091] Cl. PHB, at paras. 150, 167-168 (referring to **R-89**, Letter from [redacted] to the Ministry, dated 14 July 2014; **R-87**, Letter from the Ministry to [redacted], dated 29 July 2014; **C-205**, Letter from [redacted] to the Ministry, dated 14 July 2014; **C-206**, Letter from the Ministry to [redacted] dated 29 July 2014; **C-207**, Letter from [redacted] to the Ministry, dated 11 August 2014; **C-20**, Letter from DCT to DPA, dated 5 September 2014; **C-113**, Letter from DPA to DCT, dated 12 November 2014).

[1092] *See above*, at para. 540.

[1093] *See above*, at Section IV.E.4.

(4) Expectation of Good Faith Assessment of Claimants' Explanations to Notice of Default

670. Leaving aside the fact that the Claimants have not provided any evidence showing their expectation that they would receive a "fair and in good faith assessment of their explanations" to the Notice of Default (which explanations the Claimants say were provided in their letter dated 4 February 2015, and then reiterated in the 18 February 2015 Meeting),[1094] the Tribunal has already decided above that the Claimants *did* in fact receive such a good and fair assessment. [redacted]

(5) Expectation that the Ministry Would Secure Executive Title for the Termination Decision in a Separate Proceeding

671. The Claimants' argument relating to this expectation rests on their assertion that under Albanian law, the Termination Decision could not have been enforced without there being a separate proceeding that would give it executive title to enforce the decision. The Tribunal has already found above that: (i) there is sufficient evidence to conclude that as a matter of Albanian law, the Termination Decision was enforceable and the Ministry did not need to commence a separate proceeding in order to be able to seek its execution; [1098] (ii) DCT itself acknowledged in its Supreme Court Suspension Request that the Termination Decision was "a final decision and

[1094] Cl. PHB, at para. 156.

[redacted]

[1098] *See above*, at para. 564.

[was] consequently enforceable;"[1099] (iii) this view was shared by the State-Attorney General who advised the Ministry that the Termination Decision was "immediately executable;"[1100] and (iv) DCT has unsuccessfully attempted to make this argument before the Durres Court of First Instance, which found that the Termination Decision "constitutes a valid, effective executive title" and that "the executive title was considered valid and effective by this court, the only circumstance for the invalidity of the entire enforcement action was not established."[1101]

(6) Other Expectations

672. As noted above, prior to filing their post-hearing brief, the Claimants argued that their legitimate expectations were also breached on account of the Respondent's: (i) failure to allow the installation of the G7 crane; (ii) delay in approving the installation of the MHC 5150 crane; and (iii) delay in approving the installation of additional power outlets.[1102] The Tribunal finds that it lacks the factual basis to uphold such a claim.

673. As the Tribunal has previously indicated, it will not – and cannot – conduct a full-fledged review of the parties' compliance with the concession agreement, especially given that DCT was provided an opportunity to, and did, make several arguments to resist the termination of the concession agreement.[1103] Even if it was true that the Respondent unduly refused or delayed the installation of the cranes or delayed the approval of electrical works, it is not clear what effect that would have since it has been confirmed that Concession Agreement was validly terminated**.**[1104]

674. With respect to the expectation as to follow-up discussions after the 18 February 2015 Meeting, that cannot be the basis for a claim for breach of legitimate expectations. As the Tribunal has indicated above,[1105] legitimate expectations must be assessed at the time of making an

[1099] *See above*, at para. 564.b.

[1100] *See above*, at para. 564.c.

[1101] **R-135**, Decision No. 134 (82-2020-273) of the Durres Court of First Instance, dated 4 September 2020.

[1102] *See above*, at para. 655.

[1103] *See above*, at para. 149.

[1104] *See above*, at paras. 496-499, 525.b.

[1105] *See above*, at para. 659.

investment. Accordingly, any expectation arising out of the meeting held on 18 February 2015 is not protected as a "legitimate expectation" under the FET standard.

* * *

675. In sum, for the reasons set out above, the Tribunal finds that the claimant have not made out their claims that the Respondent frustrated their legitimate expectations. Accordingly, this claim must be dismissed.

5. Claim for Disproportionate Conduct

a) Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

682. The Tribunal starts by noting that the Parties disagree on two broad questions: whether a proportionality requirement applies in relation to State conduct taken pursuant to a contract, and whether any such requirement was breached by the Respondent.

683. The Tribunal notes the various legal arguments made by the Parties in relation to the first question but does not consider it necessary to decide the issue. As discussed below, the Tribunal concludes that – even if a proportionality requirement (as pleaded by the Claimants) did attach to the Respondent's exercise of rights under the Concession Agreement or the takeover of the Terminal – Claimants have not established the Respondents' conduct was disproportionate.

684. The Tribunal has already found above, in relation to the allegation of other breaches, that: (i) DCT was continually notified of its alleged breaches, warned of consequences of non-compliance, and provided sufficient advance notice of all of the Respondent's actions;[1125] (ii) DCT had a meaningful opportunity to cure its alleged breaches of the Concession Agreement and the Respondent did not act with undue haste in taking over the Terminal;[1126] (iii) the Claimants have not demonstrated that the Respondent acted without being guided by a public purpose; and (vi) the

[1123] Resp. C-Mem., at para. 279.

[1124] Resp. Rej., at para. 309 (referring to **C-163**, Termination Application, dated 3 April 2015; **R-64,** Letter from PIU to DCT, dated 23 May 2013; **R-68,** Letter from PIU to DCT, dated 5 August 2013; **R-72**, Letter from the Ministry to DCT, dated 8 November 2013; **C-15**, Letter from DPA to DCT, dated 11 December 2013; **R-82**, Letter from the Ministry to DCT, dated 23 May 2014; **R-86**, Letter from the Ministry to DCT, dated 3 July 2014; **R-87**, Letter from the Ministry to [redacted], dated 29 July 2014; **C-112**, Letter from DPA to DCT, dated 30 July 2014).

[1125] *See above*, at para. 500.

[1126] *See above*, at paras. 535-540.

Termination Decision constituted an executive title and could therefore be enforced without further proceedings.[1127]

685. Overall, the Respondent continually engaged with DCT, and after repeated warning exercised its rights to terminate the Concession Agreement. The existence of this remedy was clearly spelt out in the Concession Agreement, the terms of which the Claimants were aware. Given the obvious importance of the proper operation and development of the only container terminal in its largest port, the Respondent legitimately exercised its rights under the Concession Agreement in response to terminate the agreement, and take over the Terminal. In those circumstances, the Tribunal does not find that the Respondent acted disproportionately.

6. Claim for Unlawful Expropriation

a) Claimants' Position

[redacted]

[1127] *See above*, at paras. 583, 671.

[redacted]

[redacted]

b) Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c) Tribunal's Analysis

689. As noted above, both BITs applicable in the present matter provide for the prohibition against unlawful expropriation. As the Respondent points out, there is no material difference between the two standards set out in Article III(1) of the US-Albania BIT and Article 5(1) of the UK-Albania BIT.[1145] Both provisions prohibit the taking of property unless it is (i) for a public purpose; (ii) carried out in a non-discriminatory manner; (iii) upon payment of prompt, adequate and effective compensation. The US-Albania BIT further, and expressly, requires "due process of law and general principles of treatment," for an expropriation to be lawful.[1146]

690. The Tribunal starts with the Respondent's predicate argument that the Claimants cannot complain about the expropriation of their rights under the Concession Agreement because such rights are incapable of being expropriated, unless they become intangible property rights "such as debts or claims to money."[1147] The Tribunal does not agree.

[1142] Resp. C-Mem., at paras. 251-256; Resp. Rej., at paras. 270-276.
[1143] Resp. C-Mem., at para. 253; Resp. PHB, at paras. 21, 42.
[1144] Resp. C-Mem., at para. 254; Resp. PHB, at para. 42.
[1145] Resp. C-Mem., at para. 242.
[1146] **CL-2**, US-Albania BIT, at Article III(1).
[1147] Resp. C-Mem., at para. 245.

691. The US-Albania BIT in Article 1(1)(d)(iii) and the UK-BIT in Article 1(a)(v) specifically provide for the protection of contractual rights.[1148] In *Crystallex v. Venezuela,* the tribunal rejected the same argument that the Respondent has put forward here and found that excluding contractual rights from the protection of certain parties would "disregard the natural and plain meaning of these terms."[1149] Similarly, in *Vivendi v. Argentina I,* the tribunal held that non-performance by a contract could also, in certain circumstances, qualify as a an "illegitimate sovereign act."[1150] Accordingly, as a matter of principle, the Tribunal has no hesitation finding that contractual rights, such as under the Concession Agreement, are *capable* of being expropriated.

692. Moving now to the question of whether the Claimants' rights under the Concession Agreement were *in fact* expropriated by the Respondent, the Tribunal starts by acknowledging that there are limitations that apply in assessing allegations of such a breach.

693. Like any other contract, the Concession Agreement set out rights and obligations of the parties to it, which are governed in this case by Albanian law.[1151] The Concession Agreement itself delineates the circumstances and procedures that could result in the Concession Agreement being terminated.[1152] If those circumstances occur, and the Concession Agreement is terminated, that does not mean that the Claimants' interest in the Concession Agreement has been "expropriated," it only means that the Claimants' rights under the Concession Agreement – which were never unqualified and always subject to corresponding obligations and the risk of termination – had, by its own terms, come to an end.

[1148] **CL-2**, US-Albania BIT, at Article (1)(1)(d)(iii), which defines investment to include "contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts"; **CL-1**, UK-Albania BIT, at Article 1(a)(v), which defines investment to includes "business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

[1149] **RL-10**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2 Award, dated 4 April 2016, at para. 663.

[1150] **CL-91**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, dated August 2, 2007, dated 7.5.8.

[1151] **R-32**, Concession Agreement, dated 22 June 2011, at Article 20 ([redacted]

[1152] **R-32**, Concession Agreement, dated 22 June 2011, at Article 15.

694. The Tribunal is entitled to consider the Respondents' conduct relating to the performance or termination of the Concession Agreement, but it cannot engage in a full-fledged enquiry into these circumstances, especially where the termination has occurred after a lengthy judicial process against which no timely denial of justice claim has been made.[1153] The Tribunal recalls in this context two decisions relied on by the Respondent in relation to the appropriate level of review of contractual conduct.

a. In *Azinian,* the tribunal considered whether a claimant would succeed in establishing that its rights under a concession agreement were unlawfully expropriated when annulled by a Mexican state authority.[1154] The tribunal found that the Mexican state authority believed that, under Mexican law, the concession agreement was invalid and, on that basis, annulled it. According to the tribunal, the central – and only – question to answer was whether under Mexican law such grounds existed. It is in that context that the tribunal found that, having been "tested by three levels of Mexican courts," it was not open for the tribunal to revisit its findings, unless a denial of justice claim was made.

b. In *Alghanim*, the claimant sought a finding that a certain tax measure constituted a breach of the non-impairment standard under the relevant treaty because it was arbitrary. The claimant had sought to establish that the tax measure was arbitrary because it was taken in contravention with Jordanian law. The tribunal noted that the "***principal ground*** on which the [c]laimants base their allegation of arbitrary conduct is that the imposition of the [t]ax [m]easure ***was unlawful as a matter of Jordanian law***."[1155] Ultimately, the tribunal analyzed the totality of State conduct and found it not to be arbitrary because (i) due process was afforded to the claimants in their court challenge to the tax measures, and (ii) and the only alleged defect with that imposition of tax measures (that they were – in the claimants' view – imposed in violation of Jordanian law) had expressly been decided by Jordanian

[1153] *See above*, at paras. 602-629.

[1154] **RL-14,** *Robert Azinian, Kenneth Davitian and Ellen Baca v The United Mexican States*, ICSID Case No ARB(AF)/97/2) Award, dated 1 November 1999, at paras. 97-102.

[1155] **RL-16**, *Fouad Alghanim & Sons Co for General Trading & Contracting, WLL and Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, 14 December 2017, at para. 288 (emphasis added).

courts in proceedings that had been fairly conducted.[1156]

695. These decisions support the view that, as a general rule, where (i) a claim depends on the characterization of a State's conduct being violative of domestic law; (ii) domestic courts are called upon to adjudge the compliance of the measure with domestic law; (iii) domestic courts decide that the State measure complied with domestic law; and (iv) a denial of justice claim is either not pleaded, or if pleaded, is not successful; then a tribunal cannot find that the measures breached the relevant treaty.

696. At the same time, the Tribunal is sympathetic to the view that there *could* be circumstances where contractual conduct, even when fully compliant with the underlying contract, and found by domestic courts to be so, can nonetheless constitute expropriation. These circumstances could include cases where a State's conduct was motivated by an unlawful objective or was pretextual. The Tribunal need not, however, definitively decide this question, because even if unlawful expropriation could be found under these circumstances (i.e., of pretextual but domestic law-compliant use of contractual rights), that is not the case here.

697. In issuing the Termination Decision, the Tirana Court of First Instance carried out a full review of the documentation and evidence and found that, on account of DCT's failure to perform its obligations under the Concession Agreement, the Ministry was entitled to seek termination.[1157] This finding was subsequently confirmed by the Tirana Court of Appeal.[1158] Both courts found that the Ministry had the right, as a contractual counterparty, to terminate the Concession Agreement. Importantly, the Termination Application was filed after a significant amount of correspondence from the Respondent indicating to DCT the nature of DCT's alleged breaches, possible solutions, and notice as to the possibility of termination.[1159] The Tribunal has also not found an unlawful motive, for which the alleged breaches could serve as a "pretext."[1160]

[1156] **RL-16**, *Fouad Alghanim & Sons Co for General Trading & Contracting, WLL and Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, 14 December 2017, at para. 479.

[1157] Cl. Mem., at para. 167.

[1158] Cl. Mem., at para. 166.

[1159] *See above*, at paras. 500, 504-508.

[1160] *See above,* at paras. 625-626.

698. In this context, the Tribunal further recalls the discussion above, and its finding that there is insufficient evidence to conclude that the Respondents' actions in relation to the Claimants and their investment constitutes were motivated by an improper purpose such as to aid or assist [redacted].[1161]

699. Accordingly, the Tribunal finds that the Claimants have failed to make out a claim for unlawful expropriation.

VII. ARBITRATION COSTS

700. At the Hearing, the Parties agreed to have limited cost submissions, confined broadly to information on the costs incurred.[1162] They make the following costs claims.

A. Claimants' Costs Claims

701. The Claimants make the following costs claims amounting to total of USD 575,000 and EUR 3,507,500.

a. USD 525,000 towards advances on ICSID Costs (this amount includes all advances paid to ICSID in this proceeding).

b. EUR 2,982,000 towards legal fees. This comprises EUR 1,375,000 of lump sum fees agreed to and paid by the Claimants to their counsel, as well as a success fee of 6 % on all amounts "ultimately awarded, including interest and costs."[1163] The Claimants claim that the success fee was "intended to serve as a deferred payment compensating counsel by way of uplift for the gap between" the actual work undertaken by Claimants' counsel and the "modest" lump sum fee agreed.[1164] The Claimants rely on the decision in *Lahoud v. DRC* as support for their entitlement to claim the success fee,[1165] but argue that they are not claiming a success fee *per se,* but instead an amount that would "accurately reflect the

[1161] *See above,* at para. 632.

[1162] Tr. Day 4, (Kasolowsky, Gharavi), 96:23-97:10.

[1163] Claimants' Cost Submissions, at para. 3.

[1164] Claimants' Cost Submissions, at para. 3.

[1165] Claimants' Cost Submissions, at para. 4, citing *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, dated February 7, 2014, at paras. 655, 658.

time effectively spent on this case."[1166] The Claimants argue that their total costs claims reflect a blended hourly rate of EUR 400 which they describe as "conservative."[1167] As an alternative claim – and emphasizing that an award of such costs would "not even remotely reflect accurately the time actually spent" – the Claimants seek costs of EUR 1,375,000 towards the lump sum legal fees paid.[1168]

c. EUR 283,000 for time spent by the Claimants' in-house counsel ([redacted]) and [redacted] on gathering evidence and arbitration-related tasks.

d. EUR 27,500 towards expenses incurred by the Claimants' representative and witness for travel, accommodation, and the related expenses for the preparation of the case and the Hearing.

e. EUR 215,000 towards expert fees and expenses.

702. In their Memorial, Claimants also sought interest on their costs, at the rate of "Libor + 2 %" compounded semi-annually from the date the amounts are "determined to have been due to Claimants, until the date of payment."[1169]

B. Respondent's Costs Claims

703. The Respondent makes the following cost claims, amounting to a total of EUR 2,262,160 and USD 444,700.

a. USD 350,000 towards advances on ICSID costs (following the submission of the parties' costs claims, the Respondent paid an additional USD 175,000 towards advances on ICSID costs, bring the total amount it has paid to USD 525,000).

b. EUR 1,900,000 towards legal fees and disbursements. Of this amount, EUR 200,000 has been approved by the Respondent but not paid to its counsel, at least as of

[1166] Claimants' Cost Submissions, at para. 5.
[1167] Claimants' Cost Submissions, at para. 6.
[1168] Claimants' Cost Submissions, at para. 7.
[1169] Cl. Mem., at para. 308.6 - 308.7.

22 April 2024.

c. EUR 360,000 towards Respondent's expert fees and disbursements. Of this amount, EUR 190,000 has been approved by the Respondent but not paid to its experts, at least as of 22 April 2024.

d. US 94,700 towards Respondent's "litigation support fees".

e. EUR 2,160 towards disbursements incurred by the State Attorney's office.

704. The Respondent reserved their right to supplement their costs claim to seek reimbursement of additional amounts incurred by them in relation to their legal representation or the cost and fees of the Tribunal between the date of cost submissions and the final award.[1170] However, it has not sought to make any further submission in this regard.

705. Finally, the Respondent sought "interest until the date of full payment" on their costs, though it did so only with its cost submission and did not specify a rate at which interest should be calculated, or the appropriate method for its calculation.[1171]

C. Tribunal's Analysis

706. The Tribunal starts by noting that it is required to assess the expenses incurred by the Parties in relation to this proceeding and allocate the costs. Article 61(2) of the ICSID Convention provides that:

> *"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."*

[1170] Respondent's Cost Submissions, at para. 2(b).

[1171] Respondent's Cost Submissions, at paras. 2(a) and 2(b).

707. Moreover, Rule 47(1)(j) of the Arbitration Rules provides:

> *"(1) The award shall be in writing and shall contain:* […] *(j) any decision of the Tribunal regarding the cost of the proceeding.*"

708. Accordingly, the Tribunal is empowered, and duty bound, to assess and allocate (i) "expenses incurred by the parties in connection with the proceedings;" (ii) "expenses of members of the Tribunals;" and (iii) "charges for the use of" ICSID's facilities.

709. The Tribunal notes that neither Party has sought an opportunity to respond to the other Party's cost submissions or raised any objections as to the reasonableness of the costs claimed by the other Party. However, the Tribunal need not express its view on all the costs claimed by the Parties. Instead, the Tribunal will first decide the question of allocation of the costs, and then consider whether the costs allocated are reasonable.

710. As other ICSID tribunals have noted, unlike the UNCITRAL Arbitration Rules, neither the ICSID Convention nor the ICSID Rules contain a presumption in favor of an award of costs to the successful party.[1172] Accordingly, there is significant variance in the approaches adopted by tribunals. Some ICSID tribunals have ordered parties to bear their own costs regardless of the result.[1173] On other hand, increasingly, several ICSID tribunals have awarded to the successful parties' reasonable costs incurred by them.[1174]

711. The Tribunal does not consider it proper, in the circumstances of this case, to direct the Parties to bear their own costs. In making their costs claims and seeking payment of their costs, the Parties have in principle indicated their agreement to the possibility of being ordered to bear the other side's costs. In line with the practice of ICSID tribunals, the Tribunal has considered

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[1172] **CL-58***, Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, dated 2 July 2018, at para. 733.

[1173] **CL-65**, *Jan De Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, dated 6 November 2008, at para. 279-280; *See also*, **CL-66,** *LESI v. Algeria***,** ICSID Case No. ARB/05/3, Award, dated 12 November 2008, at para. 186

[1174] **RL-66**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, dated 27 August 2008, at para. 316 ("Article 61 of the ICSID Convention gives the Arbitral Tribunal the discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate. In the exercise of this discretion, the Arbitral Tribunal will apply the principle that 'costs follow the event,' by a weighing of relative success or failure, that is to say, the loser pays costs including reasonable legal and other costs of the prevailing party..."); **CL-19**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October 2006, at para. 533 ("In the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party.").

two factors when exercising its discretion to allocate the costs claimed: (i) the overall success of the Parties on the various claims and defenses raised;[1175] and (ii) the reasonableness of the Parties' conduct during the proceedings.[1176]

712. As discussed above, in this case:

a. The Respondent has put forward several jurisdictional objections. However, the Claimants have generally prevailed on these jurisdictional objections, save for the objection relating to the denial of benefits vis-a-vis MCTC on which the Respondent has prevailed.

b. The Claimants have put forward various categories of claims on the merits. However, the Respondent has prevailed on all of them.

713. Considering the fact that ultimately, the Tribunal has found that the Respondent did not breach its obligation under the BITs, the Respondent has – in the broader sense – prevailed in this dispute. Adjusting for the partial success of the Claimants in resisting the jurisdictional objections, the Tribunal considers it appropriate to order the Claimants to bear 70% of the Respondent's costs.

714. The Tribunal considers that both Parties have acted reasonably and efficiently during the proceedings. In view of their conduct, there is no cause to adjust the initial assessment of the Parties' entitlement to costs to reflect party conduct.

715. The Respondent's costs claims are comparable (and lower than) the Claimants' and are in line with what the Tribunal would have expected for an ICSID arbitration of this nature. The Tribunal therefore finds that the Respondent's costs are reasonable and sees no reason to make any downward adjustment to the Respondents' cost claim.

[1175] **CL-44***, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic,* ICSID Case No. ARB/09/01, Award, dated July 21, 2017, at para. 1141; *See also*, **CL-56**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, dated 19 December 2016, at paras. 449-450.

[1176] **CL-58***, Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, dated 2 July 2018, at para. 738(ii-iii); *See also*, **RL-18**, *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, dated 15 April 2009, at para.151 ("The Tribunal has concluded not only that the Claimant's claim fails for lack of jurisdiction, but also that the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention. It is also to be noted that the Claimant filed a request for provisional measures which was rejected in its entirety by the Tribunal and which added to the costs of the proceeding.")

716. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Prof. Dr. Maxi Scherer	297,911.02
Mr. Fernando Mantilla-Serrano	134,313.18
Ms. Loretta Malintoppi	140,395.56
ICSID's administrative fees	178,000.00
Direct expenses (estimated)	118,673.24
Total	**869,293.00**

717. The above costs have been paid out of the advances made by the Parties in equal parts.[1177] As a result, each Party's share of the costs of arbitration amounts to USD 434,646.50.

718. Accordingly, the Tribunal orders the Claimants to pay to the Respondent 70% of the costs incurred by the Respondent. Therefore, the Claimants must pay to the Respondent:

a. USD 304,252.55 for 70% of the Respondent's portion of expended advances made to ICSID;

b. EUR 1,330,000 for 70% of the legal fees and disbursements incurred.

c. EUR 252,000 for 70% of Respondents' expert fees and disbursements.

d. USD 66,290 for 70% of Respondent's litigation support fees.

e. EUR 1,512 for 70% of disbursements incurred by the State Attorney's office.

719. The Respondent did not, either in the Counter-Memorial, its Rejoinder or its Post Hearing Brief, request interest on any of costs it seeks.[1178] It sought "interest until the date of full payment"

[1177] The remaining balance will be reimbursed to the parties in proportion to the payments that they have advanced to ICSID.

[1178] Resp. C-Mem., at para. 347; Resp. Rej., at para. 379; Resp. PHB, at para. 101.

on their costs for the first time with its cost submission.[1179] However, the Respondent's request is unsubstantiated. It failed to provide a legal basis on which the Tribunal may award interest on costs. Nor has the Respondent proposed an appropriate interest rate or a basis on which the Tribunal could determine such rate. For these reasons, the Tribunal rejects the Respondent's request to order payment of interest on costs. Accordingly, the Tribunal makes no order as to either pre-award or post-award interest on the amounts set out above.

[1179] Respondent's Cost Submissions, at paras. 2(a) and 2(b).

VIII. AWARD

720. For the reasons set forth above, the Tribunal decides as follows:

a. The Tribunal lacks jurisdiction over the claims asserted by MCTC;

b. The Tribunal has jurisdiction over the claims asserted by DKS, DCT and Altberg;

c. The Tribunal dismisses the claims asserted by DKS, DCT and Altberg;

d. The Claimants shall bear 70% of the Respondent's costs and thus pay to the Respondent USD 370,542.55 and EUR 1,583,512.00; and

e. All other claims and requests are dismissed.

[redacted]

Mr. Fernando Mantilla-Serrano
Arbitrator

Date: 24 July 2024

[redacted]

Ms. Loretta Malintoppi
Arbitrator

Date: 24 July 2024

[redacted]

Prof. Dr. Maxi Scherer
President of the Tribunal

Date: 26 July 2024