INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

HYDRO S.R.L. AND OTHERS

v.

REPUBLIC OF ALBANIA

(ICSID CASE NO. ARB/15/28 - REVISION)

I hereby certify that the attached document is a true copy of the *Decision on Claimants' Application to dismiss the Revision Application under ICSID Arbitration Rule 41(5), Claimants' Request for Allocation of Advance Payments, Claimants' Requests for Security, and Respondent's Proposal for the Establishment of an Escrow Mechanism*, dated March 29, 2023.

Meg Kinnear
Secretary-General

Washington, D.C., March 29, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between

HYDRO S.R.L. AND OTHERS

and

REPUBLIC OF ALBANIA

ICSID Case No. ARB/15/28 – Revision

DECISION ON CLAIMANTS' APPLICATION TO DISMISS THE REVISION APPLICATION UNDER ICSID ARBITRATION RULE 41(5), CLAIMANTS' REQUEST FOR ALLOCATION OF ADVANCE PAYMENTS, CLAIMANTS' REQUESTS FOR SECURITY, AND RESPONDENT'S PROPOSAL FOR THE ESTABLISHMENT OF AN ESCROW MECHANISM

Arbitrators
Mr. Grant Hanessian, President of the Tribunal
Mr. Robert Anderson KC, Arbitrator
Dr. Charles Poncet, Arbitrator

Secretary of the Tribunal
Ms. Elisa Mendez Bräutigam

Assistant to the Tribunal
Mr. Maximilian Pailhès

Date of dispatch to the Parties: March 29, 2023

REPRESENTATION OF THE PARTIES

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TABLE OF ABBREVIATED TERMS

Agonset	-	Agon Set sh.p.k
Albania-Italy BIT	-	The 1991 Albania-Italy BIT
Annulment Committee	-	The *ad hoc* annulment committee that decided Respondent's August 22, 2019, Application for Annulment
Award	-	The Award in ICSID Case No. ARB/15/28 dated April 24, 2019
CJEU	-	The Court of Justice of the European Union
CJEC	-	The Court of Justice of the European Communities
Claimants	-	Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon and Liliana Condomitti
Decision on Annulment	-	The Decision on Annulment dated April 2, 2021 in ICSID Case No. ARB/15/28
ECHR	-	The European Court of Human Rights
Escrow Mechanism Proposal	-	Respondent's proposal to pay a sum equivalent to Claimants' advances on costs into an escrow account in its Letter to the Tribunal of November 21, 2022
ICJ Rules		The Rules of the International Court of Justice
ICJ Statute	-	The 1945 Statute of the International Court of Justice
ICSID Convention	-	The 1966 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
ICSID Regulations	-	The ICSID Administrative and Financial Regulations
ICSID Rules	-	The 2006 ICSID Rules of Arbitration
ILC Articles	-	The Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations
Original Arbitration	-	The arbitration resulting in the Award dated April 24, 2019 in ICSID Case No. ARB/15/28
Original Tribunal	-	The tribunal appointed in ICSID Case No. ARB/15/28 composed of Dr. Michael C. Pryles (President), Mr. Ian Glick KC (Arbitrator) and Dr. Charles Poncet (Arbitrator)
Proposal for Disqualification	-	The Proposal for Disqualification of Dr. Poncet pursuant to Article 57 of the ICSID Convention filed by Respondent dated October 18, 2022

Revision Application	-	Respondent's April 22, 2022, Application for Revision of the Award in ICSID Case No. ARB/15/28 dated April 24, 2019 under Art. 51 of the ICSID Convention
Revision Proceedings	-	The proceedings in ICSID Case No. ARB/15/28 following Albania's Revision Application dated April 22, 2022
Revision Tribunal	-	The arbitral tribunal issuing this Decision on Revision in ICSID Case No. ARB/15/28, composed of Mr. Grant Hanessian (President), Dr. Charles Poncet (arbitrator), Mr. Robert Anderson KC (arbitrator)
Request for Allocation of Advance Payments	-	Claimants Request for Allocation of Advance Payments under ICSID Rule 28 and ICSID Regulation 15(2) submitted in its Letter to the Tribunal dated November 18, 2022
Rule 41 Application	-	Claimants' Request to Dismiss the Revision Application under either Rule 41(1) or Rule 41(5) of the ICSID Rules dated December 7, 2022
Secretariat	-	The ICSID Secretariat
Security Application	-	Claimants' Application for Security for Costs and for the Award dated December 7, 2022
Summary Findings	-	Sir David Green CB KCs Summary Findings in Relation to the Tirana Judgment filed by Respondent on January 26, 2023
Tirana Judgment	-	The Decision of the Tirana Judicial District Court dated February 23, 2022
Unchallenged Arbitrators	-	Messrs. Grant Hanessian and Robert Anderson, KC

I. PROCEDURAL HISTORY

1. On June 11, 2015, Claimants Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon and Liliana Condomitti ("**Claimants**") submitted a Request for Arbitration to the International Centre for Settlement of Dispute Resolution ("**ICSID**") alleging that the Republic of Albania ("**Respondent**" or "**Albania**") violated Claimants' rights under the 1991 Albania-Italy BIT (the "**Albania-Italy BIT**"). A tribunal was duly appointed ("**Original Tribunal**") and arbitration of Claimants' claims followed (the "**Original Arbitration**").

2. On April 24, 2019, the Original Tribunal issued an Award (the "**Award**"), finding that Respondent unlawfully expropriated Claimants' interests in the Albanian media company Agon Set sh.p.k ("**Agonset**"). The Award required Respondent to pay Mr. De Renzis damages in the amount of €46,751,000, Ms. Grigolon damages in the amount of €11,688,000, Mr. Becchetti damages in the amount of €41,048,000 and to pay Claimants' legal, expert witness and associated costs in the amount of €8,222,238.53.

3. On August 22, 2019, Respondent applied for annulment of the Award. On November 6, 2019, an *ad hoc* annulment committee (the "**Annulment Committee**") was formed.

4. On April 2, 2021, the Annulment Committee rejected Respondent's application for annulment of the Award (the "**Decision on Annulment**").

5. On May 17, 2021, Respondent requested rectification of the Decision on Annulment.

6. On July 29, 2021, the Annulment Committee issued a Decision on Rectification, correcting certain clerical errors in the Decision on Annulment.

7. On April 22, 2022, Respondent filed an Application for Revision of the Award ("**Revision Application**") under Article 51 of the 1966 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "**ICSID Convention**").

8. On May 9, 2022, the Secretary-General of ICSID registered the Application for Revision.

9. On May 12, 2022, and May 20, 2022, the Parties were informed that the Original Tribunal could not be reconstituted pursuant to Rule 51(2) of the 2006 ICSID Rules of Arbitration (the "**ICSID Rules**") and were invited to constitute a new tribunal (the "**Revision Tribunal**").

10. On August 3, 2022, Mr. Robert Anderson, KC, a U.K. national, was appointed by Respondent to the Revision Tribunal.

11. On August 10, 2022, Dr. Charles Poncet, a Swiss national and a member of the Original Tribunal, was appointed by Claimants to the Revision Tribunal.

12. On August 23, 2022, Respondent submitted a letter proposing the disqualification of Dr. Poncet from the Revision Tribunal.

13. On October 17, 2022, the Chairman of the ICSID Administrative Council appointed Mr. Grant Hanessian, a U.S. national as a Presiding Arbitrator of the Revision Tribunal pursuant to Article 38 of the ICSID Convention. On the same date, ICSID informed the Parties that the Revision Tribunal was deemed to have been constituted, and proceedings ("**Revision Proceedings**") to have begun, as of October 17, 2022, pursuant to ICSID Arbitration Rule 6.

14. On the same day, Claimants notified the Revision Tribunal that they were "in a position to submit promptly Claimants' preliminary objections to Respondent's Application for Revision […], pursuant to Rule 41 of the 2006 ICSID Arbitration Rules."[1] Claimants further proposed a briefing schedule for their preliminary objections.

15. On October 18, 2022, Respondent filed a Proposal for Disqualification of Dr. Poncet from the Revision Tribunal pursuant to Article 57 of the ICSID Convention (the "**Proposal for Disqualification**"). In the letter accompanying its Proposal for Disqualification, Respondent contended that no action on Claimants' briefing schedule on their proposed preliminary objections could be taken until a decision on the Proposal had been rendered,

[1] Claimants' letter to ICSID, October 17, 2022, p. 1.

and that, in any event, the objections would be premature in circumstances where Respondent had not yet filed its full case for revision.

16. On the same day, ICSID requested that each Party make an advance payment of USD 200,000 and instructed them to do so by November 17, 2022.

17. On October 19, 2022, ICSID acknowledged receipt of Respondent's Proposal for Disqualification and informed the Parties that the Revision Proceedings were suspended as of October 18, 2022, pursuant to Rule 9 of the ICSID Arbitration Rules, except insofar as the payment of the advance requested by ICSID on October 18, 2022 was concerned.

18. On October 25, 2022, Messrs. Hanessian and Anderson (the "**Unchallenged Arbitrators**") communicated to the Parties a schedule for submissions on Respondent's Proposal for Disqualification.

19. On October 27, 2022, Claimants submitted their Opposition to Respondent's Proposal for Disqualification.

20. On October 28, 2022, ICSID wrote to the Parties on behalf of Dr. Poncet, informing them that Dr. Poncet would not express views as to the merits of the Proposal for Disqualification, and that Dr. Poncet had stated that he is independent and impartial, and would remain so throughout the Revision Proceedings.

21. On November 4, 2022, Respondent submitted Further Observations on the Proposal for Disqualification. On the same day, Claimants indicated that they had no further observations regarding the Proposal for Disqualification.

22. On November 14, 2022, Claimants informed the Revision Tribunal that they would "seek dismissal of the Revision Application under Rule 41 of the ICSID Arbitration Rules, including Rule 41(5)" and that "Claimants [would] file their full reasoned preliminary objections promptly upon the resumption of the proceeding."[2]

[2] Claimants' letter to ICSID, November 14, 2022, p. 2.

23. On November 16, 2022, Respondent submitted a response to Claimants' November 14, 2022 letter. On November 17, 2022, Claimants submitted a reply to Respondent's November 16, 2022 letter.

24. On November 18, 2022, Claimants submitted a letter inviting Respondent "to pay the Claimants' portion of the advance payments requested by ICSID out of the more than EUR 120 million and USD 2.5 million that Albania owes the Claimants under the Award and the Decision on Annulment." In their letter, Claimants further requested that, in the event that Respondent refused to make this payment, the Revision Tribunal order Respondent "to pay the entirety of the advance payments to ICSID for the rest of this proceeding, pursuant to Rule 28 of the 2006 ICSID Arbitration Rules […] and ICSID Administrative and Financial Regulation 15(2)" (the "**Request for Allocation of Advance Payments**").[3]

25. On November 21, 2022, Respondent submitted a letter opposing the Request and proposing instead that it pay a sum equivalent to Claimants' share of the advance payments into an escrow account, which would be released in favour of Claimants in the event the Revision Tribunal dismissed the Revision Application and which would allow Claimants to "pay their share of the advance payments to ICSID without the alleged recovery risk that is the sole basis of the [Request]" (the "**Escrow Mechanism Proposal**").[4]

26. On November 25, 2022, Claimants submitted a response to Respondent's November 21, 2022 letter.

27. On November 28, 2022, ICSID confirmed receipt of Respondent's portion of the advance requested on October 18, 2022.

28. On November 29, 2022, Respondent submitted a letter in response to Claimants' November 25, 2022 letter.

[3] Request for Allocation of Advance Payments, ¶¶ 3-4.

[4] Respondent's letter to ICSID, November 21, 2022, p. 2.

29. On December 1, 2022, the Unchallenged Arbitrators issued their Decision on Respondent's Disqualification Proposal of Dr. Poncet, rejecting the Proposal for Disqualification. The Revision Proceedings resumed on that day in accordance with ICSID Arbitration Rule 9(6).

30. On December 2, 2022, Claimants submitted a letter in response to Respondent's Escrow Mechanism Proposal.

31. On the same day, Respondent informed the Revision Tribunal that "it will make provision for funds equivalent to the amount of Claimants' share of the advance payments to be appropriated in its 2023 budget, and direct that, once available, those funds be placed in an escrow account under the control of the Tribunal as soon as possible." [5] Respondent further stated that it assumed that Claimants had withdrawn the Request for Allocation of Advance Payments unless they stated otherwise.

32. On December 7, 2022, Claimants filed their Preliminary Objections to the Revision Application "under Rule 41(1) of the ICSID Arbitration Rules, or alternatively, as manifestly without legal merit under Rule 41(5), or as an abuse of process" (the "**Rule 41 Application**").[6]

33. As part of the relief sought in their Rule 41 Application, Claimants further requested that Respondent be ordered to post security for (i) the full amounts it owes to the Claimants under the Award and the Decision on Annulment, and (ii) the Claimants' costs on the Revision Application (the "**Security Applications**").[7]

34. On the same day, Respondent filed a letter contending that "Claimants are raising preliminary objections pursuant to Rule 41(1) of the ICSID Rules", which Respondent submitted was "not appropriate", and informed the Revision Tribunal that it would provide a more complete response on the matter within three Albanian working days.[8] Respondent

[5] Respondent's letter to ICSID, December 2, 2022, p. 2.

[6] Claimants' Rule 41 Application, December 7, 2022, ¶ 1.

[7] *Id.*, ¶ 164(b); Claimants' Response, January 16, 2023, ¶ 94.

[8] Respondent's letter to ICSID, December 7, 2022 (dated December 8, 2022), p. 1.

requested that the Revision Tribunal "not set a briefing schedule in respect of Claimants' preliminary objections until this threshold issue is decided."[9]

35. On the same day, the Revision Tribunal informed the Parties that it would not set a briefing schedule for Claimants' Application until after having received Respondent's further submission.

36. Further on the same day, the Revision Tribunal invited the Parties to file any additional comments on the Request for Allocation of Advance Payments by December 15, 2022.

37. On December 13, 2022, Respondent submitted a letter stating that Claimants' Application "invok[es] *both* Rule 41(1) of the ICSID Rules concerning the making of preliminary objections as to the competence of the Tribunal *and* Rule 41(5) concerning the dismissal of proceedings for a manifest lack of legal merit."[10] In its letter, Respondent proposed a briefing schedule for the Rule 41 Application. With its response, Respondent filed a letter from Sir David Green CB KC to Omnia Strategy dated December 13, 2022.

38. On the same day, Claimants requested leave to respond to Respondent's letter of December 13, 2022 by December 16, which the Revision Tribunal granted on December 13, 2022.

39. On December 15, 2022, the Parties filed their respective additional comments on the Request for Allocation of Advance Payments.

40. On December 16, 2022, Claimants filed their response to Respondent's December 13, 2022 letter. In their letter, Claimants objected to the filing of the letter from Sir David Green CB KC of December 13, 2022.

41. On December 17, 2022, Respondent replied to Claimants' objection to the filing of the letter from Sir David Green CB KC. On the same day, the Parties exchanged further submissions on the matter.

[9] *Id*., p. 2.

[10] Respondent's letter to ICSID, December 13, 2022, p. 1.

42. On December 19, 2022, the Revision Tribunal informed the Parties of the briefing schedule for Claimants' Application relating to Rule 41(5) only, the Request for Allocation of Advance Payments, the Proposal on the Escrow Mechanism and the Security Application. The Revision Tribunal further decided that an oral hearing on these matters would be scheduled together with the First Session. As to Claimants' request to strike from the record the letter from Sir David Green CB KC of December 13, 2022, the Revision Tribunal determined that "it will not consider the letter from Sir David Green to Omnia Strategy for any purposes" and that its decision "is without prejudice to the Respondent's right to request to present expert evidence at a later stage pursuant to the procedural schedule to be established by the Tribunal in consultation with the Parties."[11]

43. On January 6, 2023, in accordance with the briefing schedule, Respondent filed its Observations on Claimants' Application relating to Rule 41(5), the Request for Allocation of Advance Payments, the Proposal on the Escrow Mechanism and the Security Application.

44. On January 16, 2023, Claimants submitted their Response to Respondent's Observations.

45. On January 26, 2023, Respondent filed its Further Observations on Claimants' Application relating to Rule 41(5), the Request for Allocation of Advance Payments, the Proposal on the Escrow Mechanism and the Security Application. Together with its Further Observations, Respondent filed a document titled "Sir David Green CB KCs Summary Findings in Relation to the Tirana Judgment" (the "**Summary Findings**").

46. On January 26, 2023, Claimants objected to the filing of the Summary Findings. On the same day, Respondent replied to Claimants' objection. On January 27, 2023, the Parties filed additional communications on the Summary Findings.

47. On January 27, 2023, the Revision Tribunal informed the Parties that it would not accept further submissions related to the Summary Findings.

[11] ICSID's letter to the Parties, December 19, 2022, p. 2.

48. On February 6, 2023, the Revision Tribunal informed the Parties that it "will not consider the Summary Findings in connection with the hearing on February 7, 2023" and that its decision "is without prejudice to Respondent's right to request to present expert evidence at a later stage pursuant to the procedural schedule to be established by the Tribunal in consultation with the Parties."[12]

49. The First Session and Hearing was held virtually via Zoom on February 7, 2023 with the following participants:

Revision Tribunal:	
Mr. Grant Hanessian	President
Mr. Robert Anderson, KC	Arbitrator
Dr. Charles Poncet	Arbitrator
Assistant:	
Mr. Maximilian Pailhès	Assistant to Revision Tribunal
ICSID Secretariat:	
Ms. Elisa Méndez Bräutigam	Secretary of the Revision Tribunal
For Claimants:	
Counsel:	
Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Ms. Samantha J. Rowe	Debevoise & Plimpton LLP
Mr. Romain Zamour	Debevoise & Plimpton LLP
Ms. Moeun Cha	Debevoise & Plimpton LLP
Ms. Janine Godbehere	Debevoise & Plimpton LLP
Ms. Perpétua B. Chéry	Debevoise & Plimpton LLP
Mr. Elliot F. Beaver	Debevoise & Plimpton LLP
Party Representative:	
Mr. Francesco Becchetti	
For Respondent:	
Counsel:	
Ms. Cherie Blair CBE, KC	Omnia Strategy LLP
Mr. James Palmer	Omnia Strategy LLP
Mr. James Dingley	Omnia Strategy LLP
Ms. Emily Pica	Omnia Strategy LLP
Ms. Lodovica Raparelli	Omnia Strategy LLP
Mr. Ben Wheadon	Omnia Strategy LLP

[12] ICSID's communication to the Parties, February 6, 2023.

Mr. Lucas Bastin, KC	Essex Court Chambers
Prof. Chester Brown	Essex Court Chambers
Mr. Cameron Miles	3 Verulam Buildings
Party Representatives:	
Ms. Elira Kokona	Representative of the Republic of Albania
Mr. Odise Mocka	Representative of the Republic of Albania
Ms. Manuela Imeraj	Representative of the Republic of Albania

50. On February 22, 2023, the Final Transcript of the Hearing was agreed upon by the Parties and forwarded to the Revision Tribunal.

51. On March 2, 2023, the Tribunal issued Procedural Order No. 1 addressing procedural rules for the Revision Proceedings.

52. On March 29, 2023, the Revision Tribunal closed the proceeding.

II. RESPONDENT'S REQUEST FOR REVISION

53. Respondent requests revision of the Award pursuant to Article 51 of the ICSID Convention, which states in part:[13]

> (1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.
>
> (2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

54. Respondent's Revision Application requests that the Revision Tribunal revise the Award on the basis of facts Respondent alleges it discovered with the issuance on February 23, 2022 of a Decision by the Tirana Judicial District Court in Criminal Proceeding No. 1564 convicting certain Claimants of crimes under Albanian law (the "**Tirana Judgment**"). Respondent submits that the Tirana Judgment demonstrates that Claimants' investments in

[13] ICSID Convention, Art. 51; Art. 51(3) and (4) are omitted.

Albania were obtained through criminal conduct and should therefore be deprived of protection under the Albania-Italy BIT.[14]

55. The Tirana Judgment found certain Claimants and others guilty of acts of fraud, forgery, tax evasion, smuggling and money laundering, as follows:

a. Claimant Mr. Francesco Becchetti was found guilty of the criminal offences of forgery of documents, theft by abuse of duty, creation of fraudulent schemes related to VAT and laundering of the proceeds of crime and was sentenced to 17 years in prison;[15]

b. Claimant Mr. Mauro De Renzis was found guilty of the criminal offences of forgery of documents, theft by abuse of duty, creation of fraudulent schemes related to VAT, non-payment of taxes and duties, smuggling of other goods and laundering of the proceeds of crime and was sentenced to 16 years in prison;[16] and

c. Claimant Ms. Liliana Condomitti was found guilty of the criminal offence of laundering of the proceeds of crime and sentenced to 8 years in prison.[17]

d. In addition, Agonset was found guilty of the criminal offence of laundering the proceeds of crime or criminal activity and its existence as a legal entity was terminated.[18]

56. The Tirana Judgment found that Claimants used certain companies, including Agonset, to launder the proceeds of crimes:

> … the companies "System Cable" and "400 KV" are companies that have no economic activity but have served as intermediary mechanisms to launder money by taking them from other companies involved in criminal activities, such as; theft by abusing with the duty, fraud in VAT schemes,

[14] Revision Application, ¶¶ 2-3, 32.

[15] Tirana Judgment (English translation), p. 39.

[16] *Id.*, pp. 39-40.

[17] *Id.*, p. 40.

[18] *Id.*, p. 42.

> etc., and the profits derived from these criminal offences have been laundered by investing in the company "Agon Set" sh.p.k with the description "partner financing".[19]

57. The corporate Claimants in this arbitration—Hydro S.r.l and Costruzioni S.r.l—and Ms. Grigolon, were not subjects of the Tirana Judgment. Claimants Mr. Becchetti, Mr. De Renzis and Ms. Condomitti and Agonset have appealed the Tirana Judgment.

58. The Albanian criminal proceedings were commenced on February 24, 2014,[20] prior to the Original Arbitration. During the criminal proceedings, Albania's prosecutorial authorities, *inter alia,* issued the sequestration and seizure orders against Claimants' assets in Albania that gave rise to the Original Arbitration.[21]

59. Respondent submits that by virtue of the Tirana Judgment dated February 23, 2022, it discovered what it terms the "Illegal Activities" of Claimants related to Claimants' investments in Agonset[22] and that these "Illegal Activities" are of such a nature as decisively to affect the Award. Respondent submits that it is therefore entitled to revision of the Award under Article 51.

60. Respondent further submits that the Albania-Italy BIT does not protect illegally obtained investments and such investments cannot be the object of an ICSID arbitration. Respondent asserts that if the Original Tribunal had known of the "Illegal Activities", the Original Tribunal would have declined jurisdiction over Claimants' claims under the Albania-Italy BIT. Therefore, Respondent submits, the Revision Tribunal must revise the Award and dismiss Claimants' claims.

III. THE PARTIES' REQUESTS

61. Four applications are before the Revision Tribunal: (1) Claimants' Request to Dismiss the Revision Application; (2) Claimants' Request for Allocation of Advance Payments; (3)

[19] *Id.*, p. 31 of the document. *See also* similar findings at pp. 32 and 33.

[20] *See* Award, ¶ 373, *citing* Letter of Prosecutor's Office at the Tirana District Court, January 20, 2016 (**R-9**) (Original Arbitration).

[21] *See e.g.*, Award, ¶ 376.

[22] Revision Application, ¶ 2.

Claimants' Security Applications; and (4) Respondent's Proposal to Establish an Escrow Mechanism.

62. The Parties' arguments and the Revision Tribunal's analysis and determination with respect to these requests are as follows.

A. CLAIMANTS' REQUEST TO DISMISS THE REVISION APPLICATION UNDER RULE 41(5)

63. Pursuant to Rule 41(5) of the 2006 ICSID Rules, which govern this proceeding, Claimants request that the Revision Tribunal dismiss Respondent's Revision Application as manifestly without legal merit. Respondent opposes this request.

64. Rule 41(5) provides:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is *manifestly without legal merit*. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. (Emphasis added.)

(1) Claimants' Position

65. Claimants emphasize that revision is an exception to the rule that ICSID awards are binding and final under Article 53(1) of the ICSID Convention[23] and that no revision application has succeeded under the ICSID Rules or the 1945 Statute of the International Court of Justice ("**ICJ Statute**"), which Claimants submit were the basis for the provisions in the ICSID Rules regarding revision.[24]

[23] Claimants' Preliminary Objections, December 7, 2022, ¶¶ 73-74.

[24] *Id*., ¶ 75. The Revision Tribunal has been made aware of one publicly-available decision on an application for revision of an ICSID award dismissed under ICSID Rule 41(5): *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Claimants' Objection under ICSID Rule 41(5) to Respondent's Application for Revision, March 8, 2021, ¶ 81 (**CAR-61**).

66. Claimants make essentially three arguments in support of their request to dismiss Respondent's Revision Application under Rule 41(5): (1) Respondent failed to allege "discovery" after the Award of a "fact" existing prior to the Award; (2) any alleged facts concerning Claimants' criminal convictions would not decisively affect the Award; and (3) Respondent's Revision Application is untimely and therefore inadmissible. Each of these arguments is discussed below.[25]

a. Discovery of a Fact that Pre-dated the Award

67. Claimants note that in its Revision Application, Respondent defines the alleged "Illegal Activities" which Respondent "discovered" by means of the Tirana Judgment as follows: "at all material times [Mr. Becchetti, *e.g.*] was a criminal who used his businesses in Albania and elsewhere as a cover for (*inter alia*) fraud, bribery and money laundering (the "**Illegal Activities**")."[26]

68. Claimants assert that Respondent has failed to identify any facts existing as of the date of the Award that were not before the Original Tribunal, as Respondent is required to do under Article 51.[27] Claimants submit that none of (a) the Tirana Judgment, (b) the factual allegations underlying the Tirana Judgment nor (c) the Tirana court's characterizations of those factual allegations as criminal conduct qualify as "facts" entitling Respondent to revision under Article 51.

69. First, Claimants submit that the Tirana Judgment itself cannot qualify as a "fact" under Article 51 because the Tirana Judgment was rendered after the Award.[28] Claimants submit that ICSID and ICJ cases, *e.g.,* the *Venezuela Holdings* and *Battus* cases,[29] have clearly

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[25] Claimants also argue that Respondent's Revision Application is an abuse of process (*see, e.g.,* Claimants' Response, January 16, 2023, ¶ 79). In light of the Tribunal's disposition of Claimants' Application, the Tribunal need not, and does not, address this argument.

[26] Revision Application, ¶ 2; Claimants' Preliminary Objections, December 7, 2022, ¶ 108.

[27] Claimants' Preliminary Objections, December 7, 2022, ¶¶ 112-113; Claimants' Response, January 16, 2023, ¶¶ 32(b) and 36-38.

[28] *Idem*.

[29] Claimants cite *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Revision, June 12, 2015 (hereinafter "Venezuela Holdings"), ¶ 3.1.11 (**CAR-35**) ("only a fact that existed when the award was rendered may form the basis for a request for revision under Article 51(1) of the ICSID Convention.") and *Battus c. Etat bulgare*,

held that only a fact that existed prior to the rendering of the award or judgment which is sought to be revised can be the basis for a revision application. Since the Tirana Judgment was issued on February 23, 2022, almost three years after the Award (dated April 24, 2019), Claimants assert that the Tirana Judgment cannot serve as the basis for the Revision Application.

70. Second, Claimants submit that the pre-Award factual allegations on which the Tirana Judgment are based cannot qualify as pre-Award *new facts* under Article 51, because these facts were known to the Parties and the Tribunal at the time of the Award.[30] Claimants note that in the Award the Original Tribunal specifically considered the criminal allegations pending against Claimants, which Respondent submitted to the Original Tribunal in support of its argument that the expropriation of Agonset was a legitimate exercise of Respondent's police powers.[31]

71. Claimants further note the public statements of Albania's Prime Minister about the criminal prosecutions prior to the Award. For example, on June 9, 2015, the Prime Minister stated on Facebook and Twitter: "Blocking the source of the dirty money that feeds Agon Channel a success!"[32] and on or around June 12, 2015, in an interview he stated about Agonset:

> [T]his channel turns off and on with the help of dirty money . . . . It does not exist a principle where the freedom of speech is feed [*sic*] by the dirty money. . . . I represent the Albanian Government. The structures of the Albanian State, the structures of the Albanian executive have investigated and have referred to the Prosecution about a scandalous scheme of fraud and money laundering.[33]

Franco-Bulgarian Mixed Arbitral Tribunal, Recueil des décisions des tribunaux arbitraux mixtes, Vol. IX (hereinafter "Battus"), Award, June 6, 1929, p. 286 (**CAR-14**).

[30] Claimants' Response, January 16, 2023, ¶¶ 39-45.

[31] *Id*., ¶ 41; *See e.g.*, Award, ¶¶ 82, 399-401, 724-725 ("There were significant flaws in the factual basis for the allegations that underpin the criminal investigation. . . . [T]he Tribunal finds that these activities were deliberate interference with Agonset's business and motivated by Agonset's criticisms of government. The Tribunal therefore draws that inference for which the Claimants contend, and finds that Albania's taking of Agonset was not a legitimate exercise of its police powers.").

[32] Tweet of E. Rama, Twitter, June 9, 2015 (**C-128**) (Original Arbitration); Facebook Post of E. Rama, June 9, 2015 (**C-363**) (Original Arbitration).

[33] Vizion Plus interview with Prime Minister E. Rama, June 12, 2015 (**C-370**) (Original Arbitration).

72. Claimants assert that Article 51 specifically requires that the new "fact was unknown to the Tribunal and to the applicant" when the award was rendered and that a "total absence of knowledge" of the fact prior to the Award is required.[34]

73. Claimants cite *Bellintani and Others v. Commission*, in which the Court of Justice of the European Communities ("**CJEC**") held that a judgment may not be revised "if the fact in question has been referred to in any manner, or simply known even if not expressly referred to in the course of the [original] proceedings."[35]

74. Further, Claimants submit that the revision applicant's alleged ignorance of a fact cannot result from negligence, *i.e.,* the revision applicant must demonstrate why it would not have been possible for it to know the fact prior to the award.[36] Claimants add that new evidence of a fact known prior to the award cannot be considered a *new fact* for purposes of Article 51.[37]

75. Third, Claimants submit that the Tirana Judgment's characterization of Claimants' pre-Award conduct as criminal does not create a new "fact" occurring *prior to the Award* under Article 51, because such characterization is not a fact, but a legal conclusion.[38] Claimants note that in *Ferrandi v. European Commission*[39] the CJEC held that a domestic court judgment post-dating a CJEC decision was not, in itself, capable of constituting a fact requiring revision.[40] Claimants assert that the "CJEU reasoned that Mr. Ferrandi could

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[34] Claimants' Preliminary Objections, December 7, 2022, ¶ 100.

[35] *Idem*. *See also* Claimants' Response, January 16, 2023, ¶ 32; *citing Bellintani and Others v. Commission*, Case 116/78 Rev., Judgment, January 10, 1980, ¶ 2 (**CAR-17**).

[36] Claimants' Preliminary Objections, December 7, 2022, ¶¶ 101-102.

[37] Claimants' Response, January 16, 2023, ¶ 32 (c).

[38] Claimants' Preliminary Objections, December 7, 2022, ¶¶ 109-113; Claimants' Response, January 16, 2023, ¶¶ 46-54.

[39] The first paragraph of Article 41 of the Statute of the Court of Justice of the EEC provides that 'an application for revision of a judgment may be made to the Court only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision'. The facts of this case were as follows: In 1987, the CJEC dismissed Mr. Ferrandi's claim challenging the Commission's decision to terminate his employment because he assaulted a colleague. In 1990, Mr. Ferrandi sought revision of the 1987 CJEC judgment based on a 1990 domestic court judgment finding that he was partly incapacitated at the time of the assault. *See Ferrandi v. European Commission,* Case C-403/85 REV., Judgment, March 19, 1991, ¶ 6 (**CAR-66**).

[40] Claimants' Response, January 16, 2023, ¶ 51, *citing Ferrandi v. European Commission,* Case C-403/85 REV., Judgment, March 19, 1991, ¶¶ 11-14 (**CAR-66**).

have sought revision only on the basis of the facts underlying the subsequent decision."[41] Here, Claimants submit, the Tirana Decision can likewise not constitute a new fact, and the allegations underlying it were well-known during the Original Arbitration.

76. Claimants also refer to *Yugoslavia v. Bosnia-Herzegovina*, in which the ICJ held that the legal consequences of events that occurred after an ICJ judgment could not be regarded as creating new pre-judgment facts for the purpose of an application for revision.[42] Therefore, Claimants submit, the characterization by the Tirana Judgment of Claimants' activities as criminal cannot create new *facts* (pre-dating the Award) under Article 51.

b. Decisive Effect of Alleged Pre-Award Facts

77. Claimants also submit that Respondent fails to demonstrate that its alleged discovery of facts is of such nature as to decisively affect the outcome of the Award, as required under Article 51 of the ICSID Convention—*i.e.*, had the facts been known, they would have led to a different decision by the Original Tribunal.[43]

78. Claimants dispute Respondent's assertions that had the Original Tribunal known of the Tirana Judgment and the Tirana court's determination that the conduct of certain Claimants was "criminal" under Albanian law it would have upheld an illegality defence under Articles 1(1) and 1(2) of the Albania-Italy BIT. Claimants emphasize that Respondent failed to assert such a defence even though it knew of the criminal allegations[44] and that a domestic court decision that investors breached national law is neither necessary nor sufficient for the success of a state's illegality defence in an investment treaty case.[45]

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[41] Claimants' Response, January 16, 2023, ¶ 51.

[42] *Id.*, ¶¶ 48-51, *citing* Application for Revision of the Judgment of July 11, 1996 in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Federal Republic of Yugoslavia*), Judgment, [2003] ICJ Rep. 7, ¶¶ 66-70 (**RL-27**).

[43] Claimants' Preliminary Objections, December 7, 2022, ¶ 103, *citing* Christoph Schreuer *et al*., *The ICSID Convention: A Commentary* (2nd ed., 2009) Art. 51, ¶ 18 (**RL-17**).

[44] Claimants' Response, January 16, 2023, ¶¶ 59-61.

[45] *Id.*, ¶ 58, *inter alia citing World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006, ¶¶ 130–188 (**RL-90**); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, ¶ 372 (**CL-180**); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimants' Claims, July 26, 2013, ¶ 29 (**CAR-69**).

79. Further, Claimants assert, domestic court decisions are not binding on an international tribunal, which must make its own examination of the legality of the investment.[46] Thus, Claimants argue, it would not, as Respondent submits, "automatically have 'followed' from the Tirana [Judgment] that the [Original] Tribunal 'would have held' that Claimants engaged in various alleged crimes and found itself without jurisdiction as a result."[47]

80. Finally, Claimants deny Respondent's assertion that the Original Tribunal would have found the expropriation of Agonset to be a legitimate exercise of Respondent's police powers had it known of the Tirana Judgment.[48] Claimants submit that the Original Tribunal dismissed Respondent's police powers defence after fully considering the criminal prosecutions.[49]

c. Timeliness of the Revision Application

81. Claimants also submit that Respondent's Revision Application is inadmissible because Respondent failed to comply with the time limits in Article 51.

82. Claimants note that Article 51(2) provides that an application for revision "shall be made within 90 days after discovery of the 'new fact' [and] … within three years after the date on which the award [to be revised] was rendered."[50]

83. Claimants submit that Respondent has failed to show it made the Revision Application within 90 days of the discovery of the alleged new facts.[51] Claimants assert that Respondent intentionally adopts a vague position as to the nature of the new "facts" to avoid this time limitation.[52]

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[46] Claimants' Response, January 16, 2023, ¶¶ 62-65, *citing Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, ¶¶ 213 and 209 (**CAR-68**); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, ¶ 410 (**RL-57**).

[47] Claimants' Response, January 16, 2023, ¶ 65.

[48] *Id.*, ¶¶ 66-69.

[49] *Idem*.

[50] Claimants' Preliminary Objections, December 7, 2022, ¶¶ 104-106.

[51] *Id.*, ¶ 130.

[52] *Id.*, ¶ 131, *citing* ICSID Rule 50(1)(c)(ii).

84. Further, Claimants submit, Respondent failed to make its application for Revision within three years of the issuance of the Award. Claimants assert that under Rule 50(1)(d) of the ICSID Rules, the application "shall [. . .] be accompanied by the payment of a fee for lodging the application."[53] Claimants submit that "[t]his clearly means that an application is not complete and cannot be deemed 'made' unless and until the lodging fee has been 'paid'."[54] Claimants add that Rule 69(6) of the 2022 ICSID Arbitration Rules requires that the Secretary-General "refuse registration if the application [for revision] is not filed or the fee is not paid within the time limits"[55] and that this newly-codified ICSID practice existed under the 2006 ICSID Rules and therefore applies in this case.[56]

85. Here, Claimants submit, Respondent's deadline to make the application was April 25, 2022 (three years after the Award was issued on April 24, 2019). Claimants assert that since Respondent did not pay the lodging fee for the Revision Application until May 5, 2022, Respondent's application is untimely.[57]

86. Claimants add that the Secretariat's registration of an application does not have preclusive effect on a tribunal's authority to determine the date of submission of the application.[58]

(2) Respondent's Position

a. Discovery of a Fact that Pre-dated the Award

87. As previously stated, Respondent asserts that the pre-Award "facts" Respondent "discovered" after the Award are the "Illegal Activities",[59] which Respondent defines as

[53] *Id.*, ¶ 134, *citing* ICSID Rule 50(1)(d).

[54] Claimants' Response, January 16, 2023, ¶ 73.

[55] Claimants' Preliminary Objections, December 7, 2022, ¶ 136.

[56] *Id., citing* ICSID, *Proposals for Amendment of the ICSID Rules, Working Paper #5*, June 2021, ¶¶ 109, 125 (**CAR-62**). *See also*, Claimants' Response, January 16, 2023, ¶ 74.

[57] Claimants' Response, January 16, 2023, ¶ 78.

[58] *Id.*, ¶ 76, *referring to* ¶¶ 26-27.

[59] Mr. Bastin KC for Respondent answering a question of the President, Hearing Transcript 116;21-118;12 ("The facts are the illegal activities as that term is defined in our submissions."). In its submissions to the Revision Tribunal, Respondent has partly presented arguments on the basis that it discovered not the Illegal Activities, but the criminality of those activities. *See e.g.*, Respondent's Observations, January 6, 2023, ¶ 81 ("the fact of [Claimants'] criminality was only 'discovered' at the point of their conviction by a court of competent criminal jurisdiction").

the fraud, bribery and money laundering for which certain Claimants were convicted in the Tirana Judgment.[60]

88. Respondent asserts that in *Stoicescu v. Romania,* the European Court of Human Rights ("**ECHR**") revised a judgment based on "new facts which were only confirmed with a judgment of the Romanian courts" that post-dated the ECHR's judgment.[61]

89. Here, Respondent asserts, although the "Illegal Activities" occurred before the Award was issued, Respondent only "discovered" the "Illegal Activities" "through the findings in the Tirana Judgment".[62] Respondent asserts that such a "discovery" is consistent with the requirement in Article 51(1) that the newly discovered facts pre-date the Award,[63] and thus the "Illegal Activities" are new "facts" that mandate revision of the Award under Article 51.

90. Respondent also asserts that it does not have to demonstrate a total absence of knowledge of the pre-Award facts at the time of the Award under Article 51. Respondent submits that the applicable standard is that applied in the *Tunisia/Libya (Revision and Interpretation)* case: "whether the fact in question was established by the material before [the tribunal]"[64] (internal quotations omitted).

91. Here, Respondent states, it was for the Albanian courts to determine the criminality of the "Illegal Activities".[65] Respondent submits that the Original Tribunal was not asked to determine the criminality of Claimants' conduct, and therefore could not have known of it.[66]

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[60] Revision Application, ¶ 2.

[61] Respondent's Further Observations, January 26, 2023, ¶ 43, *citing Stoicescu v. Romania,* European Court of Human Rights, Application No. 31551/96, Judgment (Revision), September 21, 2004 (**RL-102**).

[62] Respondent's Further Observations, January 26, 2023, ¶ 50 ("[. . .] Albania only discovered – and could only have discovered – the Convicted Claimants' Illegal Activities, which pre-date the Award, through the findings in the Tirana Judgment.").

[63] *Id.*, ¶ 51.

[64] *Id.*, ¶ 53, *citing Application for Revision and Interpretation of the Judgment of February 24, 1982 in the Case Concerning the Continental Shelf (Tunisia / Libya) (Tunisia v. Libya),* [1985] ICJ Rep. 192, 203, ¶ 19 (**RL-104**).

[65] Respondent's Observations, January 6, 2023, ¶¶ 85-92.

[66] *Id. See also* Respondent's Further Observations, January 26, 2023, ¶¶ 54-55.

92. Respondent acknowledges that it was aware of *allegations* of criminal activity against Claimants but submits that it never alleged before the Original Tribunal that Claimants were *convicted criminals*—only that they had been accused of such offenses in Albania.[67]

93. Respondent also asserts that "allegations" that Claimants were engaged in criminal conduct are different from the "facts" that Claimants are now convicted criminals under Albanian law. Respondent asserts that since Article 51 is only concerned with the discovery of "facts", prior *allegations* of criminality are irrelevant.[68]

94. Respondent asserts that the question of its knowledge is a question of fact and therefore the Tribunal must assume for the purposes of Claimants' application under Rule 41(5) that Respondent did not have knowledge of the "Illegal Activities".[69] Respondent submits that in considering whether to dismiss its Revision Application under Rule 41(5) the Revision Tribunal is limited to an analysis of the legal merits of the Application—that is, the Revision Tribunal must assume that the facts as stated by Respondent are true.[70]

95. Respondent adds that, in any event, knowledge of the "Illegal Activities" by one Albanian organ cannot be imputed to the State under international law, referring to Articles 16 to 18 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations (the "**ILC Articles**").

96. Respondent asserts that under the ILC Articles, knowledge of the "Illegal Activities" can only be imputed to Respondent if the State organ in charge of representing Respondent before the Original Tribunal knew of the "Illegal Activities" —which, Albania asserts, has not been shown by Claimants.[71] Therefore, Respondent submits, (a) Claimants' references to statements of the Prime Minister of Albania[72] and the conduct of Albanian officials and

[67] Respondent's Further Observations, January 26, 2023, ¶ 55.

[68] *Id.*, ¶ 52.

[69] *Id.*, ¶ 57.

[70] *Id.*, ¶ 39.

[71] *Id.*, ¶¶ 57-59.

[72] *Id.*, ¶ 56; *see e.g.*, Claimants' Preliminary Objections, December 7, 2022, ¶ 119; Claimants' Response, January 16, 2023, ¶ 40, fn. 54.

State organs in the conduct of criminal proceedings,[73] (b) Claimants' reliance on Albania's invocation of the police powers defence,[74] and (c) the commencement of civil proceedings against Claimants on October 12, 2016 by the Attorney General of Albania,[75] do not prove knowledge by Albania of the "Illegal Activities" as facts.[76] Thus, Respondent asserts, it did not and could not have known of "Claimants' criminal liability" before the Tirana Judgment.[77]

97. Finally, Respondent submits that certain cases cited by Claimants are inapposite here. Regarding *Yugoslavia v. Bosnia-Herzegovina*, Respondent submits that unlike Yugoslavia in that case, it does not base its Revision Application "on the legal consequences which it seeks to draw from facts subsequent to the [Award]".[78] In the present case, the Tirana Judgment does not "create" the new facts, and nor are the "Illegal Activities" "legal consequences".[79]

98. Similarly, Respondent asserts that the *Ferrandi* and *Battus v. Bulgaria* cases are inapposite because in those cases the alleged new facts *were* the domestic judgments, which post-dated the awards which claimants in those cases sought to revise.[80]

b. Decisive Effect of Alleged Pre-Award Facts

99. Respondent submits that the newly discovered "Illegal Activities" were such as to decisively influence the Award, had the Original Tribunal known them. Respondent submits that these facts would have led the Original Tribunal to find that it lacked jurisdiction *ratione materiae* and *ratione personae*; that Claimants' claims would have

[73] *Idem*.

[74] Respondent's Further Observations, January 26, 2023, ¶ 56, *citing* Claimants' Response, January 16, 2023, ¶ 40, fn. 54.

[75] *Idem*., *citing* Claimants' Response, January 16, 2023, ¶ 44.

[76] Respondent's Further Observations, January 26, 2023, ¶ 56.

[77] *Id.*, ¶ 60.

[78] *Id.*, ¶ 62. (Emphasis in the original).

[79] *Id.*, *citing* Application for Revision of the Judgment of July 11, 1996 in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Federal Republic of Yugoslavia*), Judgment, [2003] ICJ Rep. 7, 30–31, ¶ 69 (**RL-27**).

[80] Respondent's Further Observations, January 26, 2023, ¶¶ 63-64, *citing Ferrandi v. Commission of the European Communities*, Judgment, March 19, 1991, ¶ 8 (**CAR-66**) and *Battus c. Etat bulgare*, Franco-Bulgarian Mixed Arbitral Tribunal, Recueil des décisions des tribunaux arbitraux mixtes, Vol. IX, Award, June 6, 1929 (**CAR-14**).

been barred by the "unclean hands" doctrine; and that the Original Tribunal would have determined that Respondent's expropriations were a legitimate exercise of Respondent's police powers.[81]

100. Respondent agrees with Claimants that domestic court findings are not binding on international tribunals but submits that whether the Tirana Judgment withstands evidentiary scrutiny is not a matter the Revision Tribunal can consider when deciding whether to dismiss Respondent's Revision Application under Rule 41(5).[82]

101. Further, Respondent asserts that under Article 1(1) of the Albania-Italy BIT, an investment must be made "in accordance with the laws and regulations of [the host State]", otherwise it falls outside the scope of protected investments,[83] and that it is generally accepted that illegally obtained investments are not protected under investment treaties.[84] Here, Respondent submits, "the Tirana Judgment reveals that the Claimants' entire purported investment in Albania was a fraud from start to finish."[85] Therefore, Respondent asserts, the Tribunal would have been deprived of jurisdiction *ratione materiae* had it known of the illegality of Claimants' investment at the time of the Award.

102. In addition, Respondent asserts that Article 1(2) of the Albania-Italy BIT requires investors to have acquired their investment by legal means.[86] Here, Respondent submits, Claimants were convicted of criminal offenses that show they acquired their investments illegally.[87] Therefore, Respondent submits, the Tribunal would also have been deprived of jurisdiction *ratione personae*.

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[81] Respondent's Observations, January 6, 2023, ¶ 118.

[82] Respondent's Further Observations, January 26, 2023, ¶ 72.

[83] Respondent's Observations, January 6, 2023, ¶ 107, *citing* Art. 1(1) of the Albania-Italy BIT ("Regardless of the legal form chosen and the reference legal regime, "*investment*" means any asset invested by investors of a Contracting Party in the territory of the other, in accordance with the laws and regulations of the latter."). (Emphasis in the original).

[84] *Id.*, ¶¶ 108-111.

[85] *Id.*, ¶ 112, *see also* ¶¶ 113-114 listing the criminal convictions of the Tirana Judgment.

[86] *Id.*, ¶ 115, *citing* Art. 1(2) of the Albania-Italy BIT ("'*Investor*' means a natural or legal person of a Contracting Party that has made, is making or is intending to make, after obtaining any necessary administrative authorisation, an irrevocable obligation to make investments in the territory of the other Contracting Party, in accordance with the laws and regulations of the latter."). (Emphasis in the original).

[87] *Id.*, ¶ 116.

103. Respondent adds that the Original Tribunal would also have applied the doctrine of unclean hands, which precludes investors whose claims are based on illegal acts from obtaining the protections of an investment treaty.[88] Further, Respondent submits that a State is not responsible for any loss resulting from exercise of *bona fide* power to regulate criminal activity.[89] Since Respondent's seizures of Claimants' assets are now known to have been made in the course of successful enforcement of Albania's criminal law, they could not have constituted an illegal expropriation.[90]

104. Respondent asserts that in rejecting its police powers defence, the Original Tribunal did not know of Claimants' guilt under Albanian law,[91] which is now established,[92] and that the Tribunal would have reached a different decision had it known this fact.

105. Finally, Respondent states that it was not compelled to make an illegality objection to the jurisdiction of the Original Tribunal and was entitled to wait to see if Claimants were convicted before raising the issue.[93] Respondent submits that *Philip Morris Asia Ltd v. Australia* suggests that domestic proceedings are relevant for the analysis of an illegality exception, and therefore that it was legitimate to await the outcome of the Tirana Proceedings.[94]

106. For those reasons, Respondent submits that its new "Illegal Activities" facts would have had a decisive influence on the Award.

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[88] *Id.*, ¶117.

[89] *Id.*, ¶ 122, *see also* ¶¶ 123-126 *citing Methanex Corporation v. United States*, NAFTA, Award, August 3, 2005, Part IV.D, ¶ 7 (**RL-62**), *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 255 (**RL-63**), *Chemtura Corporation v. Government of Canada*, NAFTA, Award, August 2, 2010, ¶ 266 (**RL-64**) and *Philip Morris Brands SARL v. Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, ¶¶ 291–305 (**RL-65**).

[90] *Id.*, ¶¶ 127-128.

[91] Respondent's Further Observations, January 26, 2023, ¶ 74.

[92] *Idem.*

[93] *Id.*, ¶ 68.

[94] *Id.*, ¶¶ 70-71, *citing Philip Morris Asia Ltd v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of December 17, 2015, ¶¶ 245–350 (**R-109**).

c. Timeliness of the Revision Application

107. Respondent submits that its application was made both within 90 days of the discovery of the new facts and within three years of the Award.

108. Respondent asserts that it discovered the new facts on February 23, 2022, when the Tirana Judgment was rendered.[95]

109. Respondent disputes Claimants' allegations that it failed to make its application within three years of the date the Award. Respondent asserts that it submitted its Revision Application on April 22, 2022.[96]

110. Respondent notes that nothing under the applicable 2006 ICSID Rules permits the Secretariat to refuse to register an application for failure to pay the lodging fee.[97] Respondent disputes Claimants' assertion that the 2022 ICSID Rules could retroactively impose this requirement under the 2006 ICSID Rules.[98] Respondent adds, that, even if the failure to pay the lodging fee at the time Respondent made its application could result in ICSID's failure to accept the application—which it does not—this would not be sufficient grounds for the Revision Tribunal to dismiss it.[99]

111. In any event, the Respondent says, even if there were some technical defects with the Revision Application, international law does not insist on strict compliance with formalities.[100]

(3) Revision Tribunal's Analysis and Decision

112. The Parties agree that an applicant for revision of an award under Article 51 of the ICSID Convention must demonstrate:

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[95] Respondent's Observations, January 6, 2023, ¶¶ 130-132.
[96] *Id.*, ¶¶134-135.
[97] *Id.*, ¶¶ 136-138; Respondent's Further Observations, January 26, 2023, ¶¶ 77-78.
[98] Respondent's Observations, January 6, 2023, ¶ 137.
[99] *Id.*, ¶¶ 138-140; Respondent's Further Observations, January 26, 2023, ¶¶ 77-78.
[100] Respondent's Observations, January 6, 2023, ¶ 140.

(a) that it has "discovered" a "fact";[101]

(b) the fact must pre-date the award;[102]

(c) the fact must be of such nature as to decisively affect the award;[103]

(d) that, when the award was rendered, the fact was unknown to both the tribunal and the applicant for revision;[104]

(e) that the applicant's ignorance of the fact was not due to negligence;[105] and

(f) that the application must be made within 90 days of the discovery of the fact and within three years of the date the award was rendered.[106]

113. The Parties also agree that to obtain dismissal of an application for revision under Rule 41(5)—*i.e.*, to show that the application is manifestly without legal merit—the applicant's failure to comply with Article 51 must be established "clearly and obviously, with relative ease and dispatch."[107]

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[101] Claimants' Preliminary Objections, December 7, 2022, ¶ 76; Respondent's Observations, January 6, 2023, ¶ 4; Claimants' Response, January 16, 2023, ¶¶ 30-31; Respondent's Further Observations, January 26, 2023, ¶ 35 *see also* ¶¶ 48, 49 or 52.

[102] Claimants' Preliminary Objections, December 7, 2022, ¶ 99; Claimants' Response, January 16, 2023, ¶ 37. Respondent does not expressly cite this rule, but makes its arguments in accordance with it, *see e.g.*, Respondent's Further Observations, January 26, 2023, ¶¶ 4 (a) (i), 42, 50, 62-65; Respondent's Observations, January 6, 2023, ¶ 102(e).

[103] Claimants' Preliminary Objections, December 7, 2022, ¶ 76; Respondent's Observations, January 6, 2023, ¶ 4; Claimants' Response, January 16, 2023, ¶¶ 30-31; Respondent's Further Observations, January 26, 2023, ¶ 35, *see also* ¶¶ 48, 66-74.

[104] Claimants' Preliminary Objections, December 7, 2022, ¶ 76; Respondent's Observations, January 6, 2023, ¶¶ 4, 36; Claimants' Response, January 16, 2023, ¶ 32(d), *see also* ¶ 39; Respondent's Further Observations, January 26, 2023, ¶¶ 28, 48 (implicit in ¶¶ 51-61).

[105] Claimants' Preliminary Objections, December 7, 2022, ¶ 76; Respondent's Observations, January 6, 2023, ¶¶ 17, 36; Claimants' Response, January 16, 2023, ¶ 37; Respondent's Further Observations, January 26, 2023, ¶ 28.

[106] Claimants' Preliminary Objections, December 7, 2022, ¶ 76; Respondent's Observations, January 6, 2023, ¶ 129; Claimants' Response, January 16, 2023, ¶¶ 30-31; Respondent's Further Observations, January 26, 2023, ¶ 35, *see also* ¶ 75.

[107] Claimants' Response, January 16, 2023, ¶ 24; Respondent's Observations, January 6, 2023, ¶ 58; both Parties referencing *Trans-Global Petroleum Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, ¶ 88 (**CAR-24**). *See also* Claimants' Preliminary Objections, December 7, 2022, ¶ 87. Although Claimants initially argued that "the question of whether a claim is manifestly meritless under Rule 41(5) will … depend on the standard of proof applicable to the underlying claim" (Claimants' Preliminary Objections, December 7, 2022, ¶ 87), the Parties' subsequent submissions indicate general agreement on the applicable standard. *See* Claimants' Response, January 16, 2023, ¶¶ 30-31; Respondent's Further Observations, January 26, 2023, ¶ 35.

114. Finally, the Parties agree that, for the purposes of this Rule 41(5) application, the facts as alleged by Respondent are assumed to be true unless they are manifestly incredible, frivolous, vexatious, or inaccurate or made in bad faith[108] and the Revision Tribunal is limited to a legal analysis of Respondent's Revision Application.

a. Discovery of a Fact that Pre-dated the Award

115. As previously stated, it is common ground between the Parties that under Article 51 the alleged discovered fact must pre-date the Award and that both the Original Tribunal and Respondent must have been unaware of the alleged discovered fact prior to issuance of the Award.[109]

116. As the tribunal stated in *Venezuela Holdings:*

> Article 51 presupposes that the relevant fact *could have been known when the award was rendered* and that, had it not been known, said ignorance *could have been due to negligence when the award was rendered*. Only a fact that existed when the award was rendered could have been known when the award was rendered. Only ignorance of a fact that existed when the award was rendered could be due to negligence. It follows that only a fact that existed when the award was rendered may form the basis for a request for revision under Article 51(1) of the ICSID Convention. (Emphasis in the original).[110]

117. The first question before the Revision Tribunal is what, precisely, is the "fact" that Respondent asserts it "discovered" by means of the Tirana Judgment.

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[108] Claimants' Response, January 16, 2023, ¶ 24; Respondent's Further Observations, January 26, 2023, ¶¶ 14-15; Ms. Amirfar for Claimants answering a question by Arbitrator Anderson, Hearing Transcript 169;21-170;10.

[109] Claimants' Preliminary Objections, December 7, 2022, ¶¶ 99-100; Claimants' Response, January 16, 2023, ¶¶ 37, 39. Respondent does not expressly cite this rule, but makes its arguments in accordance with it, *see e.g.*, Respondent's Observations, January 6, 2023, ¶ 102 (c) and (e); Respondent's Further Observations, January 26, 2023, ¶¶ 4 (a) (i), 42, 49-50, 62-65.

[110] *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Revision, June 12, 2015, ¶¶ 3.1.11 (**CAR-35**).

118. In its written submissions Respondent alleged that "the fact of [Claimants'] criminality was only 'discovered' at the point of their conviction by a court of competent criminal jurisdiction."[111] At the Hearing, Respondent's counsel stated as follows:

> PRESIDENT: Could you state for us the fact or facts that were discovered, the allegation with respect to what the facts are under article 51 of the Convention, article 51 of the rules?
>
> MR BASTIN: Yes, sir. *The facts are the illegal activities as that term is defined in our submissions.* And just to remind the Tribunal, even though you have them in writing to consult later, *the facts that were established and therefore discovered at the time of the Tirana Judgment* are that Mr Becchetti and Mr de Renzis forged documents so they could make fraudulent VAT claims, ie, to get money from the state for VAT rebates that were never due, and also to defraud Deutsche Bank. You will remember, sir, that that is the mechanism by which the Claimants, based on this fraud, received a settlement from Deutsche Bank which indicated that they would receive the money because of the fraud being carried out. The second is that Mr Becchetti and Mr de Renzis orchestrated the MedArt arbitration. Again, that is the arbitration locally in Albania in which the Claimants orchestrated an award which said this money is owed to the Claimants' company, when in fact the work had never been done, the invoices didn't reflect work done. It was a sham arbitration. The third part, or the third illegal activity, is Mr Becchetti and Mr de Renzis perpetrating the Deutsche Bank fraud, the one I referred to a moment ago, having got the arbitration award from the MedArt arbitration, the local Albanian arbitration, they then took that to Deutsche Bank and said as a shareholder in the company you need to contribute to the award debt. And lastly in the illegal activity, Mr Becchetti and Mr de Renzis then laundered the proceeds of that fraud through Agonset, Agonset being the central part of the investment initiated by the Claimants. (Emphasis added.)[112]

119. Respondent's counsel also stated at the Hearing:

> MR BASTIN: The first point Ms. Amirfar [Claimants' counsel] takes is that the Respondent has tied ourselves in knots trying to characterize Tirana Judgments on new fact or something different. In particular Ms. Amirfar says that the new fact was the convictions. The Tribunal ought to be very cautious around this. The entire strategy of the Claimants on this belated 41(5) application, that was never the intended application, is to try to elide the occurrence of the illegal activities years ago with the occurrence of the

[111] Respondent's Observations, January 6, 2023, ¶ 81. *See also* ¶¶ 8, 95, 130.

[112] Mr. Bastin KC for Respondent answering a question of the President, Hearing Transcript 116;22-118;12.

> Tirana Judgment. That is not correct. *Albania's position is that the facts are the illegal activities that happened years ago. The discovery is what occurred on the date of the Tirana Judgment. The convictions*, contrary to what Ms Amirfar indicated, *are not the new fact.* This is not new. Albania's written submissions on this have been clear from day dot. Go back to our submissions, our Observations on 6 January, our Further Observations on 26 January, what I have said this morning and what I have just said now. *The new facts are the illegal activities* that I summarized for you, Mr President, discovered as at the date of the Tirana Judgment. The entire determination of 41(5) should proceed on that clarity. (Emphasis added.)[113]

120. It is clear to the Revision Tribunal that Respondent represented to the Original Tribunal that Claimants were alleged to have committed the acts of fraud, bribery, and money laundering for which they were criminally convicted in the Tirana Judgment[114] and that Respondent relied upon these accusations in the Original Arbitration to argue that the expropriations alleged by Claimants were a proper exercise of Respondent's police powers.[115]

121. The Original Tribunal fully considered Respondent's submissions regarding Claimants' alleged criminal conduct, devoting some 64 paragraphs of the Award to describing the criminal investigations, arrest warrants, asset seizures and related proceedings.[116]

122. In determining that Respondent's prosecution of Claimants and seizure of their investment in Agonset did not constitute an appropriate exercise of Respondent's police powers, the Original Tribunal described the basis for its conclusions in some 22 paragraphs, stating in part:

> 703. The Tribunal turns to the parties' substantive arguments concerning whether the Seizure Decision and Seizure Execution Decision are a legitimate exercise of Albania's police powers. When doing so, it is important to bear in mind that the Claimants' case is that it is the totality of

[113] *Id.*, 148;16-149;16.

[114] *See e.g.*, the 2015 formal notification of charges against Mr. Becchetti, Formal criminal charge against Mr. Becchetti, July 7, 2015 (exhibited as **R-89**). *See also*, Award, ¶¶ 698-726: Albania attempted to defend the seizure of Claimants' assets based on the police powers doctrine, but the Original Tribunal refused this argument.

[115] *See e.g.*, Award, ¶¶ 373-437, substantially describing the criminal proceedings against Claimants in Albania. *See also id.*, ¶¶ 698-726: Albania attempted to defend the seizure of Claimants' assets based on the police powers doctrine, but the Original Tribunal refused this argument.

[116] *Id.*, ¶¶ 373-437 (internal citations omitted).

the conduct of which it complains that constitutes expropriation and not those decisions considered in isolation.

….

724. When taken together, all of the matters discussed in paragraphs 708 to 719 above therefore strongly support an inference that the Seizure Decisions were the culmination of a political campaign against the Claimants.

The criminal investigations were commenced by a government that was close to the Claimants' commercial competitors, incumbent operators of television stations, against a channel that was critical of the government.

At the outset of those investigations, a representative of the government explicitly stated that Mr. Becchetti should speak with one of those competitors if he wished to understand why the Claimants' investments were under investigation, and that it was not a good idea to oppose the state.

There were significant flaws in the factual basis for the allegations that underpin the criminal investigation. When called upon to justify the allegations that underpinned the Arrest Warrants by INTERPOL, Albania failed to do so.

Once the Seizure Decisions were issued, Prime Minster Rama stated his "war" against investors such as the Claimants had been a "success", and went on to threaten the judiciary on the basis that it was somehow implicated in the supposed wrongs of those investors.

725. ….the Tribunal finds that these activities were deliberate interference with Agonset's business and motivated by Agonset's criticisms of government. The Tribunal therefore draws that inference for which the Claimants contend, and finds that Albania's taking of Agonset was not a legitimate exercise of its police powers. As such, Mr. De Renzis', Mr. Becchetti's, Ms. Grigolon's and Hydro's investment in Agonset was expropriated in breach of Article 5 of the Treaty.[117]

[117] *Id.*, ¶¶ 703, 724-725.

123. At the Hearing, Respondent particularly relied on *Stoicescu v. Romania* and *Elz v. Commission of the European Communities*[118] to argue that domestic court judgments following an award may be referenced by a party seeking revision.[119]

124. The Revision Tribunal cannot agree that these cases support Respondent's position.

125. In *Stoicescu,* the ECHR revised its decision based on a domestic court judgment that *pre-dated* the Award but was unknown to Romania (the party seeking revision) or the ECHR at the time of the original award.[120] The *Stoicescu* court declined to charge Romania with knowledge of the pre-award domestic judgment because the case was a civil, not criminal, matter; it was not prosecuted by a public authority; and there was no evidence that the Romanian State entities involved in the ECHR case received notice of the case or judgment.[121]

126. Here, the Tirana Judgment was issued almost three years *after* the Award, and there is no question that Respondent specifically brought the criminal proceedings at issue against Claimants to the attention of the Original Tribunal.[122]

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[118] *Stoicescu v. Romania*, European Court of Human Rights, Application No. 31551/96, Judgment (Revision), September 21, 2004 (**RL-102**); *Raymond Elz v. Commission of the European Communities* (Case 56-75 – Rev.), European Court of Justice (First Chamber), Judgment, October 13, 1977 (**RL-101**).

[119] Mr. Bastin KC for Respondent on *Stoicescu*, Hearing Transcript 110;2-112;19.

[120] *See Stoicescu v. Romania, European Court of Human Rights*, Application No. 31551/96, Judgment (Revision), September 21, 2004 (**RL-102**). The facts of this matter are as follows. In 1950, Romania nationalized a house owned by Mr. Stoicescu's aunt. In 1994, Mr. Stoicescu brought an action in the Romanian courts arguing that the nationalization was unlawful, and, as the sole heir of his aunt—Stoicescu at the time held valid a certificate of inheritance—the State should return the house to him. Mr. Stoicescu prevailed in the first instance and on appeal, but in 1995 Romania's highest court rejected Mr. Stoicescu's claim of ownership holding that Romania's new constitution provided that a law would be enacted to remedy such takings, and that no relief was available in Romania's courts until such a law was enacted. In 1998, Mr. Stoicescu brought an action against Romania before the ECHR alleging violation of the right to a fair trial and protection of property under the European Convention on Human Rights. In 2003, the ECHR found in favor of Mr. Stoicescu. Romania subsequently brought a Revision Application, asserting as a new fact that Mr. Stoicescu's certificate of inheritance had been annulled in 1999 by a Romanian court decision. This decision was confirmed on appeal in 2003. The ECHR held that because Mr. Stoicescu's inheritance rights were terminated he lacked standing since 1999 to claim ownership of the property and that this fact was likely to have had a decisive influence on the 2003 award.

[121] *Id.*, ¶¶ 46-47.

[122] *See* Claimants' Preliminary Objections, December 7, 2022, ¶¶ 115-120 for Claimants' argument. *See also* Award, ¶¶ 708-725, where the Original Tribunal discusses the criminal investigations in the context of Respondent's police powers defense. *See also* Order on Provisional Measures, March 3, 2016, (Original Arbitration) in particular, ¶¶ 3.41, 5.1 (a) – the criminal proceedings in Albania against Claimants where the subject of this Order. The Original Tribunal

127. In *Elz,* a 1976 CJEC judgment dismissed Mr. Elz's action against the European Commission on the grounds that he had suffered no damages. Mr. Elz applied for revision in 1977, citing a judgment by a Belgian appellate court issued after the CJEC judgment. The Belgian appellate decision confirmed a first instance Belgian decision rendered prior to the CJEC judgment requiring Mr. Elz to pay certain court costs, which Mr. Elz argued in his revision application constituted a new "fact" evidencing his damages.

128. In finding Mr. Elz's revision application inadmissible, the CJEC held that the appellate decision simply confirmed the first instance decision, which was known to the CJEC and the parties at the time of the CJEC judgment.[123]

129. The Revision Tribunal does not agree with Respondent's attempted distinction between knowledge of the "fact" of "Illegal Activities" and knowledge of "factual allegations" or evidence on the "Illegal Activities", which the Respondent acknowledges it had prior to the Award.[124] In light of Respondent's submissions to the Original Tribunal, and the Original Tribunal's determinations, regarding Claimants' alleged criminal conduct, it is obvious that both Respondent and the Original Tribunal had knowledge of these allegations during the Original Arbitration.

130. As the ICJ stated in *Tunisia v. Libya*, a tribunal "must be taken to be aware of every fact established by the material before it, whether or not it expressly refers to such fact in its judgment; similarly, a party cannot argue that it was unaware of a fact which was set forth in the pleadings of its opponent, or in a document annexed to those."[125]

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also had access to Albania's 2015 formal Criminal Notifications against Claimants which contain substantially similar allegations to the conclusions of the Tirana Judgment, *see* Award ¶¶ 399–401 (the Award citing Prosecutor's Office at the First Instance Court of Tirana, Measure Submitted for Notification of Prosecution, No. 10912, July 16, 2015 (**C-116**) (Original Arbitration) (Mr. Becchetti and Mr. De Renzis, also exhibited as **R-89**).

[123] *Raymond Elz v. Commission of the European Communities* (Case 56-75 – Rev.), European Court of Justice (First Chamber), Judgment, October 13, 1977, ¶¶ 7-9 (**RL-101**).

[124] *See, e.g.*, Respondent's Further Observations, January 26, 2023, ¶¶ 52-55 ("Contrary to the Claimants' submissions, the power of revision in Article 51 does not concern the discovery of "factual allegations". Rather, Article 51 can be invoked in relation to the discovery of actual "facts").

[125] Application for Revision and Interpretation of the Judgment of February 24, 1982 in the Case Concerning the Continental Shelf (Tunisia / Libya) *(Tunisia v. Libya)*, [1985] ICJ Rep. 192, ¶ 19 (**RL-104**).

131. Clearly, a domestic court's post-award legal characterization of a pre-award fact—such as the Tirana Judgment's characterization of Claimants' pre-award acts as in violation of Albania's criminal code—does not qualify as a "fact" under Article 51 of the ICSID Convention for the purposes of a revision application.[126] The Revision Tribunal notes that in *Yugoslavia v. Bosnia-Herzegovina* the ICJ specifically declined to give retroactive legal effect to events after the judgment, holding that legal consequences of such events "cannot be regarded as facts" within the meaning of the ICJ's revision rules.[127]

132. Respondent argues that the date of the Tirana Judgment is the moment in time Respondent "discovered" the new "fact" of the "Illegal Activities" but that the judgment itself was not the new "fact". Respondent has not presented any authority in support of its conflation of these separate concepts (the existence of the new fact and the "discovery" of the new fact), and the Revision Tribunal cannot accept it. Neither the Tirana Judgment (which is clearly post-Award), nor the Tirana Judgment's findings that Claimants acts prior to the Award violated Albania's criminal law, qualify as new "facts" under Article 51.

133. Since there is no dispute that Respondent and the Original Tribunal had knowledge prior to the Award of Claimants' pre-Award acts that resulted in the criminal convictions, Respondent cannot rely on the finding of criminality in the Tirana Judgment to establish a pre-Award fact under Article 51.

134. Because it is clear, certain and obvious that Respondent did not "discover" any pre-Award "fact" justifying revision of the Award, Respondent's Revision Application is "manifestly

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[126] Respondent acknowledges this: "the Tirana Judgment does not "create" the new facts, and nor are the Illegal Activities "legal consequences." Rather, the Tirana Judgment reflects the point in time at which Albania "discovered" the new facts." (Respondent's Further Observations, January 26, 2023, ¶ 62).

[127] Claimants' Response, January 16, 2023, ¶¶ 48-51, *citing* Application for Revision of the Judgment of July 11, 1996 in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Federal Republic of Yugoslavia*), Judgment, [2003] ICJ Rep. 7, ¶¶ 66-70 (**RL-27**). *See also* Christoph Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed., 2009), Art. 51, ¶17 (**RL-17**); Application for Revision of the Judgment of July 11, 1996 in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Federal Republic of Yugoslavia*), Judgment, [2003] ICJ Rep. 7, ¶ 70 (**RL-27**); *Ferrandi v. Commission of the European Communities*, Judgment, March 19, 1991, ¶ 13. *See* Claimants' Preliminary Objections, December 7, 2022, ¶ 98 (**CAR-66**); Claimants' Response, January 16, 2023, ¶¶ 48-49; Respondent's Further Observations, January 26, 2023, ¶¶ 62-65.

without legal merit" under Article 51 of the ICSID Convention and must be dismissed under ICSID Arbitration Rule 41(5).

b. Decisive Effect of Alleged Pre-Award Facts

135. Article 51 of the ICSID Convention also requires that the newly discovered fact be "of such a nature as decisively to affect the award".[128] The Revision Tribunal need not consider this requirement in view of its determination that Respondent failed to plead any newly discovered fact under Article 51.

c. Timeliness of the Revision Application

136. Article 51(2) states that an application for revision "shall be made…within three years after the date on which the award was rendered." Respondent filed the Revision Application on April 22, 2022, within three years of April 24, 2019, when the Award was rendered. The Application was allegedly not accompanied by payment of the fee required for lodging the Application, as required under Rule 50(1)(d).[129]

137. The question raised by Claimants is whether Respondent "made" its application in a timely fashion since payment of the lodging fee was made and received on May 5, 2022, and the ICSID Secretary-General registered the Revision Application on May 9, 2022, both dates more than three years after the Award was rendered.[130] Claimants assert that ICSID's

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[128] ICSID Convention, Art. 51 (1). *See also* Application for Revision of the Judgment of September 11, 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (*El Salvador v. Honduras*), Judgment, ICJ Reports 2003, ¶ 53 (**CAR-5**) ("*The new chart produced by El Salvador thus does not overturn the conclusions arrived at by the Chamber in 1992*."); *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Claimants' Objection under ICSID Rule 41(5) to Respondent's Application for Revision, March 8, 2021, ¶ 58 (**CAR-61**) ("*A 'fact of such a nature as decisively to affect the award' is a fact of such a nature as to affect the award conclusively or determinatively*.").

[129] Rule 50(1)(d) provides:

> (1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:
>
> [. . .]
>
> (d) be accompanied by the payment of a fee for lodging the application.

[130] *See* Claimants' Preliminary Objections, December 7, 2022, ¶¶ 136-157; Claimants' Response, January 16, 2023, ¶¶ 70, 73.

registration of a revision application under Rule 50(1)(d) is tantamount to the *making* of an application under Art. 51(2).

138. In light of the Revision Tribunal's decision to dismiss Respondent's Application under Rule 41(5), the Revision Tribunal need not, and does not, determine whether Respondent's Application was timely.

B. THE REMAINING APPLICATIONS

(1) CLAIMANTS' REQUEST FOR ALLOCATION OF ADVANCE PAYMENTS

139. Claimants request that the Revision Tribunal order Respondent to pay Claimants' share of advance payments pursuant to ICSID Arbitration Rule 28 and Regulation 15(2) of the ICSID Administrative and Financial Regulations (the "**ICSID Regulations**"). Respondent opposes this request.

a. Claimants' Position

140. Claimants submit that it would be "unfair and unjust to require [Claimants] to advance a single cent towards Albania's latest, meritless post-award tactic to avoid its obligations."[131] Further, Claimants assert serious doubts as to Respondent's willingness to comply with a cost award in this case.[132] Therefore, Claimants request that the Revision Tribunal order Respondent to "pay all costs advances".

141. Claimants submit that the Revision Tribunal has the authority to make such an order pursuant to Regulation 15(2) of the ICSID Regulations and Rule 28 of the ICSID Rules.[133] Regulation 15(2) provides that "each party shall pay one half of the payments [requested by ICSID], unless a different division is agreed to by the parties or ordered by the Tribunal."

142. Rule 28 provides:

[131] Claimants' Response, January 16, 2023, ¶ 107.

[132] *See e.g.*, Claimants' Request for Allocation of Advance Payments, November 18, 2022, ¶¶ 10-11, 20-21.

[133] *Id.*, ¶ 18; Claimants' Response, January 16, 2023, ¶ 108.

> the Tribunal may . . . decide at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14 [of the 2006 ICSID Administrative and Financial Regulations], of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre.

143. Claimants submit that in *RSM v. Saint Lucia*[134] an ICSID tribunal ordered the claimant to pay all advances, because of the claimant's failures (1) to comply with a prior cost award and (2) to make advance payments in prior ICSID proceedings.[135]

144. Claimants also submit that Respondent's Application for Revision is an abuse of procedure in that Respondent represented to the Annulment Tribunal that it would comply with the Award if it was not annulled and then failed to do so and Respondent has continued to assert publicly that it has no intention of complying with the Award.[136]

b. Respondent's Position

145. Respondent opposes Claimants' Request for Allocation of Advance Payments, arguing that Claimants have an obligation to pay their share of advance payments on costs under Regulation 14(3)(d) of the ICSID Regulations.[137] Respondent asserts that the ICSID Rules do not permit a party to decline to pay its share of advance payments in post-award proceedings on the basis of a prior favourable award.[138] Respondent submits that it has the right to request revision of the Award under the ICSID Rules, and that its request cannot be a sufficient basis for the Tribunal to order it to make the entire advance payment.[139]

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[134] *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Provisional Measures, December 12, 2013 (**CAR-10**).

[135] Claimants' Request for Allocation of Advance Payments, November 18, 2022, ¶ 19, *citing RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Provisional Measures, December 12, 2013, ¶¶ 71, 74.

[136] Claimants' Request for Allocation of Advance Payments, November 18, 2022, ¶¶ 20-21; *see also id.*, ¶¶ 11-12.

[137] Respondent's Observations, January 6, 2023, ¶¶ 147, 154, 157. *See also*, Respondent's Letter to the Tribunal, November 29, 2022, p. 2, (*n.b.*: Respondent is referring to Regulation 14(3)(d) but miscites it as Regulation 14(d) (*see* citation in the Letter)).

[138] Respondent's Further Observations, January 26, 2023, ¶ 107.

[139] *Idem.*

146. To reassure Claimants of its willingness to pay any award of costs that may be assessed against it, Respondent has suggested the establishment of an escrow mechanism (discussed below).[140]

c. Revision Tribunal's Decision

147. Claimants' request that the Revision Tribunal order Respondent to bear all advances on costs paid to ICSID in these Revision Proceedings is dismissed as moot, as the Revision Tribunal has dismissed Respondent's Revision Application under Rule 41(5) and the amounts Respondent has paid towards the advance on costs are sufficient to cover the costs of the Revision Proceedings.

(2) CLAIMANTS' REQUESTS FOR SECURITY

148. Claimants have requested that Respondent post security for (1) the costs of the Revision Proceedings, and (2) the sums owed by Respondent under the Award and the Decision on Annulment. Respondent opposes these requests.

a. Claimants' Position

149. Claimants submit that Article 47 of the ICSID Convention empowers the Revision Tribunal to order security.[141] Article 47 provides that: "[T]he Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

150. However, Claimants submit that its request for security does not have to meet the Article 47 requirements for provisional measures.[142] Claimants note that Rule 53 of the 2022 ICSID Arbitration Rules—which they say reflects prior ICSID practice[143]—sets out a

[140] *See* Section III. B.(3).

[141] Claimants' Preliminary Objections, December 7, 2022, ¶ 160.

[142] Claimants' Response, January 16, 2023, ¶101.

[143] *See id.*, ¶ 102, *citing* ICSID, *Proposals for Amendment of the ICSID Rules, Working Paper #1*, August 2018, ¶ 514 (**CAR-71**); *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, ¶ 49 (**CAR-55**).

procedure for requests for security for costs distinct from the procedure to obtain provisional measures.[144]

151. Claimants submit that the Tribunal's authority to order security for the award is supported by Article 51 of the ICSID Convention, which they assert was modelled on Article 61 of the ICJ Statute. Article 61(3) of the ICJ Statute provides that the ICJ may require "previous compliance with the terms of the judgment before it admits proceedings in revision."[145] Claimants submit that ICSID practice supports such an approach, and that ICSID tribunals often condition a stay of the enforcement of an award upon payment of security.[146]

152. Further, Claimants assert that ICSID tribunals have ordered parties "to post security for costs in 'exceptional circumstances,' where there is a 'material risk' that a party will not comply with a potential order for costs because it is unable or *unwilling* to do so."[147]

153. Here, Claimants submit, Respondent's senior officials have repeatedly stated that Respondent has no intention of complying with any award against it[148]—*e.g.*, Albania's Prime Minister Rama has stated "I said it before and they said that I said it for the campaign, but I say it even now after the campaign: the Albanian State will pay ZERO to [Mr. Becchetti]."[149] Claimants further state that Respondent failed to perform its promise to the Annulment Committee to comply with the Award if the Award was not annulled.[150]

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[144] Claimants' Response, January 16, 2023, ¶ 102.

[145] Claimants' Preliminary Objections, December 7, 2022, ¶ 158, *citing* Statute of the ICJ, Art. 61(3) (**RL-22**).

[146] *Id*., ¶ 159, *citing Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Stay of Enforcement, April 12, 2017, ¶ 88 (**CAR-44**) and *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Stay of Enforcement, September 17, 2020, ¶ 213 (**CAR-60**).

[147] *Id.*, ¶ 160, *citing RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶¶ 77-82 (**CAR-33**). (Emphasis in the original).

[148] *See e.g.*, *id.*, ¶ 6, *citing* TPZ.al, Interview with Edi Rama, April 15, 2021, p. 1 (**C-703**) (Original Arbitration); Fatjona Mejdini, Interview with Edi Rama, April 29, 2021, p. 3 (**C-705**) (Original Arbitration); Mustafa Nano, Interview with Edi Rama, MCN TV, April 20, 2021, p. 1 (**C-704**) (Original Arbitration); Republic of Albania, Offering Circular for EUR 650,000,000 3.5% Notes due November 23, 2031, November 23, 2021, pp. 2, 57 (**CER-8**); Prime Minister Rama, Year-End Press Conference, December 30, 2021 (excerpt, Claimants' translation) (**CER-9**); Prime Minister Rama, Parliament Address, June 16, 2022 (excerpt, Claimants' translation) (**CER-10**).

[149] Fatjona Mejdini, Interview with Edi Rama, April 29, 2021, p. 3 (**C-705**) (Original Arbitration).

[150] Claimants' Preliminary Objections, December 7, 2022, ¶ 161.

154. In response to Respondent's argument that no ICSID tribunal has ordered a State to pay security for costs, Claimants assert that Respondent's "continuing abuse" is "unprecedented", and that no rule forbids ordering security against a State.[151]

b. Respondent's Position

155. Respondent opposes Claimants' Request for Security on grounds that (1) such relief can only be awarded under Article 47 of the ICSID Convention; (2) the conditions of Article 47 are not met; and (3) no ICSID tribunal has ever required a State to post security.

156. Respondent asserts that an order for security can only "be made in 'exceptional' cases as a form of provisional measure under Article 47 of the ICSID Convention."[152] Respondent submits that Article 47 requires, *inter alia*, that:

(a) the applicant has "rights requiring protection";

(b) provisional measures are "urgent";

(c) provisional measures are "necessary" to avoid "imminent and irreparable harm", which is harm in respect of which "monetary compensation would [not] be an adequate remedy"; and

(d) provisional measures are "proportionate".[153]

157. Respondent asserts that Claimants cannot meet those requirements. Respondent asserts that ICSID tribunals have required claimants to post security in cases involving exceptional circumstances not present here.[154] In *RSM v. Saint Lucia* the tribunal found that claimant (a) had a history of non-payment of cost-orders; (b) lacked financial resources; and (c) was funded by a third-party that was not obligated to pay a cost award.[155] In *Dirk Herzig v. Turkmenistan*, claimant was funded by a third-party, but under the contract the third-party

[151] Claimants' Response, January 16, 2023, ¶ 98.

[152] Respondent's Observations, January 6, 2023, ¶ 168.

[153] *Id.*, ¶ 169. (Emphasis in the original)

[154] *Id.*, ¶¶ 173-176.

[155] *Id.*, ¶ 173, *citing RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Security for Costs, August 13, 2014, ¶ 86 (**CAR-33**).

was not obligated to pay adverse awards of costs.[156] In *Kazmin v. Latvia* the tribunal found that claimant had (1) failed to pay its former counsel; (2) was under criminal investigation; and (3) had a practice of transferring assets to avoid payments to its creditors.[157]

158. Here, Respondent submits, exceptional circumstances do not exist. There is no allegation that Albania is unable to pay the Award or any costs awarded in these Revision Proceedings; that Albania's counsel team is funded by a third-party; or that Albania has engaged in any scheme to defraud its creditors. Respondent underscores its record of honouring its financial obligations and its ability to pay the Award.[158]

159. Further, Respondent submits that Claimants have failed to establish any urgency, necessity, and irreparable imminent harm.[159] Security would further be disproportionate and unduly burdensome on Albania.[160]

160. Further, regarding Claimants' request for security for the Award, Respondent notes that it has not sought a stay of the enforcement of the award[161] and submits that under the ICSID Rules, security for an award has never been ordered and cannot be ordered outside of a procedure for the stay of the enforcement of an award.

c. Revision Tribunal's Decision

161. The Revision Tribunal denies Claimants' Request for Security as moot, as the Revision Tribunal has dismissed the Revision Application under Rule 41(5) and ordered Respondent to pay ICSID's administrative fees and the fees and expenses of the Revision Tribunal and each Party to bear its own legal fees and expenses (*see* Part IV, *infra*).

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[156] *Id.*, ¶ 174, *citing Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, ¶¶ 54-59 (**CAR-55**).

[157] *Id.*, ¶ 175, *citing Eugene Kazmin v. Republic of Latvia,* ICSID Case No. ARB/17/5, Procedural Order No. 6 (Decision on Security for Costs), April 13, 2020, ¶¶ 31-59 (**CAR-58**).

[158] *Id.*, ¶¶ 180-184, 202-206.

[159] *Id*., ¶ 199.

[160] *Id.*, ¶ 186.

[161] *Id*., ¶ 185.

(3) RESPONDENT'S PROPOSAL TO ESTABLISH AN ESCROW MECHANISM FOR ADVANCE PAYMENTS

162. Respondent requests that the Revision Tribunal order Claimants to enter into an escrow mechanism for the advance payments due to ICSID. Claimants oppose this request.

a. Respondent's Position

163. In view of Claimants' refusal to pay their share of the advance to ICSID, Respondent proposes that the Parties enter into an escrow arrangement whereby Respondent puts into escrow a sum equivalent to the advances owed by Claimants. If Respondent were to lose on the Revision Application and be ordered to bear the costs of the proceedings, the escrowed sums would be transferred to Claimants. In exchange, Respondent asks that Claimants agree to pay their advance on costs. Respondent requests that the Revision Tribunal order Claimants to comply with this proposal.

164. Respondent asserts that this mechanism alleviates Claimants' concerns regarding their ability to recoup the advances. Further, Respondent submits that it also balances its own risk, as it asserts that Claimants have engaged in fraudulent and corrupt activities.[162]

b. Claimants' Position

165. Claimants oppose Respondent's suggested escrow mechanism on the basis that they should not be required "as a matter of basic justice and fairness" to fund Albania's claims.[163] They further oppose the escrow mechanism on grounds that (a) Respondent will not comply with this mechanism even if ordered by the Revision Tribunal, and (b) Respondent will not pay if it loses on the Revision Application.[164] Claimants submit that Respondent cannot be trusted to make good on its promises, because of its "continuing violations of its assurances to the annulment committee that it would pay the Award if its Application for Annulment failed."[165]

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[162] Respondent's Further Observations, January 26, 2023, ¶ 104.

[163] Claimants' Response, January 16, 2023, ¶ 110.

[164] *Id.*, ¶¶ 110-111.

[165] *Id.*, ¶ 111.

c. Revision Tribunal's Decision

166. The Revision Tribunal denies Respondent's proposal as moot, as the Revision Tribunal has dismissed the Revision Application under Rule 41(5) and the amounts paid towards the advances on costs by Respondent suffice to cover the costs of arbitration in these Revision Proceedings.

IV. COSTS

167. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

168. This provision gives the Revision Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

169. The Revision Tribunal finds that each Party is to bear its own legal fees and expenses of these Revision Proceedings.

170. In light of the Revision Tribunal's decision to dismiss Respondent's Application for Revision, Respondent is ordered to pay the costs of arbitration, i.e., the fees and expenses of the Revision Tribunal as well as ICSID's administrative fees and direct expenses with respect to these Revision Proceedings. Claimants are not required to contribute to such payment.

171. The costs of the arbitration, including the fees and expenses of the Revision Tribunal, ICSID's administrative fees, and direct expenses amount to (in USD):

Arbitrators' fees and expenses	
Mr. Grant Hanessian	68,350.00
Mr. Robert Anderson, KC	17,002.42
Dr. Charles Poncet	12,250.00

ICSID's administrative fees	42,000.00
Direct expenses	5,567.25
Total	**145,169.67**

172. The above costs have been paid out of the advance payment made by Respondent.[166]

V. DECISION

173. For the reasons set forth above, the Revision Tribunal:

a. Dismisses Respondent's Revision Application under Rule 41(5) of the ICSID Arbitration Rules as manifestly without legal merit;

b. Denies Claimants' request to allocate all advance payments to Respondent;

c. Denies Claimants' requests for security for the costs of these Revision Proceedings and for the sums due under the Award;

d. Denies Respondent's request to order Claimants to enter into Respondent's suggested escrow mechanism;

e. Orders each Party to bear its own legal fees and costs; and

f. Orders Respondent to bear the costs of the Revision Proceedings.

[166] The remaining balance will be reimbursed to Respondent.

Dr. Charles Poncet
Arbitrator

Date: March 29, 2023

Mr. Robert Anderson KC
Arbitrator

Date: March 29, 2023

Mr. Grant Hanessian
Arbitrator

Date: March 29, 2023