

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Hydro S.r.l. and others

v

Republic of Albania

(ICSID Case No. ARB/15/28)

ORDER ON PROVISIONAL MEASURES

Members of the Tribunal

Dr Michael Pryles AO PBM, President of the Tribunal
Mr Ian Glick QC, Arbitrator
Dr Charles Poncet, Arbitrator

Secretary of the Tribunal

Mr Francisco Abriani

Assistant to the Tribunal

Dr Albert Dinelli

3 March 2016

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PART I: INTRODUCTION

- 1.1 The Claimants commenced this arbitration on 10 June 2015 by application to the International Centre for Settlement of Investment Disputes (“**ICSID**”), pursuant to a bilateral investment treaty existing between the Government of the Republic of Italy and the Government of the Republic of Albania dated 12 September 1991 (the “**BIT**”).
- 1.2 The present dispute concerns the Claimants alleged investments in the Republic of Albania. The six Claimants comprise corporations and natural persons as follows:
- (a) Hydro S.r.l, and Costruzioni S.r.l (“**Costruzioni**”), two companies incorporated in Italy (collectively, the “**Corporate Claimants**”); and
 - (b) Francesco Becchetti, Mauro De Renzis, Stefania Grigolon and Liliana Condomitti (collectively, the “**Individual Claimants**”), each of whom has either a direct, or indirect, ownership interest in one or both of the Corporate Claimants.
- 1.3 The Corporate Claimants own, directly or indirectly, a number of Albanian corporate entities; specifically, 400 KV Sh.p.k (“**400 KV**”), Cable System Sh.p.k (“**Cable System**”), Energji Sh.p.k (“**Energji**”), and Agonset Sh.p.k (“**Agonset**”) (collectively, the “**Claimants’ Albanian Entities**”). The Claimants’ investments in Albania are, or are held by, these Albanian corporate entities. In response to a request from the Tribunal, the Claimants filed a flowchart of the companies and shareholders mentioned in their Request for Provisional Measures dated 5 December 2015 (the “**Application**”), a copy of such flowchart being attached, for convenience, as Annexure A to this Order.
- 1.4 The Claimants allege that the Respondent has sought to undermine its investments in Albania in a number of ways. At a high level of generality the allegations made by the Claimants are as follows:
- (a) the launch of tax audit proceedings against the Claimants’ Albanian Entities as a pretext for not issuing value added tax (“**VAT**”) refunds to those companies, which the Claimants say they are entitled to under certain tax concession agreements;
 - (b) the grant of preferential treatment to other Albanian companies offering a similar service as the Albanian Entities;
 - (c) the launch of money laundering investigations into both the Albanian Entities and the Individual Claimants;

- (d) the seizure and sequestration of the bank accounts and assets of the Albanian Entities, in an effort to make the operation of the Albanian Entities virtually impossible; and
- (e) the issue of arrest warrants against Mr Becchetti, Mr De Renzis and Ms Erjona Troplini.

1.5 This Order deals with the Application. In the Application, the Claimants requested the Tribunal to order the Respondent to:

- (a) suspend the criminal proceedings identified as Criminal Proceeding No. 1564 and any other criminal proceedings directly related to the present arbitration until this arbitration is completed and consequently withdraw its Requests for Extradition submitted to the Home Office of the United Kingdom dated 21 July 2015, as well as the arrest warrants for Mr Becchetti, Mr De Renzis, and Ms Troplini;
- (b) withdraw the orders of execution issued by the Tirana Prosecutor's Office on 8 June 2015 to sequester the assets of each of the Claimants' Albanian Companies and freeze these companies' bank accounts in Albania;
- (c) suspend or refrain from bringing any actions against the Claimants or their investments to establish or collect on any alleged tax, customs, or other liability to the Respondent disputed in this arbitration until this arbitration is completed;
- (d) refrain from initiating any other proceedings, criminal or otherwise, directly or indirectly related to the present arbitration or engaging in any other course of action that may aggravate the dispute, jeopardize the procedural integrity of this arbitration, and/or violate the Respondent's obligation to respect the exclusive resolution of its dispute with the Claimants in this forum; and
- (e) pay to the Claimants the full costs of the Application.¹

1.6 On 16 December 2015, after receiving submissions from the Parties as to an appropriate timetable, the Tribunal set a timetable for the filing of further submissions regarding the Application.

¹ Application, paragraph 171.

- 1.7 On 20 January 2016, and in accordance with the timetable set by the Tribunal, the Respondent submitted its Response to the Claimants’ Request for Provisional Measures (“**Response**”). The Respondent requested the Tribunal to:
- (a) reject the Application; and
 - (b) order the Claimants to pay the Respondent’s costs of and incidental to responding to the Application in a sum to be assessed or agreed.²
- 1.8 On 28 January 2016, the Claimants submitted their Reply to the Respondent’s Answer (“**Reply**”). In the Reply, the Claimants reiterated the relief sought in the Application, albeit seeking relief in slightly different form and they no longer pressed for an order in relation to arrest warrant in respect of Ms Troplini. The Claimants specifically requested that the Tribunal order the Respondent to suspend the Insolvency Proceedings No. 605 registered in the Tirana Judicial District Court on 11 November 2014.
- 1.9 On 5 February 2016, the Respondent submitted its Rejoinder on Provisional Measures (“**Rejoinder**”), repeating its prayer for relief, namely that the Application be rejected and a costs order be made in its favour.
- 1.10 On 10 February 2015, a hearing by teleconference was held. The following persons participated in the hearing:

Tribunal	
Dr Michael Pryles AO PBM – <i>President</i> Dr Charles Poncet MCL – <i>Arbitrator</i> Mr Ian Glick QC – <i>Arbitrator</i>	Dr Albert Dinelli – <i>Assistant to the Tribunal</i> Mr Francisco Abriani – <i>Secretary to the Tribunal</i>
Claimants	Respondent
Dr Philippe Pinsolle Dr Tai-Heng Cheng Mr Alexander Leventhal Mr Marco Garofalo <i>Quinn Emmanuel Urquhart & Sullivan</i>	Mr David Breslin Ms Karen O’Connell Ms Jameela Sastre Ms Emily Airtton <i>Gowling WLG (UK) LLP</i>

² Response, paragraph 257.

Mr David W Rivkin Mr Christopher Tahbaz Ms Ina Popova <i>Debevoise & Plimpton LLP</i>	Mr Siddharth Dhar Mr Peter Webster <i>Essex Court Chambers</i>
Mr Alexandre de Fontmichel <i>Scemla Loizon Veverka & de Fontmichel</i>	Ms Alma Hicka Ms Brunilda Lilo <i>State Advocates, Republic of Albania</i>
Mr Karel Daele <i>Mischon de Reya LLP</i>	
Mr Francesco Becchetti	

1.11 Dr Pinsolle and Mr Rivkin made submissions on behalf of the Claimants, and Mr Dhar made submissions on behalf of the Respondent.

PART II: THE PARTIES' SUBMISSIONS

A. Summary of Investments

- 2.1 The Claimants' investments in Albania are essentially three-fold: (i) a hydroelectric plant in Kalivaç; (ii) a waste management facility; and (iii) a TV station named Agonset.
- 2.2 In or about May 1997, the Third Claimant, Mr Becchetti, through an Italian entity known as Becchetti Energy Group S.p.a ("BEG") contracted with the Respondent to build a hydroelectric plant in the Kalivaç.³ BEG and the Respondent signed a concession agreement which the Claimants allege entitled BEG (through a concession company) to a full VAT exemption.⁴ The Claimants allege that the Respondent has not granted, and refuses to grant, any VAT exemptions to the concession company, and has launched tax audits into the hydroelectric plant, and offered preferential treatment to other hydroelectric plant providers.
- 2.3 In or about May 2004, the Second Claimant, Costruzioni, through one of its Albanian entities, Cable System, contracted with the Respondent to build and operate a waste management facility that would service Albania's capital, Tirana, via another VAT concession agreement.⁵ The Claimants allege that the facility never came to fruition due to the Respondent's various

³ Application, paragraph 11.

⁴ Application, paragraph 12.

⁵ Application, paragraph 20.

repudiations of the concession agreement.⁶ Costruzioni, along with other investors in the waste management facility have launched separate ICSID proceedings under the Energy Charter Treaty in relation to that concession agreement (namely, ICSID Case No. ARB/15/28).

2.4 In 2012, Mr Becchetti launched a television company named Agonset, after receiving authorisation to do so from the Albanian media regulator. Agonset began broadcasting in Albania in or about April 2013, and, it is said by the Claimants, soon became very popular.⁷ The Claimants allege that Albania has imposed, unjustifiably and unlawfully, over €1,500,000 in taxes and duties for Agonset's technological equipment, and has also prevented Agonset from participating in a contest for digital broadcasting rights, thus harming its future viability as a broadcaster.⁸

2.5 The Claimants submit that, in response to the filing of this arbitration, and two other arbitrations (ICSID Case No ARB/14/26, and ICC Case No. 20564/EMT) (the "**Other Arbitrations**"), all regarding disputes involving these investments, the Respondent has commenced, by way of retaliation a number of administrative and criminal proceedings against the Claimants. Those proceedings are, it is alleged, geared towards preventing the Claimants from being able to pursue their rights in this proceeding, and the Other Arbitrations. Specifically, the Claimants allege that the Respondent's actions:

- (a) violate the Claimants' right to non-aggravation of the dispute;
- (b) violate Claimants' right to procedural integrity of this arbitration; and
- (c) breach the Respondent's consent to settle this dispute through arbitration exclusively.

B. Administrative Proceedings: Tax Investigations

(a) Claimants' Submissions

2.6 The Claimants say that the Respondent has (i) engaged in unwarranted tax investigations into the various Claimants and their Albanian entities; and (ii) sought to collect on tax amounts that the Claimants dispute in the current proceedings.⁹

⁶ Application, paragraph 22.

⁷ Application, paragraphs 25-26.

⁸ Application, paragraph 27.

⁹ Application, paragraphs 35 – 40.

2.7 The Claimants allege that, in or about December 2013, shortly after the Respondent had received letters from Costruzioni, and Albaniabeg Ambient Sh.p.k (“**Albaniabeg**”) (being another of the Claimants’ Albanian entities) putting them on notice of treaty violations, the Respondent launched a tax investigation into Agonset. It is then alleged that, shortly thereafter, the Respondent also commenced tax investigations into the Claimants’ Albanian entities which had financed Agonset. The Claimants say that these investigations were, and are, baseless, especially given that Agonset was in its infancy and had not yet turned a profit. The Claimants’ essential complaint in this respect is that the tax investigations were retaliatory, that proposition being evidenced by their commencement shortly after letters had been sent by Costruzioni and Albaniabeg to the Respondent.

(b) Respondent’s Submissions

2.8 The Respondent contends that there is no evidentiary link between the letters sent by Costruzioni and Albaniabeg, and the commencement of tax investigations into Agonset, especially given that those letters were in respect of the Claimants’ waste management facility investment.¹⁰

2.9 As to Agonset being in its infancy, the Respondent submits that this fact does not mean that the Albanian tax authorities are not entitled to investigate it, nor does it mean that the investigation lacked *bona fides*.¹¹

2.10 The Respondent submits that the “investigations” into Cable System and 400 KV were not really investigations at all, but, rather, were merely requests for documentation to verify loan transactions granted to Agonset.¹²

2.11 Further, the Respondent contends that Agonset has not been a “mere passive recipient” of the tax investigations as it makes out in their submissions, but in fact challenged, successfully, the Respondent’s decision not to grant VAT exemptions in the Tirana Administrative Court. The Respondent says that evidences that the situation is not the “one-sided history of oppression the Claimants would wish the tribunal to believe”.¹³

¹⁰ Response, paragraph 124.

¹¹ Response, paragraph 132.

¹² Response, paragraph 129.

¹³ Response, paragraph 127.

2.12 The Respondent ultimately submits that, in any event, none of the matters complained of pose a risk of irreparable harm to the Claimants or their investments, nor is there any urgency in respect of any of the complaints.

C. Administrative Proceedings: Forcible Collection of Tax Amounts

(a) Claimants' Submissions

2.13 The Claimants further complain that the Respondent has forcibly attempted to collect disputed tax amounts by commencing insolvency proceedings against Energji on 7 November 2014, with the planned outcome to “destroy Energji”.¹⁴

2.14 The Claimants complain that, in order to challenge those insolvency proceedings in Albanian courts, they were required to “pre-pay” the taxes, which they did by a bank guarantee. The Claimants say that the guarantee was later revoked because the Respondent intimidated the bank giving the guarantee.¹⁵

2.15 Further, the Claimants complain about the Respondent having imposed various mortgage and security liens over its Albanian entity, KGE Sh.p.k (“**KEG**”), in order to force it to surrender taxes and pay penalties that the Respondent alleges are owing to it.¹⁶

(b) Respondent's Submissions

2.16 The Respondent contends that the tax investigations, to which the insolvency proceedings relate, were commenced well before the commencement of this, or the Other Arbitrations, and thus cannot be seen to be retaliatory.¹⁷ Furthermore, the Respondent submits that only an application to commence insolvency proceedings has been made by the Respondent, but no actual insolvency proceedings have commenced.¹⁸

2.17 The Respondent submits that it is perfectly reasonable for it to have taken the steps to recover the disputed tax amounts in the manner it has, which it considers are legitimately owed,

¹⁴ Application, paragraph 42.

¹⁵ Application, paragraph 42.

¹⁶ Application, paragraph 43.

¹⁷ Response, paragraph 142.

¹⁸ Response, paragraph 141(2).

especially where the Claimants admit that it has been withholding VAT from the Respondent's tax authority.¹⁹

2.18 The Respondent contends that: (i) the requirement under Albanian law to pre-pay the tax amount in dispute before an appeal can be heard is not a requirement unique to Albania; (ii) denies that it intimidated the bank providing the guarantee; and (iii) contends that, in any event, the Claimants did in fact pre-pay the amount (or at least did so in part) in or about April 2015.²⁰

2.19 Lastly, the Respondent submits that the Claimants have not justified why the imposition of a lien over KGE was an impermissible exercise of the Respondent's authority, or what detriment it has suffered due to that lien being imposed. Accordingly, the Respondent says that this cannot be held to be a legitimate ground of criticism.²¹

D. Criminal Proceedings: Introduction

2.20 The Claimants also contend that the Respondent had taken a number measures against it through Albanian criminal proceedings. The bulk of the Claimants' complaints relate to the measures taken in relation to money laundering investigations against both the Individual Claimants and the Albanian Entities. Further, the Claimants also complain of an incident that occurred at Tirana airport, to which the Tribunal turns first.

E. Criminal Proceedings: Airport Incident

(a) Claimants' Submissions

2.21 The Claimants submit that, on or about 1 July 2014, Mr Becchetti was assaulted and threatened by a customs officer at the Tirana International Airport. They contend that Mr Becchetti was detained for a short time, before being released, and later charged with a criminal act.²²

¹⁹ Response, paragraph 145.

²⁰ Response, paragraphs 146(1)-(2).

²¹ Response, paragraphs 148-149.

²² Application, paragraph 46.

2.22 The Claimants further complain that Mr Becchetti was given no notice of the criminal investigation, and that Mr Becchetti was assigned a public defence lawyer, rather than his chosen counsel in the subsequent criminal proceedings.²³

2.23 The Claimants allege that these events “can only be explained by an order from the government”.²⁴

(b) Respondent’s Submissions

2.24 In response, the Respondent tendered video footage of the “airport incident” which it said clearly showed Mr Becchetti assaulting the customs officer.²⁵

2.25 In any event, the Respondent concedes that there were some “procedural flaws” with regard to the subsequent criminal prosecution, which resulted in Mr Becchetti not being properly notified of the proceedings against him. Indeed, the Respondent notes that, at a directions hearing in the criminal proceedings, the District Court of Tirana dismissed the charges against Mr Becchetti on the basis of the procedural flaws.²⁶

F. Criminal Proceedings: Sequestration and Seizure of Documents

(a) Claimants’ Submissions

2.26 The Claimants submit that, on or about 21 April 2014, Albanian prosecutorial authorities sequestered the building plans of the hydroelectric plant in Kalivaç and other documents on the basis of a discrepancy between the cost of the project at its inception in 1997, and the total cost ten years later in 2007. The Claimants say that this sequestration order occurred at the same time as the tax investigations into the Albanian Entities.²⁷

2.27 The Claimants also take issue with the further sequestrations of documents, on or about 23 June 2014, which, on this occasion, covered a much wider range of documents. It is said this further sequestration was done under the guise of Criminal Proceeding No. 1564, the Claimants noting that they were not even notified those proceedings had commenced. Further sequestration

²³ Application, paragraph 47.

²⁴ Request for Arbitration dated 10 June 2015 (“**Request**”), paragraph 118.

²⁵ Exhibit R-0001.

²⁶ Response, paragraph 29(4).

²⁷ Application, paragraph 50.

orders were made on 26 June 2014, 23 December 2014, 20 January 2015, and 27 April 2015, each time for more documents relating to the construction of the hydroelectric plant.²⁸

(b) Respondent's Submissions

2.28 The Respondent submits that the prosecution decision to sequester the documents it did is justified when it is understood that the prosecution was trying to establish a basis for the difference between what works had been carried out at the hydroelectric plant, and what those works might have, or should have, cost.²⁹ The inference throughout these criminal proceedings was money transferred between the Claimants' Albanian Entities, including the concession entity created to build the hydroelectric plant, was suspicious, and that the transactions may involve money laundering.

2.29 The Respondent further contends that the criticism that the Claimants were not told about the criminal proceedings being commenced is misguided. They rely on Albanian law providing that a prosecutor is under a legal obligation to keep those proceedings confidential.³⁰

G. Criminal Proceedings: Arrest Warrants and Extradition Proceedings

(a) Claimants' Submissions

2.30 The Claimants contend that, on 5 June 2015, Albanian prosecutors obtained arrest warrants for Mr Becchetti, Mr De Renzis, and a business partner, Ms Erjona Troplini, who is not a party to this arbitration.³¹ The Claimants say that Mr Becchetti, Mr De Renzis and Ms Troplini were not notified that criminal proceedings had been commenced against them, and in the case of Ms Troplini, she had been arrested before her arrest warrant was prepared.³²

2.31 The arrest warrants were based on three charges:

- (a) money laundering, namely that the monies used to fund the hydroelectric plant were transferred from abroad indicating that they are the product of illegal criminal activity;³³

²⁸ Application, paragraph 57.

²⁹ Response, paragraph 41.

³⁰ Response, paragraphs 44-46.

³¹ Application, paragraph 59.

³² Application, paragraph 60.

³³ Application, paragraph 62(a).

(b) falsification of documents, namely that Energji had invoiced KGE for works that were never performed;³⁴ and

(c) tax evasion, namely that Mr De Renzis, as administrator of Energji, had failed to pay levies and taxes owing to Albania.³⁵

2.32 The Claimants contend that the reasoning behind these arrest warrants lacked merit, and were in violation of due process and Albanian law, on the basis that: (i) a report supporting the money laundering charges was not independent; (ii) the accused were not given a chance to participate in the making of that report; and (iii) the arrest warrants purported to establish criminal liability for the directors of the impugned companies without presenting any proof that those directors were directly involved in the alleged violations.³⁶

2.33 The Claimants further submit that, in the case of Mr Becchetti and Mr De Renzis, who face extradition from the United Kingdom as a result of the arrest warrants, their prospective incarceration in Albania prevents them from managing their businesses, and participating in this arbitration.³⁷

(b) Respondent's Submissions

2.34 The Respondent submits that, according to Albanian criminal procedure, an arrest warrant can be granted before official charges are brought, so the Claimants' complaint in respect of not being notified of the criminal proceedings is misguided.³⁸ The Respondent emphasises that the arrest warrants were issued by an independent court (namely the District Court of Tirana), and that the judgments of that court note that the arrest warrants were the culmination of a long-running investigation.³⁹

2.35 In any event, the Respondent contends that the arrest warrants were issued as a part of Criminal Proceeding No. 1564, which had commenced on 24 February 2014, well before the arrest warrants were issued, and submit that "the investigation being conducted under [Criminal Proceeding No. 1564] led the authorities to suspect that Mr Becchetti (and Mr De Renzis) were

³⁴ Application, paragraph 62(b).

³⁵ Application, paragraph 62(c).

³⁶ Application, paragraphs 65-67.

³⁷ Application, paragraphs 4, 161.

³⁸ Response, paragraph 50(2).

³⁹ Exhibits C-102, C-103.

guilty of various crimes and the proceedings against them were joined to the existing criminal case”.⁴⁰

2.36 The Respondent denies that the arrest warrants lack detail, and point to the decision of the District Court of Tirana where the reasons for granting the arrest warrants against Mr Becchetti and Mr De Renzis were considered in detail. It points to the District Court’s summary in its decision that:

- (a) Energji had on a number of occasions invoiced works to KGE that were never carried out, had overcharged for the services that it did provide, and had inflated the costs of subcontractor invoices that it passed onto KGE;
- (b) as a result, KGE declared that it was entitled to a far larger VAT credit from Albania than that to which it was otherwise entitled;
- (c) Energji failed to pay its tax obligations in the amount of 770,423,159 Albanian Lek;
- (d) a fictitious arbitration occurred between Energji and KGE, which resulted in a €15,000,000 payment to Energji, which was subsequently invested in 400 KV, Cable System, and Costruzioni, and which was later invested in Agonset;
- (e) the money invested in Agonset should have been used to satisfy Energji’s tax debt to the Respondent;
- (f) there was enough information to charge Mr Becchetti, Mr De Renzis, Ms Troplini and Ms Liliana Condomitti with tax evasion, document forgery and money laundering; and
- (g) the arrest of Mr Becchetti was justified given the nature of the crimes.⁴¹

2.37 The Respondent ultimately contends that the reasons behind the granting of the arrest warrant were well-considered and detailed in the District Court’s reasons. The Respondent further points out that, when Mr Becchetti and Mr De Renzis appealed the granting of the warrants, that appeal was dismissed by the Albanian Court of Appeal.⁴²

⁴⁰ Response, paragraph 55.

⁴¹ Response, paragraph 59; Exhibit C-102.

⁴² Response, paragraph 68.

2.38 As to the extradition of Messrs Becchetti and De Renzis, the Respondent denies that the two accused will be precluded from participating in this arbitration, as the extradition procedure in the United Kingdom is likely to be lengthy, and may involve multiple appeals.⁴³ In any event the Respondent submits that the extradition proceedings, before English courts, provide an existing neutral forum for the validity of the Claimants' factual allegations regarding the propriety of the Albanian criminal proceedings to be tested.⁴⁴

H. Criminal Proceedings: Sequestration of Assets

(a) Claimants' Submissions

2.39 The Claimants submit that, on 5 June 2015, the same day that the arrest warrants were issued, the District Court of Tirana also issued sequestration orders allowing the sequestration of the assets of Mr Becchetti, Mr De Renzis, and Ms Condomitti in proportion to the shares they held in the Albanian Entities, and that those orders did not explain the basis on which they were made, nor the specific assets to be seized.⁴⁵ The Claimants take issue with the fact that these proceedings were, essentially, *ex parte*.

2.40 Subsequently, on 8 and 9 June 2015, orders were made sequestering the assets and bank accounts of the Albanian Entities.⁴⁶

2.41 The Claimants submit that the sequestering of the company bank accounts has been particularly devastating as the Albanian Entities and the Corporate Claimants have not been able to make any payment to their creditors, including for utility costs, wages, taxes and other liabilities.⁴⁷ The result is that the Claimants are incurring significant penalties from their creditors.

2.42 The Claimants contend that the Respondent's agency in charge of sequestered assets (the "AASCP") has breached its duty to order payment of "expenses necessary or useful to safeguard and administer the sequestered assets".⁴⁸

2.43 The Claimants further contend that the sequestering of the assets of Agonset (i.e. broadcasting equipment) was completely unnecessary and unjustified in light of the criminal investigation of

⁴³ Response, paragraphs 169(1), 172(1).

⁴⁴ Response, paragraph 169(2).

⁴⁵ Application, paragraph 68.

⁴⁶ Exhibits C-110, C-113.

⁴⁷ Application, paragraph 76.

⁴⁸ Application, paragraph 76.

money laundering, document forgery and tax evasion, as the Agonset equipment had no evidentiary value to any of those charges.⁴⁹ In October 2015, Agonset ceased broadcasting in Albania, unable to operate after the sequestration of its bank accounts and seizure of its technical equipment.⁵⁰

(b) Respondent's Submissions

- 2.44 The Respondent submits that the sequestration orders, much like the arrest warrants, were supported by considered reasons of the District Court of Tirana. That court produced a 20 page judgment setting out its reasons for granting the sequestration orders against the Individual Claimants and the Albanian Entities.⁵¹ The Respondent submits that it is hardly surprising that Albanian prosecution sought to freeze the assets of the Albanian entities, including the bank accounts implicated in the suspected money laundering scheme.⁵²
- 2.45 The Respondent submits that the *ex parte* nature of the sequestration application is common sense, given that, if the accused were “tipped-off” about the sequestration application, they might seek to hide assets connected to the alleged crime.⁵³
- 2.46 The Respondent further emphasises that the Claimants have not been deprived of their proprietary rights in their assets, as their assets are merely frozen pending the resolution of the criminal proceedings.⁵⁴
- 2.47 The Respondent denies that there is any impropriety in the sequestration order not specifying particular assets to be frozen, as the order specified a Euro or Lek value of the assets to be frozen.⁵⁵ Moreover it says there is no abnormality with the prosecution deciding to freeze the bank accounts of the accused and the Albanian entities, given that the court order allowing the sequestration specifically referred to the sequestration of “mobile articles including bank accounts”.⁵⁶

⁴⁹ Application, paragraph 79.

⁵⁰ Application, paragraph 95.

⁵¹ Response, paragraph 102; Exhibit C-110.

⁵² Response, paragraph 104.

⁵³ Response, paragraph 106.

⁵⁴ Response, paragraph 107.

⁵⁵ Response, paragraph 109.

⁵⁶ Response, paragraph 112.

- 2.48 As to the administration of the sequestered assets by the AASCP, the Respondent submits that the Claimants has not properly particularised how the AASCP has failed to administer the assets, provided particulars about the impact of those particulars, or provided evidence of the Claimants' requests to the AASCP, except for a letter sent by the Chairman of the Commission for Education (and not the Claimants) on 21 October 2015 in respect of Agonset.⁵⁷
- 2.49 As to the reasons for sequestering the assets of Agonset (specifically, the broadcasting equipment), the Respondent submits this was logical because on the prosecution's case, those goods may have been purchased with laundered money.⁵⁸

PART III: TRIBUNAL'S DETERMINATION

- 3.1 Having carefully considered the submissions of the Parties, the Tribunal has decided to grant the Application in part.
- 3.2 Despite the length of the submissions, and extensive material, filed on behalf of each Party, the ultimate resolution of the Application turns on various discrete issues as part of a careful analysis of the material in relation to what, for the most part, are accepted principles. Insofar as any of the arguments summarised above are not referred to below, that should not be taken to mean that the argument has not been considered. Rather, all arguments have been considered, and the analysis that follows is intended to set out the reasoning of the Tribunal so as to explain the basis of its decision, rather than reciting its consideration of each and every argument. Not only is this sufficient, but it is appropriate where there is, at least in the view of the Claimants, an urgency attendant to the Tribunal's determination of this application.
- 3.3 Before turning to the reasons for the Order, it is necessary to deal first with some preliminary matters, namely jurisdiction and the appropriate standard to be applied.

A. Jurisdiction

- 3.4 The Application is made pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.
- 3.5 Article 47 of the ICSID Convention provides:

⁵⁷ Response, paragraph 115.

⁵⁸ Response, paragraph 116.

“[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.”

3.6 Rule 39(1) of the ICSID Arbitration Rules provides:

“At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

3.7 The Tribunal has no hesitation in confirming its jurisdiction to hear, and determine, the Claimants’ Request. While acknowledging that the Respondent has made various jurisdictional objections, each of which will be considered in due course, those objections do not prevent the consideration by the Tribunal, and its consideration now, of a request for provisional measures. It is not in issue that an ICSID tribunal may recommend provisional measures even where it is yet to decide the question of its jurisdiction.⁵⁹

3.8 The Claimants contend, and the Tribunal accepts, that all that is required is that the provisions invoked appear *prima facie* to afford a basis for jurisdiction to decide the merits. While the Tribunal has not yet finally determined that it has jurisdiction on the merits of the case, it is satisfied that the provisions invoked by the Claimants are such that this Tribunal has the requisite *prima facie* jurisdiction. Indeed, the Respondent does not strongly contend otherwise.

3.9 So, therefore, it is clear that the ICSID Convention and the ICSID Arbitration Rules provide a sufficient basis for the existence of the Tribunal’s power to decide the questions the subject of the Claimants’ Application.

B. The Appropriate Standard

3.10 The second preliminary matter is the appropriate test to be applied.

3.11 The Parties agree on the fundamental standards that are applicable to a request for provisional measures, namely that such measures are necessary to protect the applicant’s rights, are urgent and are proportionate.

⁵⁹ *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §105 (CL-5).

- 3.12 It is also right to acknowledge that there is a high threshold for the Tribunal to recommend the making of provisional measures.
- 3.13 Some ICSID tribunals have utilised terminology suggestive of a lower standard, particularly *PNG v Papua New Guinea*, where the tribunal used language suggestive of a distinction between a higher threshold of “irreparable” harm and a lower, and preferable one, in their view, of some “serious harm”.⁶⁰ More fully, the tribunal in that proceeding explained that “the term ‘irreparable’ harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally ‘irreparable’ in what is sometimes regarded as the narrow common law sense of the term. The degree of ‘gravity’ or ‘seriousness’ of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party”. The tribunal continued, “suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures”.⁶¹
- 3.14 While it is not necessary in this case to set out the test that would apply in all cases of requests for provisional measures, it is necessary to ascertain what test is appropriate in the circumstances of a case, such as this, where the relief sought would interfere with the exercise of a sovereign State’s rights and duties to investigate and prosecute crime.
- 3.15 No doubt, it was this concern which underlay the approach of the tribunal in *Caratube v Kazakhstan*, where it explained:
- “This Tribunal feels that a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.”⁶²
- 3.16 It is trite to say that criminal law and procedure are a most obvious and undisputed part of a State’s sovereignty. That (trite) fact supports the approach adopted here by the Tribunal, namely that any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary. As will be seen, the Tribunal is satisfied that this is such a case.

⁶⁰ *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures (21 January 2015), §109 (CL-14).

⁶¹ *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures (21 January 2015), §109 (CL-14).

⁶² *Caratube International Oil Company LLP v The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Provisional Measures (31 July 2009), §137 (RL-11).

C. Rights relied upon

- 3.17 The Claimants identify three rights as the basis for their Request, namely: (i) the procedural integrity of the arbitration; (ii) the preservation of the *status quo* and the non-aggravation of the dispute; and (iii) the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention. It is not in issue that these rights, if relevantly infringed, are rights capable of protection by provisional measures.
- 3.18 The Tribunal is satisfied that a real question arises in relation to the procedural integrity of the arbitral proceedings. In particular, criminal proceedings have been brought against, *inter alia*, Mr Becchetti, who is one of the Claimants and who is perhaps the central person involved in the arbitration from the Claimants' side. In the case of Mr Becchetti (and Mr De Renzis), who face extradition from the United Kingdom as a result of the arrest warrants, their possible incarceration in Albania would prevent them from effectively managing their businesses, and fully participating in this arbitration. The Tribunal considers that this is a grave concern to the procedural integrity of the proceeding.
- 3.19 The Tribunal notes that there may be situations where incarceration of a claimant would disrupt an arbitration but where it would be improper for the tribunal to intervene. An example given by counsel is where a person is charged with a serious offence totally unrelated to the factual circumstances of the dispute being arbitrated, such as murder. But that is not the situation here. The alleged offences here are not divorced from the investments made by the Claimants.
- 3.20 While the Tribunal is reluctant to interfere with the sovereignty of the Respondent, subject to considering whether the requirements of urgency, necessity and proportionality are met (discussed below), it sees no difficulty in recommending an order, the effect of which is not to deny the prospect of Mr Becchetti (and Mr De Renzis) being prosecuted for their alleged criminal conduct, but merely postpones that eventuality until the conclusion of this proceeding. That is to say, the Tribunal is satisfied that the procedural integrity of the proceeding would be protected by recommending that the criminal proceedings (and the associated extradition proceedings) be stayed pending resolution of this proceeding.
- 3.21 The Tribunal believes that the Parties may be able to agree on necessary steps to preserve the seized assets and the contents of the frozen bank accounts of the companies which are the subject of the investments in this dispute. Accordingly, the Tribunal proposes to make an order recommending that the Parties confer in this regard. If the Parties are unable to agree on such steps, the Tribunal will allow the Claimants to make a further application for provisional

measures with a view to preserving the *status quo* of the investment companies involved. By inviting the Parties to confer, the Tribunal makes no determination as to the aforesaid measures.

- 3.22 The Tribunal considers that this is an appropriate means to resolve the issue, on the basis that the competing submissions suggest that a modicum of co-operation may be capable of being achieved in this regard. While the Respondent contends that any decline in the value of the Claimants' assets can be appropriately protected by an award of damages at a later point in time, the Tribunal also sees merit in that eventuality being avoided, if the Parties are able to resolve, between themselves, some preservation of the *status quo*, pending the resolution of this proceeding by Final Award.
- 3.23 The Tribunal is not persuaded that any provisional order should be made in order to protect the right of exclusivity of the arbitral proceedings. The prosecution of an offence is of a very different nature to the resolution of a civil claim where compensation is sought for the infringement of an alleged right.

D. Urgency, Necessity and Proportionality

- 3.24 There is, sensibly, no disagreement between the Parties that an order of provisional measures can only be granted where the orders that are sought are urgent, necessary, and proportionate to the conduct complained of.

(a) Urgency

- 3.25 A number of tribunals and writers have opined on the "urgency" requirement and various formulations have been put forward. The Claimants refer to Professor Schreuer who has written that relief is urgent when "a question cannot await the outcome of the award on the merits".⁶³ A similar definition was suggested in *Biwater Gauff v Tanzania*, where the Tribunal stated:

"[T]he degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award."⁶⁴

⁶³ C. Schreuer, *The ICSID Convention, A Commentary*, 2nd ed., Cambridge (2009), p. 775 (CL-4).

⁶⁴ *Biwater Gauff v. Tanzania*, Procedural Order No. 1 (31 March 2006) §76.

3.26 The Claimants point out that in order for the criteria of urgency to be met, there must be an “imminent” risk that the rights of a party will be prejudiced before the tribunal has rendered its award.⁶⁵

3.27 The Claimants also rely on the statement of the Tribunal in *Quiborax S.A v Bolivia*, where the Tribunal stated that in some circumstances measures to protect certain rights are urgent by definition:

“The Tribunal agrees with the Claimants that if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. **Indeed the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.**”⁶⁶

3.28 The Claimants submit that the urgency in this case comes from the fact that two Claimants (namely, Messrs Becchetti and De Renzis) may soon find themselves incarcerated in Albania, for a period exceeding the present arbitration, if the extradition proceedings are not resolved in their favour.

3.29 The Respondent says, in respect of the extradition proceedings, there is no urgency because the extradition proceedings before the courts in the United Kingdom may take months to conclude. The Tribunal accepts that the extradition proceedings may take some time, perhaps weeks or even months. However if the British authorities decide to extradite, it would take some time for the Claimants to seek further orders from this Tribunal and extradition may be an accomplished fact by the time an order is made. The Tribunal therefore considers that there is an **imminent** risk to the Claimants’ ability to effectively participate in this arbitration.

3.30 The Respondent says that in any event, the urgency in the Claimants’ Application cannot be real because of the period of time which the Claimants delayed before making their application for provisional measures, a period of six or so months after commencing proceedings. Whatever may be said about this delay, the Tribunal is in no doubt that the measures sought are now urgent.

⁶⁵ Reply, paragraph 36; C. Schreuer, *The ICSID Convention, A Commentary*, 2nd ed., Cambridge (2009) (CL-4), citing *Azurix v Argentina*, ICSID Case No ARB/01/12, §33.

⁶⁶ Emphasis added. *Quiborax S.A., et. al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, §153 (CL-5).

(b) Necessity

3.31 ICSID tribunals have differed as to the correct approach to determining the requirement of necessity for provisional measures to be awarded. The Claimants and the Respondent however are agreed that the criteria requires that harm complained of would not adequately be reparable by an award of damages.⁶⁷ Such a requirement is embodied in Article 17A of the UNCITRAL Model Law, which requires the party requesting an interim measure to satisfy the tribunal that:

“Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.”

3.32 Following this standard, the Claimants submit that, first, allowing the criminal proceedings to proceed would cause irreparable harm to the integrity of this arbitration as it would hinder the Claimants’ ability to effectively present its case before this Tribunal (i.e. if Mr Becchetti and Mr De Renzis are incarcerated). And secondly, allowing the administrative and criminal proceedings to continue by Albania would effectively destroy the Claimants’ investments in Albania entirely.

3.33 The Respondent repeats the submission that the extradition proceedings may be some time away from concluding (and therefore the risk to their right not to be able to effectively participate in the arbitration is overstated), and submits that any such loss caused by putative wrongs (i.e. the criminal and administrative proceedings) to the Claimants’ investments can perfectly well be remedied by damages.

3.34 Whilst the destruction of the Claimants’ investments in Albania may be capable of being repaired by an award of damages as the Respondent points out, the Claimants’ ability to effectively participate in the arbitration, by definition, cannot be adequately remedied by damages.

3.35 In *City Oriente*, the Tribunal, referring to Article 17A of the UNCITRAL Model Law stated:

“It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared by the petitioner by such measures

⁶⁷ Application paragraph 167; Response paragraph 251; *Burlington Resources Inc v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Resource’s Request for Provisional Measures (29 June 2009), §75 (CL-7); *Quiborax SA Non Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), §155 (CL-5).

must be significant and that it exceed greatly the damage caused to the party affected thereby.”⁶⁸

- 3.36 The ability of the Claimants to effectively participate in this arbitration, specifically Messrs Becchetti and De Renzis is extremely important. Not only are they Claimants in their own right but they are intimately connected with the Corporate Claimants.

(c) Proportionality

- 3.37 In granting provisional measures, the Tribunal must consider the proportionality of the provisional measures requested. Specifically, the Tribunal must balance the harm caused to the Claimants by the criminal proceedings and the harm that would be caused to the Respondent if those proceedings were stayed.

- 3.38 The Claimants assert that the measures sought are proportionate because the sovereign prerogatives of the Respondent, specifically its ability to prosecute crime, would not be affected by a stay of criminal proceedings because those proceedings may be resumed after the arbitration is concluded. They rely on the decisions in *Quiborax* and *Lao Holdings* in this respect.⁶⁹

- 3.39 The Respondent submits that the measures sought are not proportionate and would cause “real harm to Albania and its people’s interests”.⁷⁰ The Respondent submits that the legal proceedings (especially the criminal proceedings) against the Claimants concern serious criminal wrongdoing and seek to collect substantial amounts of tax. They further say that a suspension of proceedings would allow the alleged wrongdoers to deal with what Albania says are assets tainted by criminality, and that the Claimants might completely dissipate those assets by the time it is allowed to resume its prosecution. The Respondent also points out that it is under an obligation, by virtue of the United Nations Convention against Corruption (2003), to collect proceeds of crime, especially in relation to money laundering.⁷¹

- 3.40 The Claimants submit that Albania, by signing the ICSID Convention, has accepted a tribunal’s interference with its sovereign rights.⁷² In the Tribunal’s view adherence to the ICSID

⁶⁸ *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and other Procedural Matters (13 May 2008), §72 (CL-18).

⁶⁹ *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010), § 165 (CL-5). See *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Order (30 May 2014), §§74-75 (CL-8).

⁷⁰ Response, paragraph 256.

⁷¹ Rejoinder, paragraph 97.

⁷² Reply, paragraph 68.

Convention has some ramifications on the sovereign rights of a member state. The Tribunal also accepts the Respondent's submission that when a State investigates a crime, particularly in circumstances where the State is under an international obligation to do so, "[t]he strongest of reasons need to be shown for impeding such an investigation".⁷³

- 3.41 In this case the Tribunal has formed the view that the recommendation of provisional measures is, on balance, warranted. The extradition and criminal proceedings concern or relate to the factual circumstances at issue in this arbitration. The possible incarceration of Messrs Becchetti and De Renzis would affect the ability of these two claimants and indeed other claimants to adequately put their cases and participate in the arbitration. The effect of the provisional measures proposed would affect the Respondent's ability to proceed with the criminal prosecution in the immediate future. However a stay would not put an end to the criminal proceedings. They would be delayed but not terminated. The Respondent also adverts to the possibility of the Claimants dissipating assets if the criminal proceedings are stayed. Given that the investments are physically located in Albania, it is difficult to accept that this would be a major risk. The balance of proportionality comes down in favour of protecting the Claimants' rights.

PART IV: RELIEF CLAIMED

- 4.1 In paragraph 72 of the Claimants' Reply, they seek the following orders from the Tribunal, requiring the Respondent to:
- (a) suspend the proceedings identified as Criminal Proceeding No. 1564 until the issuance of a Final Award in this proceeding;
 - (b) take all actions necessary to suspend the extradition proceedings currently pending as Case Numbers 1502751601 (for Mr Becchetti) and 1502752144 (for Mr De Renzis), until the issuance of a Final Award in this proceeding;
 - (c) lift the seizure and security measures taken against the assets and bank accounts of Energji, KGE, 400 KV, Cable System, and Agonset, and against the Claimants' shareholdings in those companies, until the issuance of a Final Award in this proceeding;
 - (d) suspend or refrain from bringing any actions against the Claimants or their investments to establish or collect on any alleged tax, customs, or other liability to the Respondent

⁷³ Rejoinder, paragraph 95.

disputed in this arbitration until the issuance of a Final Award in this proceeding, including insolvency proceedings case no. 605 registered on November 11, 2014;

- (e) refrain from initiating any other proceedings, criminal or otherwise, directly or indirectly related to the present arbitration, or engaging in any other course of action that may aggravate the dispute, jeopardize the procedural integrity of this arbitration, and/or violate the Respondent's obligation to respect the exclusive resolution of its dispute with the Claimants in this forum;
- (f) pay to the Claimants the full costs of the Application; and
- (g) provide such other relief as the Tribunal may deem appropriate.

4.2 As the Tribunal has decided above, it considers that the measures set out in paragraphs 4.1(a) and 4.1(b) should be recommended in this case for the reasons set out above.

4.3 In relation to paragraph 4.1(c) above, the Tribunal is not presently of the view that any measure should be recommended to the Respondent. Rather, as noted above, the Tribunal has taken the view that it would be appropriate for the Parties to confer and attempt to agree measures to preserve the *status quo*. If such measures cannot be agreed, the Claimants may, if they wish, seek further provisional measures from the Tribunal; if that happens, the Tribunal will of course consider such application on its merits.

4.4 The Tribunal decides that it is not appropriate to make any recommendation proposed in the terms sought by the Claimants in paragraph 4.1(d) above. In the first place, the measures sought are very broad, encompassing suspending or refraining from bringing "any actions against the Claimants or their investments" and "until the issuance of a Final Award". Not only is this expressed in broad terms, but it is premature because it is directed at actions not yet initiated and which may or may not be initiated at some time in the future.

4.5 As set out in paragraph 4.1(e) above, the Claimants seek an order which the Tribunal believes is altogether too broad and indeed uncertain in its terms. The proposed measure is to refrain from initiating other proceedings "directly or indirectly related to the present arbitration" and also to "engaging in any other course of action that may aggravate the dispute". The terminology is too broad, vague and uncertain in scope and is in any event premature.

4.6 The Claimants also seek the cost of their Application. The Tribunal decides that all questions of costs including the cost of the Application should be determined in the Final Award. The Tribunal accordingly reserves the question of costs to the Final Award.

PART V: TRIBUNAL'S ORDER

- 5.1 The Tribunal recommends that the Republic of Albania:
- (a) suspend the proceedings identified as Criminal Proceeding No. 1564 until the issuance of a Final Award in this proceeding; and
 - (b) take all actions necessary to suspend the extradition proceedings currently pending as Case Numbers 1502751601 (for Mr Becchetti) and 1502752144 (for Mr De Renzis), until the issuance of a Final Award in this proceeding.
- 5.2 The Tribunal invites the Republic of Albania to confer with the Claimants and seek to agree appropriate measures to be taken by the Republic of Albania to preserve:
- (a) the seized assets and the contents of the frozen bank accounts of Energji, KGE, 400 KV, Cable System, and Agonset; and
 - (b) the current shareholdings in those companies.
- 5.3 In the event that the Republic of Albania and the Claimants are unable to agree appropriate measures to be taken by the Republic of Albania within the period of 60 days from the date of this order, the Claimants may apply to the Tribunal for further provisional measures.

On behalf of the Tribunal,



Michael Pryles
Presiding Arbitrator

3 March 2016.