INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE
ICC CASE NO. 22676/GR

IN AN ARBITRATION PURSUANT TO THE 2017 ICC ARBITRATION RULES BETWEEN:

GBC OIL COMPANY LTD
(CAYMAN ISLANDS)

CLAIMANT

VS

THE MINISTRY OF INFRASTRUCTURE AND ENERGY
(REPUBLIC OF ALBANIA)

THE NATIONAL AGENCY OF NATURAL RESOURCES
(REPUBLIC OF ALBANIA)

ALBPETROL SH.A
(REPUBLIC OF ALBANIA)

RESPONDENTS

FINAL AWARD

The Arbitral Tribunal

Prof. Christophe Seraglini (Chairman)
Ms. Loretta Malintoppi
Dr. Sabine Konrad

LIST OF MAIN ABBREVIATIONS

Albpetrol	Albpetrol Sh.A
Albpetrol Agreement	Agreement between the Ministry of Industry, Natural Resources and Energy and Albpetrol, oil and gas corporation dated 26 July 1993
AKBN	National Agency of Natural Resources of the Republic of Albania
Amending Agreements	First Amending Agreement between Albpetrol Sh.A and TransAtlantic Albania Ltd. in relation to the Petroleum Agreements, signed on 26 May 2015
ASP	Albpetrol's percentage share of Available Petroleum
Available Petroleum	After deduction of PEP, remaining petroleum not used in Petroleum Operations
Ballsh License Agreement	License Agreement for the Development and Production of Petroleum in Ballsh-Hekal Oilfield dated 4 July 2017 between the Ministry of Economy, Trade and Energy as represented by the National Agency of Natural Resources and Albpetrol Sh.A
Ballsh Oilfield	Ballsh-Hekal Oilfield
Ballsh Petroleum Agreement	Petroleum Agreement for the Development and Production of Petroleum in Ballsh-Hekal Field between Albpetrol Sh.A and Stream Oil & Gas Limited
BPAL	Bankers Petroleum Albania Ltd
Cakran License Agreement	License Agreement for the Development and Production of Petroleum in Cakran-Mollaj Oilfield dated 4 July 2017 between the Ministry of Economy, Trade and Energy as represented by the National Agency of Natural Resources and Albpetrol Sh.A
Cakran Oilfield	Cakran-Mollaj Oilfield
Cakran Petroleum Agreement	Petroleum Agreement for the Development and Production of Petroleum in Cakran-Mollaj Field between Albpetrol Sh.A and Stream Oil & Gas Limited
Continental	Continental Oil & Gas Ltd.
Cost Recovery Petroleum	Licensee's / Contractor's percentage share of Available Petroleum
Gorisht License Agreement	License Agreement for the Development and Production of Petroleum in Gorisht-Kocul Oilfield dated 4 July 2017 between the Ministry of Economy, Trade and Energy as represented by the National Agency of Natural Resources and Albpetrol Sh.A
Gorisht Oilfield	Gorisht-Kocul Oilfield

Gorisht Petroleum Agreement	Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field between Albpetrol Sh.A and Stream Oil & Gas Limited
Haywood	Haywood Securities (UK) Limited
Instrument of Transfer	Annex E to the Petroleum Agreements
January 2017 Cash Payment Agreements **or** **Conversion Agreements**	Agreement on rules and procedures for obtaining in cash the corresponding value of the amount of deemed production (PEP) for the calendaric year 2015 on Gorisht-Kocul Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 19 January 2017 Agreement on rules and procedures for obtaining in cash the corresponding value of the amount of deemed production (PEP) for the calendaric year 2014 on Cakran-Mollaj Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 20 January 2017
March 2016 Breach Notice	Letter from Albpetrol to TranAtlantic Albania Ltd. dated 7 March 2016
May Meeting	Meeting held on 5 May 2016 between the MEI, GBC and Albpetrol
MEI	Ministry of Energy and Industry of the Republic of Albania
METE	Ministry of Economy, Trade and Energy of the Republic of Albania
MIE	Ministry of Infrastructure and Energy of the Republic of Albania
Ministry of Economic Development	Ministry of Economic Development, Tourism, Trade and Entrepreneurship
PEP	Albpetrol's share of deemed production of petroleum
PEP&ASP Liability	Claimant's liabilities for delivery of PEP&ASP obligations in respect of the Cakran and Gorisht Oilfields
Petroleum Costs	Costs and expenses incurred in operating each Oilfield
Petroleum Fiscal Law	Law on the Fiscal System in the Hydrocarbons Sector (Exploration – Production) No. 7811 dated 12 April 1994
Petroleum Law	Albania's Petroleum Law (Exploration and Production) No. 7746 of 28 July 1993
Petroleum Law Amendment	Amendment to the Petroleum Law dated 29 July 1994 incorporating the Albpetrol Agreement to the Petroleum Law
Pre-2014 Liabilities Cash Conversion Agreement **or**	Agreement for the payment of the crude oil obligation for the non-delivered deemed production (PEP) and Albpetrol share of production (ASP) from the effective date until December 31, 2013 for Cakran-Mollaj, Gorisht-Kocul and Delvina Fields dated 28 February 2014, between Stream Oil and Gas Ltd and Albpetrol (translation submitted by Claimant)

28 February 2014 Conversion Agreement	Agreement for the liquidation of the obligation in crude oil for the undelivered share of estimated production (EPP) and Albpetrol production share(APS) for the oil fields of Cakran-Mollaj, Gorisht-Kocul and Delvine, from the effective date until 31.12.2013 (translation submitted by Respondents)
SCO	Swiss Code of obligations
Settlement Agreement	Agreement for settlement of the mutual obligations between Albpetrol Sh.A, Transatlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship
SOG	Stream Oil and Gas Ltd
SPILA	Swiss Private International Law Act
Stream	Stream Oil & Gas Ltd
TAT	TransAtlantic Holdings B.C. Ltd
TransAtlantic	TransAtlantic Albania Ltd
Termination Notices	Termination letter from Albpetrol to TransAtlantic Albania Ltd. regarding the Cakran-Mollaj Oilfield dated 19 September 2016 and Termination letter from Albpetrol to TransAtlantic Albania Ltd regarding the Gorisht-Kocul Oilfield dated 19 September 2016

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1. THE PARTIES, THE ARBITRAL TRIBUNAL AND THE ARBITRATION AGREEMENTS

1.1. Claimant

1. GBC Oil Company Ltd. (hereafter, "**GBC**" or "**Claimant**"), which was previously successively named Stream Oil & Gas Ltd (hereafter, "**Stream**") and TransAtlantic Albania Ltd (hereafter, "**TransAtlantic**"), is a company registered and incorporated under the laws of the Cayman Islands[1] under number GC-188194,[2] with the following address:

   GBC Oil Company Ltd.
   PO Box 448, George Town
   Grand Cayman, KY1 1106
   CAYMAN ISLANDS[3]

2. Claimant indicates that it "*carries on business in Albania as a producer of oil and gas, having a branch registration in Albania under the name TransAtlantic Albania*".[4]

3. GBC is owned by Stream Oil and Gas Ltd. (hereafter, "**SOG**"), a company incorporated under the laws of British Columbia, Canada.

4. On 18 November 2014, SOG was acquired by TransAtlantic Holdings B.C. Ltd. (hereafter, "**TAT**") a company incorporated under the laws of British Columbia, Canada.[5]

5. Since 29 February 2016, SOG has itself been owned by GBC Oil Company Ltd., a company incorporated under the laws of the British Virgin Islands (hereafter, "**GBC BVI**").[6] GBC BVI is owned by Continental Oil & Gas Ltd (hereafter, "**Continental**"), a company incorporated under the laws of Delaware, United Stated of America. In its Request for Arbitration, Claimant stated that Continental was the parent company that owned and controlled Claimant at 100%, via GBC BVI and SOG.[7]

6. Claimant submitted the following chart to illustrate the organization of its corporate group:[8]

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[1] Statement of Claim, para. 38, p. 5.
[2] Request for Arbitration, para. 4, p. 3.
[3] Terms of Reference, para. 2.
[4] Statement of Claim, para. 38, p. 5.
[5] Statement of Claim, para. 40, p. 5.
[6] Request for Arbitration, para. 4, p. 3; Statement of Claim, paras. 39, 41, p. 5.
[7] Request for arbitration, para. 5, p. 3.
[8] **C-20** – Corporate Organization Chart of GBC Oil Company Ltd. (Cayman Islands), Stream Oil and Gas Ltd., GBC Oil Company Ltd. (British Virgin Islands) and Continental Oil and Gas Ltd.

7. In their Statement of Defence, Respondents argued that Claimant had not provided any documentary evidence for its legal existence. Respondents did not accept Exhibit C-1 as a Certificate of Incorporation and Name Change, but as a "*mere uncertified copy of an alleged* "Certificate of Incorporation *on* Change of Name"", which was insufficient to prove Claimant's existence.[9]

8. Claimant responded to that allegation in its Reply, by arguing that it was validly incorporated pursuant to the laws of the Cayman Islands and filing Exhibit C-163, a Certificate of Good Standing of GBC Oil Company Ltd. dated 28 March 2018.[10] Claimant added that up to the end of 2016, it had offices, staff, technical and financial support in different locations. According to Claimant, the issues of (i) who its shareholders were in 2007 and today and (ii) the fact that it did not have its branch registration name updated from Transatlantic Albania Ltd. to GBC Oil Company Ltd are irrelevant to the arbitration.[11]

9. Claimant is represented in this arbitration by the following counsel, to whom all notices and communications relating to this arbitration shall be delivered:

Mr. Geoffrey Holub
Mr. Trent Mercier
Mr. David M. Price
STIKEMAN ELLIOTT LLP
888 3rd St SW

[9] Statement of Defence, paras. 78-81, p. 32.
[10] Reply, paras. 69-70, p. 11.
[11] Reply, para. 70, p. 11.

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1.2. Respondents

A. The determination of the Ministry acting as First Respondent in these proceedings

10. A question arose at a late stage of the proceedings concerning whether the first Respondent in these proceedings is the Ministry of Energy and Industry of the Republic of Albania (hereinafter, "**MEI**") or the Ministry of Infrastructure and Energy (hereinafter, "**MIE**"). The Tribunal will briefly review the sequencing of events and set out the Parties' main arguments before making a decision on this issue.

11. As a preliminary point, and as will be detailed in section 1.4 below, Claimant bases its claims upon the arbitration agreements contained in the License Agreements entered into between the Ministry of Economy, Trade and Energy (hereinafter, "**METE**"), as represented by the National Agency of Natural Resources and Albpetrol Sh.A on 4 July 2007.

12. On 17 March 2017, Claimant filed its Request for Arbitration with the ICC Court against the MEI, the National Agency of Natural Resources and Albpetrol Sh.A.

13. On 5 May 2017, these three entities submitted an Answer to the Request for Arbitration.

14. The MEI, the National Agency of Natural Resources and Albpetrol Sh.A then signed the Terms of Reference dated 26 October 2017.

15. On 14 November 2017, Claimant submitted its Statement of Claim, naming the MEI as the first Respondent.

16. On 9 April 2018, Respondents submitted their Statement of Defence, naming the MIE as the first Respondent.

17. On 1 August 2018, Claimant submitted its Reply, naming the MEI as the first Respondent and, on 7 November 2018, Respondents submitted their Rejoinder Brief, naming the MIE as the first Respondent.

18. On 12 November 2019, the Tribunal informed the Parties that it noticed that counsel for Respondents now filed submissions on behalf of the MIE instead of the MEI, as was the case at the beginning of the proceedings. Given that the change was not officially notified, the Tribunal requested counsel for Respondents to confirm that it was simply a name change and to indicate when the change took place.

1. Parties' arguments on the determination of the Ministry acting as First Respondent

19. The Parties exchanged several emails and letters on this issue between 20 November 2019 and 28 January 2020, which are summarized as follows.

20. In response to the Tribunal's question, on 20 November 2019, Respondents stated that no legal act expressly stipulated a change of name concerning the MIE, but that the Albanian Council of Ministers' Decision no. 504 dated 13 September 2017 (submitted at exhibit RL-50) conferred to the MIE the responsibility for the energy sector and the exploitation of energy and mining resources, for which the MEI was previously responsible since 2013. Decision No. 833 dated 18 September 2013, which determined the area of responsibility of the MEI, was repealed by Decision no. 504 dated 13 September 2017.

21. On 22 November 2019, the Tribunal asked Respondents to confirm that the MIE was now a party to the arbitration instead of the MEI, in which case counsel for Respondents should notify this change to the ICC Court.

22. On 29 November 2019, Respondents stated that following Decision no. 504, the MIE had the responsibility for the energy sector and the exploitation of energy and mining resources "*and* [was] *therefore the party to this arbitration instead of the Ministry of Energy and Industry (MEI) as referred to in the Request for Arbitration. A Ministry called Ministry of Energy and Industry does no longer exist in the Republic of Albania*".

23. Invited by the Tribunal to comment, Claimant stated that it did not object to the correction of the Respondent party based on the understanding that the MIE assumed the rights and obligations of the MEI and on the condition that the change of this party would not have any negative effect on the enforceability of the final award.

24. On 20 December 2019, the Tribunal requested Respondents to confirm that the MIE assumed the rights and obligations of the MEI and to provide supporting evidence in that respect.

25. On 6 January 2020, Respondents responded that, in their understanding, the content of Decision no. 504 included the assumption of the related rights and obligations from the MEI. A reading of the Petroleum Law supports this conclusion. Respondents also argued that Claimant: (i) had ample opportunity to comment on Decision no. 504 and on the stipulations of the Petroleum Law, but did not present evidence indicating that the MEI continued to be responsible for the hydrocarbon sector and related contracts; (ii) never objected to the correction of the Respondent party from MEI to MIE throughout the arbitration, so that the legal situation as presented by Respondents was unchallenged; and (iii) filed its Statement of Claim against the MEI although it based its claims on the License Agreements signed by the METE and assumed that the Ministry liable under certain agreements may change.

26. On 7 January 2020, the Tribunal invited Claimant to provide its potential comments and emphasized that no new facts or further legal arguments should be introduced by the Parties at this late stage of the proceedings.

27. On 20 January 2020, Claimant pointed out that Respondents never informed the Tribunal or Claimant of any change of parties or legal succession from the MEI to the MIE. In fact, on 5 October 2017, the State Advocate's Office of the Republic of Albania signed the Terms of Reference on behalf of the MEI, almost a month after the MEI supposedly ceased to be a party to the License Agreements and/or no longer existed, pursuant to Decision no. 504 of 13 September 2017. Moreover, although the change of party from the MEI to the MIE was reflected in the document notifying Clifford Chance's appointment as counsel for Respondents communicated on 5 January 2018, as well in Respondents' submissions, the change was never officially notified.

28. Claimant accepted, as offered by the MIE on 29 November 2019, to add the MIE to the arbitration and to have it treated as a party which has assumed all obligations of the MEI under the License Agreements. However, Respondents have not met their burden of proving that the MEI has ceased to exist and has been released from its obligations under the License Agreements, which does not necessarily follow from Decision no. 504 dated 13 September 2017. According to Claimant, the MIE should be added as a fourth Respondent on the basis of the Swiss law doctrine of cumulative assumption of debt leading to an extension of the arbitration agreement.

29. In conclusion, Claimant requested the Tribunal to rule that: (a) the MIE shall be added as a fourth Respondent and that all of Claimant's claims against the MEI shall be deemed claims against the MEI and the MIE; or (b) in the alternative, the designation of the first Respondent shall be changed to the MIE "*as the legal successor*" of the MEI and all of Claimant's claims against the MEI shall be deemed claims against the MIE (as the legal successor of the MIE); or (c) in the further alternative, the designation of

the first Respondent shall be changed to the MIE and that all of Claimant's claims against the MEI shall be deemed claims against the MIE.

30. On 27 January 2020, Respondents argued that the First Respondent is the MIE and that the Tribunal should consequently change the designation of the First Respondent to the "Ministry of Infrastructure and Energy (Republic of Albania)". Respondents' main argument is that the MEI does not exist anymore given that Decision no. 504 of the Council of Ministers put an end to its existence and repealed Decision no. 833 of 18 September 2013 which formerly attributed responsibility (and liability) to the MEI. Respondents therefore dismissed Claimant's argument that there could be a cumulative assumption of debt between the MEI and the MIE.

31. According to Respondents, Claimant never objected to the correction of the Respondent party from the MEI to the MIE in Respondents' Statement of Defence and throughout the arbitration. Moreoever, Claimant accepted the mechanism argued by Respondents because, although the License Agreements on which Claimant based its claims were concluded with the METE and not with the MEI, Claimant chose to raise claims against the MEI. By referring to the "*responsibility for the oil sector*", Claimant itself has taken the position that the attribution of responsibility in the Albanian state-organisation triggers the liability under the License Agreements, in line with Decision no. 833 dated 18 September 2013 and Decision no. 504 dated 13 September 2017.

32. On Claimant's motion to change the designation of the First Respondent to the MIE "*as the legal successor*" of the MEI, Respondents indicate that the available Albanian laws and decrees do not suggest that the MIE is the full legal successor of the MEI, as, for instance, the competence for industry matters is not covered by Decision no. 504. Moreover, Claimant has not presented any Albanian laws or decrees that would support this motion.

33. On 28 January 2020, Claimant reiterated that, given that Respondents did not prove that the MEI was released from its obligations and liabilities under the License Agreements, the MEI should not be released as Respondent from this arbitration. Claimant points out that the MEI's capacity as a party under the License agreements at the time when Claimant initiated the arbitration is undisputed and that the MEI signed the Terms of Reference. Claimant also argues that its submissions are not contradictory given that it did not allege that the METE was released from its obligations and existing liabilities under the License Agreements.

2. <u>Tribunal's decision on the determination of the Ministry acting as First Respondent</u>

34. The Tribunal first notes that Claimant filed its Request for Arbitration with the ICC Court against the MEI as First Respondent and not against the Albanian State.

35. The Tribunal also notes that counsel for Respondents did not sponteanously notify the Tribunal, Claimant and the ICC Court that the MEI was no longer in existence and was replaced as a party to this arbitration by the MIE pursuant to Decision no. 504 of the

Council of Ministers dated 13 September 2017. In fact, Respondents did not submit Decision no. 504 as an exhibit in this arbitration until 20 November 2019, when it was asked by the Tribunal to explain the change of denomination of the first Respondent. Contrary to what Respondents argue, it was not the responsibility of Claimant to object to the mention of the MIE *in lieu* of the MEI in Respondents' Statement of Defence and their following submissions.

36. That being said, it is uncontested by the Parties that Decision no. 833 of the Council of Ministers dated 18 September 2013, which gave the responsibility for the oil sector to the MEI instead of the METE, constituted a basis for the MEI to be a party to these proceedings based on the License Agreements signed by the METE.

37. The Tribunal is convinced that, similarly, section II of Decision no. 504 which gave the MIE responsibility for the energy sector and the exploitation of energy and mining resources, made the MIE the legal successor of the MEI's rights and obligations under the License Agreements.

38. The MIE should therefore be a party to the present proceedings instead of the MEI, and Claimant's claims against the MEI should be considered as claims against the MIE.

39. This conclusion is supported by the fact that, as argued by Respondents, Claimant did agree to the mechanism described above when it initiated the present proceedings against the MEI and not the METE despite the fact that the signatory to the License Agreements was the METE.

40. Therefore, the Tribunal concludes that Respondents in this arbitration are:

1. The Ministry of Infrastructure and Energy (as the legal successor of the MEI under the License Agreements)
Rr. "Abdi Toptani", Nr.1, 1001,
Tiranë
ALBANIA

(hereafter, "**MIE**", "**First Respondent**" or "**the Ministry**"). First Respondent is a primary organ of the Albanian Government responsible for the regulation of Albania's oil and gas industry.[12]

Given that the First Respondent has been designated as the MEI by Claimant and as the MIE by Respondents throughout most of the proceedings, the Tribunal will leave the term "*MEI*" when referring to and quoting Claimant's submissions.

[12] Statement of Defence, para. 3, p. 7.

2. The National Agency of Natural Resources
Bulevardi "Bajram Curri", Blloku "Vasil Shanto",
Tiranë
ALBANIA

(hereafter, "**AKBN**" or "**Second Respondent**"). Second Respondent is a primary organ of the Albanian Government that oversees the oil and has activities in Albania.[13]

3. Albpetrol Sh.A.
Rruga Fier-Patos Km. 7, Patos,
Fier
ALBANIA

(hereafter, "**Albpetrol**" or "**Third Respondent**"). Third Respondent is 100% held by the Albanian State.[14]

B. Representation of Respondents in these proceedings

41. Respondents are represented in this arbitration by the following counsel, to whom all notices and communications relating to this arbitration shall be delivered:

Ms. Enkelejda Mucaj
Ms. Boriana Nikolla
Mr. Helidon Jacellari
The State Advocate's Office of the Republic of Albania
Ministry of Justice
6th floor, Bulevardi "Zogu I"
Tirana
ALBANIA
Tel: +355 4 2253600
Enkelejda.Mucaj@avokaturashtetit.gov.al
boriana.nikolla@avokaturashtetit.gov.al
helidon.jacellari@avokaturashtetit.gov.al

Mr. Audley Sheppard, QC
Clifford Chance
10 Upper Bank Street
London, E14 5JJ
UNITED KINGDOM
audley.sheppard@cliffordchance.com

Mr. Tim Schreiber, LL.M and

[13] Statement of Defence, para. 3, p. 7.
[14] Statement of Defence, para. 3, p. 7.

Mr. Olivier Seyd
Clifford Chance
Lenbachplatz 1
80333 Munich
GERMANY
tim.schreiber@cliffordchance.com
olivier.seyd@cliffordchance.com

42. MEI, AKBN and Albpetrol are hereafter referred to collectively as "**Respondents**".

43. Claimant and Respondents are hereafter referred to individually as a "**Party**" and collectively as the "**Parties**".

1.3. The Arbitral Tribunal

44. The Arbitral Tribunal consists of three arbitrators (hereinafter the "**Tribunal**"), one arbitrator appointed by each of the Parties and one Chairman of the Tribunal appointed by the Parties (hereinafter the **"Chairman"**):

Chairman of the Tribunal
Professor Christophe Seraglini
FRESHFIELDS BRUCKHAUS DERINGER LLP
2 rue Paul Cézanne
75008 Paris
FRANCE
T: +33 1 44 56 27 44
christophe.seraglini@freshfields.com

Ms. Loretta Malintoppi
39 ESSEX CHAMBERS
32 Maxwell Road #02-16
069115 Singapore
SINGAPORE
T: +6566341336
loretta.malintoppi@39essex.com

Dr. Sabine Konrad
MORGAN, LEWIS & BOCKIUS LLP
OpernTurm
Bockenheimer Landstr. 4
60306 Frankfurt am Main
GERMANY
T: +49 69 714 00 777

sabine.konrad@morganlewis.com

Dr. Sabine Konrad was appointed by the ICC Court in November 2017 following the resignation of Ms. Maxi Scherer as Co-Arbitrator.

45. After consulting the Parties and with their approval, the Tribunal has appointed as Administrative Secretary:

Ms. Camille Teynier
FRESHFIELDS BRUCKHAUS DERINGER LLP
2 rue Paul Cézanne
75008 Paris
FRANCE
T: +33 1 44 56 27 44
camille.teynier@freshfields.com

Ms. Teynier was the third administrative secretary to be appointed by the Tribunal, as will be developed in the procedural background below.

1.4. The arbitration agreements and applicable law

46. The present arbitration proceedings relate to the Parties' dispute with respect to Claimant's right to conduct petroleum operations in three onshore oilfields in the Republic of Albania, namely the Cakran-Mollaj Oilfield (hereafter, the "**Cakran Oilfield**"), the Gorisht-Kocul Oilfield (hereafter, the "**Gorisht Oilfield**") and the Ballsh-Hekal Oilfield (hereafter, the "**Ballsh Oilfield**", together the "**Oilfields**").

47. In particular, on 4 July 2007, the following agreements were entered into:

(i). The License Agreement for the Development and Production of Petroleum in Cakran-Mollaj Oilfield dated 4 July 2007 between the Ministry of Economy, Trade and Energy as represented by the National Agency of Natural Resources and Albpetrol Sh.A (hereafter, the "**Cakran License Agreement**");

(ii). The License Agreement for the Development and Production of Petroleum in Gorisht-Kocul Oilfield dated 4 July 2007 between the Ministry of Economy, Trade and Energy as represented by the National Agency of Natural Resources and Albpetrol Sh.A (hereafter, the "**Gorisht License Agreement**");

(iii). The License Agreement for the Development and Production of Petroleum in Ballsh-Hekal Oilfield dated 4 July 2007 between the Ministry of Economy, Trade and Energy as represented by the National Agency of Natural Resources and Albpetrol Sh.A (hereafter, the "**Ballsh License Agreement**", together the "**License Agreements**", sometimes referred to by the Parties as "**LAs**".).

48. The following agreements were then entered into:

(i). The Petroleum Agreement for the Development and Production of Petroleum in Cakran-Mollaj Field between Albpetrol Sh.A and Stream Oil & Gas Limited (hereafter, the "**Cakran Petroleum Agreement**");

(ii). The Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field between Albpetrol Sh.A and Stream Oil & Gas Limited (hereafter, the "**Gorisht Petroleum Agreement**");

(iii). The Petroleum Agreement for the Development and Production of Petroleum in Ballsh-Hekal Field between Albpetrol Sh.A and Stream Oil & Gas Limited (hereafter, the "**Ballsh Petroleum Agreement**", together the "**Petroleum Agreements**", sometimes referred to by the Parties as "**PAs**").

49. The date of the Petroleum Agreements is disputed between the Parties. Indeed, Claimant submitted versions of the Petroleum Agreements bearing the date of 8 August 2007 on their first page,[15] whereas Respondents submitted versions bearing the date of 19 July 2007 on their first page.[16] The Parties agree that there appears to be no difference between the two versions of the Petroleum Agreements, except for the different dates.[17]

50. Claimant relies upon the arbitration agreements contained in Articles 25.3 of the License Agreements, which are drafted in identical terms and read as follows:

"***25.3 Arbitration between AKBN, Albpetrol and Foreign Partner(s).***

(a) All disputes arising in connection with this License Agreement between AKBN, Albpetrol and foreign partner(s) shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC"). Said arbitration shall be carried out by, in the case of mere technical matters, one (1) arbitrator and, in the case of all other disputes, three (3) arbitrators, appointed by the ICC Court of Arbitration in accordance with said Rules and their interpretation by said Court. In that regard, the Parties hereto waive the right each to nominate an arbitrator and as of now accept the appointment made by the ICC Court as it deems best. Consistent with the Parties desire to have an expedited arbitration proceeding the appointment of the arbitrator(s) shall occur within ten (10) days from the date in which a Party hereof delivers to the other a written notice requesting that the dispute be submitted to arbitration, which written notice shall clearly state the issue in dispute, and any other relevant fact. Notwithstanding the foregoing, no arbitrator shall be Albanian or a national of the country of LICENSEE, nor shall any arbitrator be related to,

[15] **C-5**, **C-6** and **C-7** – Petroleum Agreements.
[16] **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements.
[17] Statement of Defence, para. 76, p. 31; Reply, para. 76, p. 12.

employed by or have (or had) a substantial or ongoing business relationship with any Party hereto or any of their respective Affiliates. Shortened time limits for the procedural aspects of the proceeding, including but not limited to discovery and submission of prehearing briefs, shall be imposed, in consultation with the Parties, by the arbitrator(s).

(b) The arbitration proceeding shall take place in Zurich, Switzerland and shall be conducted in the English language. All documents submitted therein and the award of the arbitral panel shall also be in English.

(c) Clauses of this License Agreement related to arbitration will continue to be in force despite the termination of this License Agreement.

(d) The Ministry and AKBN irrevocably waive any right of immunity or any right to object *to this arbitration agreement, any arbitration award, any judgment regarding the enforcement of an arbitration award of the execution of any arbitration award against or in respect of any of its property whatsoever it now has or may acquire in the future in any jurisdiction.*

(e) The Party that loses an arbitration decision shall pay all expenses incurred in connection with such arbitration, including, but not limited to, the fees and expenses of the arbitrator(s). All such costs and expenditures shall not be considered as Petroleum Costs and shall not be recoverable under this License Agreement.

(f) Each Party hereto agrees that any arbitral award rendered against it pursuant to this Section 25.3 may be enforced against assets wherever they may be found and that a judgment upon the arbitral award may be entered in any court having jurisdiction thereof".

51. The License Agreements contain the following clause concerning the law applicable to the dispute:

"***26.1. Governing Law.***

(a) Subject to section 26.1(b), the activities of LICENSEE in performing the Petroleum Operations shall be governed by and conducted in accordance with the requirements of the Albanian Law.

(b) All questions with respect to the interpretation or enforcement of, or the rights and obligations of the Parties under, this License Agreement and which are the subject of arbitration in accordance with ARTICLE 25

(i). shall be governed by the laws of the Republic of Albania in the case of a dispute subject to resolution under ARTICLE 25, Section 25.2; or

(ii). shall be governed by the laws of Switzerland in the case of a dispute subject to resolution under ARTICLE 25, Section 25.3".[18]

2. PROCEDURAL BACKGROUND

52. On 17 March 2017, Claimant filed its Request for Arbitration with the ICC Court.

53. On 21 March 2017, the Secretariat of the ICC Court acknowledged receipt of Claimant's Request for Arbitration.

54. On 4 April 2017, the Secretariat informed Claimant that it was notifying the Request for Arbitration to Respondents and indicated that since the arbitration agreements did not specify the number of arbitrators but provided, in relevant part, that "*[s]aid arbitration shall be carried out by, in the case of mere technical matters, one (1) arbitrator and, in the case of all other disputes, three (3) arbitrators, appointed by the ICC Court of Arbitration in accordance with said Rules and their interpretation by said Court (...)*", it understood that the matter would be submitted to three arbitrators to be appointed by the Court. The Secretariat requested Claimant to provide an estimate of the monetary value of its claims by 7 April 2017 in order for the ICC Court to fix the advance on costs. Failing receipt of such estimate, it indicated that the Secretary General will fix the advance on costs at his discretion.

55. On the same day, the Secretariat notified the Request for Arbitration to Respondents, invited Respondents to submit their Answer to the Request for Arbitration (hereafter, the "**Answer**") within 30 days from the day following receipt of this communication, and provided the same information as to the constitution of the Tribunal.

56. On 6 April 2017, the Secretariat reminded Claimant that it was expecting the quantification of its claims by 7 April 2017.

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[18] **C-2**, **C-3** and **C-4** – License Agreements, Article 25.2, p. 63: "*All disputes arising in connection with this License Agreement between AKBN and Albpetrol alone shall be finally settled by arbitration taking place in Tirana in accordance with Albanian legislation. Notwithstanding the foregoing, in the event LICENSEE consists of Albpetrol and a foreign partner and such foreign partner gives notice in writing to AKBN and to Albpetrol that, in its reasonable judgment, a dispute between Albpetrol and AKBN affects such foreign partner's interests under the License Agreement, any such dispute, whether having just arisen or already the subject of pending arbitration under this Section 25.2, shall be resolved in accordance with Section 25.3. In such event, at the request of either Albpetrol or AKBN the arbitration under Section 25.3 shall include a determination of whether the foreign partner was reasonable in its assertion that the dispute affected its interests. If it is determined that such assertion was not reasonable, the arbitrage award shall include a determination of the costs of the arbitration which are in excess of those which would have been incurred by Albpetrol and AKBN had such arbitration taken place or been concluded under Section 25.2, and the foreign partner shall be responsible for the payment of all such excess costs*".

57. On 7 April 2017, Claimant indicated that it currently estimated the damages to be USD 75 million. "*In light of the fact that one of the Respondents has not yet been served by the ICC*", Claimant also requested that the ICC only require payment of the provisional advance on costs at this stage.

58. On 10 April 2017, the Court directly appointed Mr. Christophe Seraglini as President of the Tribunal, Ms. Loretta Malintoppi as Co-Arbitrator and Ms. Maxi Scherer as Co-Arbitrator.

59. In addition, the Court fixed, "*in light of the fast track nature of this dispute*", an advance on costs at US$ 710 000, "*based on the amount in dispute, the expedited nature of the proceedings, and three Arbitrators*". The Court invited the Parties to pay their share of the advance on costs by 9 May 2017.

60. On 25 April 2017, Claimant requested an extension of time for payment of its share of the advance on costs to 31 May 2017.

61. On 26 April 2017, the Secretariat indicated that, in light of the fact that the Tribunal was already constituted, it granted Claimant until 9 May 2017 to pay its share of the advance on costs.

62. On 6 May 2017, Respondents filed their Answer dated 5 May 2017.

63. On 9 May 2017, Claimant requested an extension of time for payment of its share of the advance on costs to 31 May 2017.

64. On 11 May 2017, the Tribunal informed the Parties that it had received the case file and that it would start preparing the draft Terms of Reference and Procedural Order n°1. The Tribunal invited the Parties to submit the abstracts of their respective claims and positions by 23 May 2017.

65. In addition, the Tribunal proposed the appointment of Ms. Elsa Nicolet as Administrative Secretary to the proceedings and invited the Parties to confirm that they had no objections to such appointment by 23 May 2017.

66. On the same day, the Secretariat invited Respondents to provide 1 original copy of its Answer. The Secretariat noted that Respondents raised a plea pursuant to Article 6(3) of the ICC Rules and that such plea would be decided directly by the Tribunal after the advance on costs was paid and after providing the Parties with an opportunity to comment.

67. The Secretariat noted that the Parties had still not paid the balance of the advance on costs and invited the Parties to proceed with the payment by 26 May 2017.

68. On 23 May 2017, Claimant submitted its brief abstract for incorporation in the Terms of Reference and indicated that it "*may be required to amend the nature of the relief*

sought in the Request for Arbitration to withdraw its request for specific performance and seek only damages, depending on the circumstances as they exist at the time the Terms of Reference are being finalized".

69. Claimant also confirmed that it had no objection to the appointment of Ms. Elsa Nicolet as Administrative Secretary.

70. On the same day, Respondents communicated their brief abstract to be incorporated into the Terms of Reference. Respondents also confirmed that they had no objections to the appointment of Ms. Elsa Nicolet as Administrative Secretary.

71. On 1 June 2017, the Court extended the time limit for establishing the Terms of Reference until 31 July 2017.

72. On 2 June 2017, the Secretariat granted the Parties additional time to pay the balance of the advance on costs, *i.e.* until 19 June 2017.

73. On 19 June 2017, Claimant indicated that it had transferred US$ 30,000 to the ICC and that the balance of the advance on costs will be transferred immediately.

74. On 22 June 2017, Claimant confirmed that it had transferred the balance of its share of the advance on costs.

75. On 26 June 2017, the Secretariat acknowledged receipt of Claimant's share of the advance on costs and granted Respondents additional time to pay their share, *i.e.* until 11 July 2017.

76. On 12 July 2017, the Tribunal communicated to the Parties a draft Terms of Reference as per Article 23 of the ICC Rules, inviting them to provide their comments and modifications before the Case Management Conference Call to be scheduled.

77. On 26 July 2017, the Parties submitted their comments on the draft Terms of Reference.

78. The Case Management Conference call took place on 27 July 2017, as agreed between the Parties and the Tribunal on 17 July 2017. During the Case Management Conference, Claimant requested that the proceedings be bifurcated into a jurisdictional phase and a merit phase. Respondents indicated that they were also in favour of a bifurcation but that they would not oppose a joinder if the Tribunal were to decide that way. Respondents thus requested that the Tribunal make a determination on the matter of bifurcation.

79. On 31 July 2017, the Secretariat informed the Tribunal and the Parties that, on 6 July 2017, the ICC Court had extended the time limit for establishing the Terms of Reference until 31 August 2017 as per Article 23(2) of the ICC Rules.

80. On 3 August 2017, the Tribunal communicated to the Parties an updated version of the draft Terms of Reference, inviting them to provide their comments by 8 August 2017.

81. On 8 August 2017, Claimant provided its comments on the draft Terms of Reference and Respondents requested the Tribunal to grant them two additional days to provide their comments.

82. On 8 August 2017, Enea Karakaci from the State Advocate's Office of Albania informed the Tribunal that the State Advocate's Office's representation was exercised without the requirement or need of any authorization, and provided relevant excerpts of Albanian law. Enea Karakaci added that the State Advocate's Office considered that the power of attorneys required were not valid in terms of Albanian law and practice but that, if the Tribunal still considered that power of attorneys were necessary, the State Advocate's Office would comply with such request.

83. On 9 August 2017, the Tribunal granted to Respondents the two-day extension requested to provide their comments on the draft Terms of Reference.

84. On 9 August 2017, Claimant provided to the Tribunal a photograph of the power of attorney given to its counsel, the PDF of the original version being sent on 11 August 2017.

85. On 9 August 2017, the Tribunal communicated to the Parties its decision to join the jurisdictional and the merits phase of the proceedings, after considering (i) the Parties' positions expressed during the Case Management Conference, (ii) the Tribunal's limited knowledge of the case at this early stage of the proceedings, (iii) the fact that the jurisdictional objections raised by Respondents seemed potentially closely related to the merits of the case and (iv) the need to conduct the arbitration proceedings in an expeditious and cost-effective manner pursuant to Article 22(1) of the ICC Rules. The Tribunal therefore invited the Parties to confer and provide it either jointly or separately with a proposed procedural timetable by 18 August 2017.

86. On the same day, the Tribunal communicated to the Parties a draft Procedural Order no. 1 containing the procedural rules of the arbitration, asking them to (i) provide their potential comments and (ii) confer and provide either jointly or separately a proposed procedural timetable by 18 August 2017. The Tribunal also took note of the Respondents' email concerning Albanian law and practice, and indicated that it would still be grateful if each Respondent could provide the Tribunal with a power of attorney, as agreed during the Case Management Conference.

87. On 10 August 2017, Respondents provided their comments on the draft Terms of Reference, containing, in particular, the estimate of their counterclaims.

88. On 11 August 2017, the Tribunal informed the Parties that the following the Parties' last comments on the draft Terms of Reference, the Terms of Reference were considered final.

89. On 18 August 2017, the Parties separately informed the Tribunal that they had conferred and jointly proposed a procedural timetable and that they did not have further comments on the draft Procedural Order no. 1.

90. On the same day, the Tribunal took note of the Parties' positions and of the fact that Respondents suggested that the city for the hearing should be Zurich, Switzerland. It invited Claimant to confirm its agreement on this point, which Claimant confirmed later that day.

91. On 22 August 2017, the Tribunal took note of the Parties' agreement concerning Zurich as the city of the hearing.

92. On 25 August 2017, Claimant specified that, although it agreed that the hearing take place in Zurich, it would also be prepared to agree that it take place in Paris, if Respondents and the Tribunal be better disposed to this location, considering the availability and cost of hearing rooms.

93. On 28 August 2018, the Tribunal informed the Parties that it had no objection to the hearing taking place in Paris, as this would limit the costs with regards to the Tribunal's members' accommodations.

94. On 28 August 2017, Claimant informed the Tribunal that it had signed eight copies of the Terms of Reference, which were couriered to the Ministry of Energy and Industry for their signature.

95. On 29 August 2017, the Secretariat informed the Tribunal and the Parties that, on 3 August 2017, the ICC Court had extended the time limit for establishing the Terms of Reference until 29 September 2017 as per Article 23(2) of the ICC Rules.

96. On 29 August 2017, Respondents indicated that they had no objection to Claimant's proposal that the hearing take place in Paris.

97. On 11 September 2017, the Tribunal issued Procedural Order no. 1 after taking into account the Parties' comments exchanged between 31 August and 5 September 2017, and invited again Respondents to confirm the safe receipt of the copies of the Terms of Reference sent by Claimant and to indicate when they would be able to send the copies to the members of the Tribunal.

98. On 12 September 2017, Claimant informed the Tribunal that (i) it had been advised that the Ministry of Energy and Industry had received eight signed copies of the Terms of Reference on 5 September 2017 signed by Claimant, and that (ii) Respondents had required the Terms of Reference to be delivered to the address of the state Advocacy Office in order to be signed by the State Advocate General. Claimant specified that, in the interests of efficiency, it had asked Respondents whether the State Advocate Office could arrange for the Ministry of Energy to deliver to it the Terms of Reference for execution, without any response from Respondents.

99. On 13 September 2017, Respondents confirmed what was explained by Claimant in its email of 12 December 2017 and informed the Tribunal that the Ministry of Energy and Industry had sent the signed Terms of Reference to the State Advocacy Office on 12 September 2017. Respondents added that it had noticed that the Terms of Reference had not been signed by GBC Oil Company Ltd or its representatives in the proceedings, but by the Administrator of TransAtlantic Albania Ltd, Branch in Albania, Mr. Naim Kasa. Claimant further explained that given that the letter sent by Kasa to the Ministry of Energy stated that the Terms of Reference has been "*signed by TransAtlantic Albania Ltd, as Claimant*", it had asked Claimant's counsel in what capacity the Terms of Reference had been signed by TransAtlantic Albania Ltd and Mr. Kasa whereas the Terms of Reference specify that Claimant in the proceedings is GBC Oil Company Ltd (Cayman Islands), without any response yet from Claimant.

100. On the same day, Claimant explained that Mr. Kasa was "*a Director of the Claimant, GBC Oil Company Ltd*" as well as "*the registered Administrative Director of GBC in Albania*". Claimant also explained that as indicated at paragraph 51 of the Terms of Reference, GBC, a corporation incorporated under the laws of the Cayman Islands, carried business in Albania as a producer of oil and gas under Albanian branch identification number NIUS: K72205016P and the name registration "*TransAtlantic Albania Ltd.*". Claimant specified that there was no separate legal entity in Albania as the legal entity was Claimant, a Cayman Islands company, with a branch registration in Albania, named TransAtlantic Albania Ltd. Claimant also indicated that Mr. Kasa was authorized to and had bound GBC by signing the Terms of Reference.

101. On 14 September 2017, the Tribunal acknowledged receipt of Claimant's explanations and invited Respondents to inform the Tribunal if they had any objection in this regard by 15 September 2017.

102. On 15 September 2017, Claimant advised the Tribunal, by a letter dated 14 September 2017, that it had entered into a litigation funding agreement with a litigation funding entity, Bentham IMF Capital Ltd. on 8 September 2017, for the purpose of pursuing the claims.

103. In response to Claimant's explanations, on 15 September 2017, Respondents emphasized that TransAtlantic Albania Ltd. had "*no legal personality in its own under Albanian law*" and was only created "*for purposes of Albanian commercial law and to carry out is* (sic) *day to day business in Albania*". Respondent thus reiterated that the branch in Albania was not the claimant in the present proceedings. Respondents indicated that they were awaiting instructions on whether the State Advocacy should sign the Terms of Reference.

104. On 18 September 2017, the Tribunal took note of the Parties' comments on the issue of the signature of the Terms of Reference by Mr. Naim Kasa. The Tribunal further asked that the Parties send it an electronic copy of the page of the Terms of Reference signed

by Mr. Naim Kasa and the letter sent by Claimant to Respondents and referred to in Respondents' email dated 15 September 2017.

105. On the same day, Respondents provided to the Tribunal the letter of TransAtlantic Albania Ltd. no. 131/17 sent to the Ministry of Energy and Industry on 28 August 2017 and the page of the Terms and Reference signed by Mr. Naim Kasa.

106. On 19 September 2017, the Tribunal informed the Parties that it found that Mr. Kasa's power to act on behalf of Claimant and to sign the Terms of Reference was not clearly established. The Tribunal thus invited Claimant to either (i) send to Respondents eight new copies of the Terms of Reference signed by Claimant's representatives or counsel, or (ii) provide the Tribunal with a document evidencing Mr. Kasa's power to act on behalf of Claimant, by 20 September 2017.

107. On 20 September 2017, Claimant provided the Tribunal with the Register of Directors and Officers for GBC Oil Company Ltd. indicating that Mr. Kasa was appointed Director on 10 February 2017 and notified to the Registrar on 1 March 2017.

108. Following the information provided by Claimant on 15 September 2017, on 21 September 2017, co-arbitrator Ms. Scherer disclosed to the Parties - pursuant to Article 11(3) of the ICC Rules - that partners in her firm Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale") were representing another subsidiary of IMF Bentham Ltd. in matters unrelated to the present dispute. Ms. Scherer specified that she had no involvement in, or knowledge of any of these matters and that they were of no nature to affect her independence of impartiality in any way.

109. On 21 September 2017, the Tribunal acknowledged receipt of the document communicated by Claimant on 20 September 2017 and invited Respondents to provide their comments on this document and on the Terms of Reference signed by Claimant by 22 September 2017.

110. On 22 September 2017, Respondents provided their comments regarding the documents communicated by Claimant on 20 September 2017. According to Respondents, the document was not satisfactory to prove Mr. Kasa's power to act on behalf of GCB Oil Company Ltd. because the list of the directors (i) was produced by a company named Genesis Trust & Corporate Services Ltd. without any information on this company, its relation to Claimant, or its authority to issue such a list, and (ii) was not accompanied by any other document certifying the existence, nature and the extent of the capacities of the directors to, "*legally and binding*", act on behalf of Claimant. In the same email, Respondents noted that the power of attorney provided by Claimant was made in Albania and governed by Albanian law whereas Claimant was a company organized under the law of Cayman Islands. In light of these facts, Respondents interrogated the Tribunal on the validity of such a power of attorney.

111. On 25 September 2017, the Tribunal noted that the document provided by Claimant mentioning Mr. Kasa as a director of GBC Oil Company Ltd. was not an official document clearly establishing his power to act on behalf of the company and invited Claimant to either (i) send to Respondents eight new copies of the Terms of Reference signed by Claimant's representatives or counsel, or (ii) provide the Tribunal with an official document clearly evidencing Mr. Kasa's power to act on behalf of Claimant. In any event, the Tribunal invited Claimant to indicate which decision it would make by 26 September 2017.

112. On 28 September 2017, the Secretariat informed the Tribunal and the Parties that, on 7 September 2017, the ICC Court had extended the time limit for establishing the Terms of Reference until 31 August 2017 as per Article 23(2) of the ICC Rules.

113. On 5 October 2017, in response to the Tribunal's email of 9 August 2017 requesting to be provided with powers of attorney, Respondents attached a letter from their counsel dated 4 October 2019 informing the Tribunal that in spite of their best efforts, they could not meet such request. Respondents set out the parts of Albanian law relevant to the issue and enclosed the powers of attorney from the MEI, AKBN and Albpetrol "*for purpose of counterclaim submission in these arbitration proceedings*".

114. On 6 October 2017, Respondents sent a letter to the Tribunal in response to Ms. Scherer's letter dated 19 September 2017, and asked to be provided information on (i) the subsidiary which was represented by partners of WilmerHale, including but not limited to, name, ownership percentage of such subsidiary by IMF Bentham Ltd., activity field/s, location, (ii) the matters of such subsidiary which were represented by partners of WilmerHale, (iii) duration (starting from its commencement), commercial nature of such relationship between the partners of WilmerHale and the subsidiary at question, and its financial impact to the business of WilmerHale, and (iv) existence and duration of any relationships between partners of WilmerHale and the Parent Company.

115. On 10 October 2017, Ms. Scherer, reminding the Parties of her lack of involvement in, or knowledge of, any of the matters described in her Disclosure, indicated that she had requested the relevant information from WilmerHale and would revert to the Parties.

116. On 11 October 2017, Ms. Scherer submitted the following Additional Information Disclosure: "[s]*ince 2015, partners in WilmerHale's Washington office have provided advice on public policy matters in relation to congressional inquiries to Bentham Capital LLC. I understand that Bentham Capital LLC is a wholly-owned subsidiary of IMF Bentham Limited. The advice provided by WilmerHale in this matter is limited: since the beginning of the present arbitration proceedings in April 2017 only a small amount of time has been billed". Please note that WilmerHale is not representing IMF Bentham Limited, or any of its subsidiaries, in litigation, arbitration or other contentious matter*". Ms. Scherer added that (i) her current full-time employment was with Queen Mary University of London as Professor of Law, (ii) her position with WilmerHale as special counsel was part-time, and (iii) the firm's income in representing

Bentham IMF Capital Ltd. had no bearing on the salary or other financial rewards she received from WilmerHale.

117. On 12 October 2017, the President of the Tribunal informed the Parties that, for reasons unrelated to this case, Ms. Nicolet was no longer able to perform her role as secretary, and that he thus proposed to appoint Ms. Magali Garin, Associate at BETTO SERAGLINI, as the new Administrative Secretary to the proceedings. The President attached (i) a declaration of independence and impartiality and Undertaking from Ms. Garin to act in accordance with the ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries dated 1 August 2012, (ii) an undertaking from the Tribunal to ensure the Administrative Secretary's compliance with the ICC Rules, and (iii) Ms. Garin's *curriculum vitae*. The President requested the Parties to confirm Ms. Garin's appointment as Administrative Secretary by 25 October 2017.

118. The appointment of Ms. Garin as Administrative Secretary was confirmed by Claimant on 13 October 2017 and by Respondents on 17 October 2017.

119. On 20 October 2017, Respondents challenged Ms. Scherer as member of the Tribunal on the ground that her law firm represented a subsidiary of IMF Bentham Limited, a litigation funder which was funding the present case.

120. On 26 October 2017, the Tribunal sent to the Parties and the Secretariat an electronic copy and a hard copy of the signed Terms of Reference.

121. On 30 October 2017, the Secretariat informed the Tribunal and the Parties that, on 5 October 2017, the ICC Court had extended the time limit for establishing the Terms of Reference until 30 November 2017 as per Article 23(2) of the ICC Rules.

122. On 31 October 2017, Prof. Seraglini and Ms. Malintoppi provided comments to the Secretariat regarding the challenge of Ms. Scherer.

123. On 31 October 2017, Claimant provided its comments regarding the challenge filed by Respondents against Ms. Scherer. Claimant stated that although it did not believe that the circumstances suggested that the challenge should be successful, it agreed to the challenge due to risks of annulment of an award on this ground at the likely place of enforcement.

124. On 31 October 2017, Ms. Scherer notified to the Parties and the Secretariat of the ICC Court her resignation from the Tribunal.

125. On 1 November 2017, Claimant requested an extension of time for the filing of its Statement of Claim from 2 November 2017 until 14 November 2017, specifying that Respondents agreed to such extension on the condition that the same period of extension would apply for the submission of their Statement of defense.

126. On 1 November 2017, the Tribunal granted to Claimant the required extension of time and indicated that the same would be granted to Respondents. The Tribunal added that it would revert to the Parties regarding the potential impact of such extensions on the procedural timetable.

127. On 2 November 2017, the Tribunal reverted to the Parties to propose an amended procedural timetable taking into account the granted extensions, for their comments.

128. On 6 November 2017, Claimant and Respondents informed the Tribunal of their agreement with the proposed amended procedural timetable.

129. On 7 November 2017, the Secretariat of the ICC Court sent a letter to the Tribunal and the Parties, noting that the amount in dispute was USD 112,000,000. The Secretariat also reiterated its invitation to Respondents to pay the balance of the advance on costs of USD 355,000 until 21 November 2017.

130. On 7 November 2017, the Tribunal issued Procedural Order no. 2 containing the amended Procedural Timetable.

131. On 9 November 2017, the Secretariat informed the Tribunal and the Parties that it had transmitted the Terms of Reference signed by the Parties and the Tribunal on 26 October 2017 to the Court at its session of 9 November 2017, pursuant to Article 23(2) of the ICC Rules. The Secretariat also acknowledged the appointment of Ms. Garin as new Administrative Secretary and the Parties' agreement to such appointment.

132. On 14 November 2017, Claimant submitted its Statement of Claim, along with the Witness Statements of Mr. Crawford, Mr. Grezda, Witness Statements/Expert Reports and attachments of Mr. Mamer, Mr. Bertram, Legal authorities CL-1 to CL-15 and Exhibits C-1 to C-162.

133. On 16 November 2017, the Secretariat of the ICC Court informed the Tribunal and the Parties that the Court had accepted Ms. Scherer's resignation acting as co-arbitrator, pursuant to Article 15(1) of the ICC Rules, and appointed Dr. Sabine Konrad as co-arbitrator on behalf of Respondents, pursuant to Articles 13(4) and 15(1) of the ICC Rules.

134. On the same day, the Secretariat informed Ms. Scherer that the Court had accepted her resignation, asked her to return the file by 23 November 2017 and fixed her fees at USD 32,500.

135. On 17 November 2017, Claimant sent to the Tribunal, the Secretariat and Respondents hard copies of its Statement of Claim.

136. On 21 November 2017, the Secretariat sent a letter to the Tribunal and the Parties stating that because it understood that the amount in dispute had increased, the Court would examine whether to readjust the advance on costs.

137. On 24 November 2017, the Secretariat of the ICC Court noted that it had not received payment of the balance of the advance on costs from Respondents and thus invited Claimant to substitute for Respondents by paying USD 355,000 by 26 December 2017.

138. On 1 December 2017, the Tribunal consulted the Parties on hearing dates and gave its availabilities, inviting the Parties to confer and agree, before 12 December 2017, on (i) the number of days that would be required in their view, and (ii) proposed hearing dates.

139. On 12 December 2017, Respondents asked the Tribunal for a ten-day extension in order to address the matter of hearing dates, as they were in the process of finalizing the retention of outside counsel in addition to the State Advocate's Office. Claimant indicated that a five-day hearing would probably be required and indicated its preference for a hearing at the dates suggested between 3 and 20 December 2018.

140. On the same day, the Tribunal granted Respondents the extension requested until 22 December 2017.

141. On 15 December 2017, Claimant wrote a letter to the Secretariat of the ICC Court (i) expressing its disappointment that Respondents had failed to pay their shares of the advance on costs, and (ii) asking for an extension of the time within which to substitute payment for Respondents' share of the advance of costs, precisely of fourteen days following the receipt of the Statement of Defence.

142. On 18 December 2017, the Secretariat informed Claimant that it could not derogate from the obligations to ensure the necessary payments to the arbitrators and of the ICC administrative expenses and thus reminded Claimant that it was expecting to receive the payment requested within the due deadline.

143. On 22 December 2017, Respondents asked the Tribunal for an additional two-week extension to address the matter of hearing dates, in order to finalise the rentention of outside counsel.

144. On 22 December 2017, the Tribunal granted Respondents the extension required to provide its availabilities for the hearing date until 5 January 2018.

145. On 28 December 2017, the Secretariat of the ICC Court granted additional time to Claimant to pay Respondents' share of the advance on costs.

146. On 5 January 2018, Mr. Audley Sheppard and Mr. Tim Schreiber, from Clifford Chance, informed the Tribunal, Claimant and the Secretariat that they had been appointed as new counsel to the Respondents.

147. On 8 January 2018, the Tribunal acknowledged receipt of Mr. Sheppard and Mr. Schreiber's notice of appointment as counsel to the Respondents and agreed to grant Respondents one week, until 15 January 2018, to provide their comments on Procedural Order no. 2. The Tribunal also invited Respondents to update their mailing list in order

to take into account that on 16 November 2017, the ICC accepted Ms. Scherer's resignation and appointed Dr. Konrad on behalf of Respondents.

148. On the same day, Claimant wrote to the Tribunal, announcing that it was about to write in response to Respondents' counsel's communication of 5 January 2018 and indicated that it may be requesting the Tribunal to reconsider the extension of time until 15 January 2018, for reasons to be explained.

149. As announced, Claimant then objected to the granting of an extension until 15 January 2018 for Respondents to provide their availabilities for a hearing, on the ground that the successive extensions granted to Respondents had been putting several members of Claimant's legal team in an "*untenable position in several other proceedings*". Claimant thus requested that the Tribunal order Respondents to at least state their availability on or before 11 January 2018. Claimant also requested a confirmation of the Tribunal that Procedural Order no. 2, and in particular the time-limits and procedural steps approved by Respondents on 6 November 2017, was not open to a renewed discussion.

150. On 9 January 2018, the Tribunal clarified that the dates in Procedural Order no. 2 already agreed upon by the Parties were not to be reconsidered. The Tribunal added that, given the difficulties faced by Claimant's counsel, Respondents were invited to provide an approximate estimate of the length of the hearing and confirm their availability on the proposed slots, by 11 January 2018 if possible and, in any event, no later than 15 January COB.

151. On 12 January 2018, Claimant requested to the Secretariat of the ICC an extension of time to 1 March 2018 in order to assess whether to make a request for separate advances on costs. Claimant specified that the full payment of its share of the advance on costs would at any rate fully cover the Tribunal's fees and expenses and the ICC Administrative Costs up to that point in time, so that it appeared premature to insist on Claimant substituting for Respondents' share at this point.

152. On 15 January 2018, Respondents sent to the Tribunal a Motion for Extension of Deadline and Response re Hearing Date, along with Exhibits R-2 to R-5, in which they (i) requested to file their Statement of Defence and Counterclaims on 30 April 2018 and (ii) confirmed their availability for a hearing from 14 to 18 January 2019.

153. On the same day, the Tribunal acknowledged receipt of Respondents' Motion of 15 January 2018 and invited Claimant to provide its comments by 18 January 2018.

154. On 18 January 2018, the Secretariat of the ICC Court acknowledged receipt of Claimant's letter dated 12 January 2018 and granted Claimant an extension for the payment of Respondents' shares of the advance on costs until 1 March 2018.

155. On 18 January 2018, Claimant submitted its Response to Respondents' Motion in which it asked that the Tribunal dismiss the Motion in its entirety and, if the Motion were to be granted, to fix a time for the Parties to attempt to negotiate mutually acceptable

amendments to the procedural timetable that would not materially alter the current overall duration of the proceedings.

156. On 19 January 2018, the Tribunal acknowledged receipt of Claimant's submission of 18 January 2018 in response to Respondents' motion dated 15 January 2018 requesting a two-month extension of time for the filing of their Statement of Defence and Counterclaims, and indicated that it would revert shortly regarding the Parties' submissions.

157. On 24 January 2018, the Tribunal issued Procedural Order no. 3, in which it (i) granted in part the extension sought by Respondents, ordering them to submit their Statement of Defence and Counterclaims, with accompanying documents, by 9 April 2018 and (ii) invited the Parties to consult each other in order to seek mutually acceptable amendments, if any, to the procedural timetable set out in Procedural Order no. 2.

158. On 5 February 2018, Claimant communicated to the Tribunal an amended procedural timetable on which the Parties had agreed on and informed the Tribunal that both Parties would be available for the hearing from 21 to 25 January 2019.

159. On 6 February 2018, the Tribunal took note of the Parties' agreement on the amended procedural timetable and indicated that it was available on the hearing dates proposed by the Parties and that it would shortly circulate a new procedural order with a revised procedural timetable.

160. On 8 February 2018, the Tribunal issued Procedural Order no. 4 containing the revised procedural timetable.

161. On the same day, Respondents asked for a clarification that the Tribunal gives effect to the Parties' agreement that all deadlines refer to "*midnight Zurich time*". In an email dated 9 February 2018, the Tribunal asked whether Respondents found paragraph 144 of the Terms of Reference incomplete for the purposes mentioned in Respondents' email, to which Respondents replied that paragraph 144 of the Terms of Reference was "*clear and complete*".

162. On 5 March 2018, the Secretariat of the ICC Court requested payment of Respondents' share of the advance on costs from Claimant.

163. On 26 March 2018, the Secretariat of the ICC Court granted Claimant additional time to pay Respondents' share of the advance on costs and indicated that unless it received the requested payment within the time limit granted, the Secretary General might invite the arbitral tribunal to suspend its work and set a time limit of not less than 15 days on the expiry of which the relevant would be considered withdrawn, pursuant to Article 37(6) of the ICC Rules.

164. On 9 April 2018, Respondents submitted their Statement of Defence, along with the Witness Statement of Mr. Puka, Expert Reports of Mr. MacGregor and Mr. Rogers, Legal authorities RL-1 and RL-2, and Exhibits R-1 to R-161.

165. On 12 April 2018, Claimant informed the Secretariat of the ICC Court that it would pay for Respondents' share of the advance on costs. Exchanges on material issues followed.

166. On 25 April 2018, the Secretariat informed the Tribunal and the Parties that, on 5 April 2018, the ICC Court had extended the time limit for rendering the final award until 30 April 2019 as per Article 31(2) of the ICC Rules.

167. On 27 April 2018, the President of the Tribunal acknowledged receipt of hard copies of Respondents' submissions submitted electronically on 9 April 2018 and indicated that some files sent in hard copies did not appear to have been submitted in accordance with paragraphs 9-11 of Procedural Order no. 1. The Tribunal also drew to the attention of the Parties the Tribunal's Decision on Bifurcation of 9 August 2017 whereby it held that its decision on jurisdiction would be joined to its decision on the merits.

168. On 2 May 2018, Respondents responded to the Tribunal's letter of 27 April 2018 by clarifying that the two videos on the flash drive which had not been named in accordance with Procedural Order no. 1 supported the photographic evidence submitted as Exhibits R-3 and R-4. Respondents also explained that the raw data contained in the "*monthly and quarterly reports of the Claimants*", which shows that Claimant's amount of debt grew month-by-month, was too "*immense*" to print and therefore stored on USB flash drive only.

169. On 24 May 2018, pursuant to Procedural Order no. 1 and 4, Claimant communicated to the Tribunal and Respondents its replies to the document request objections of Respondents, answer on Respondents' general objections, and publications and cases cited in the Answer on Respondents' General Objections.

170. On 12 June 2018, the Tribunal communicated to the Parties its Orders on the Parties' requests for the production of documents and invited the Parties to reach an agreement on mutually acceptable confidentiality arrangements by 18 June 2018. The Tribunal also informed the Parties that, given the slightly delayed issuance of the Orders on document production, they should produce all documents whose production was not subject to the Order on Confidentiality by 25 June 2018 instead of 20 June 2018.

171. On 21 June 2018, the Tribunal issued Procedural Order no. 5 containing its Order on Confidentiality, specifying that the documents covered by the Order should be produced by 2 July 2018, and reminding the Parties that they had to produce all documents whose production was not subject by the Order on Confidentiality by 25 June 2018.

172. On 21 June 2018, the Secretariat informed the Tribunal and the Parties that on 21 June 2018, the Court had increased the advance on costs, pursuant to Article 37 of the ICC Rules, and enclosed a Financial Table and Payment Requests.

173. On 9 July 2018, the Secretariat granted additional time to the Parties to pay the balance of their respective advance on costs until 23 July 2018.

174. On 1 August 2018, Claimant submitted its Reply, along with the Second Witness Statement of Mr. Grezda, the Deloitte Lost Profits Rebuttal Report of Mr. Mamer and its exhibits, the Deloitte Resource Rebuttal Report of Mr. Bertram, Legal Authorities CL-16 to CL-21 and Exhibits C-163 to C-184.

175. On 2 August 2018, after Respondents informed Claimant and the Tribunal that the document labeled as "Second Witness Statement of Mr. Grezda" was in fact Mr. Grezda's first witness statement, Claimant sent the second witness statement of Mr. Grezda.

176. On 13 August 2018, the Secretariat granted additional time to the Parties to pay the balance of their respective advances on costs until 27 August 2018, failing which the Secretary General might invite the Tribunal to suspend its work and set a time limit of not less than fifteen days on the expiry of which the claims would be considered withdrawn, pursuant to Article 37(6) of the ICC Rules.

177. On 28 August 2018, the Secretariat of the ICC informed the Parties that Respondents had not paid the balance of the advance on costs despite the Secretariat's invitations on 9 July, 24 July and 13 August 2018. The Secretariat thus enclosed a new payment request in which it extended the time limit until 12 September 2018, failing which it may request that Claimant pay the balance of the advance on costs on behalf of the defaulting parties.

178. On 29 August 2018, the Tribunal invited the Parties to confer and agree on material matters relating to the organization of the hearing scheduled for the week of 21 January 2019, such as the venue and the length of the hearing.

179. On 13 September 2018, the Secretariat invited Claimant to pay the balance of the advance on costs on behalf of Respondents.

180. On 17 September 2018, Claimant informed the Tribunal that the Parties were discussing the organization of the Hearing and believed that the full five days scheduled would be required.

181. On 18 October 2018, the Secretariat informed the Parties that Claimant had not paid the balance of the advance on costs and enclosed a new payment request extending the time limit until 2 November 2018.

182. On 7 November 2018, Respondents submitted their Rejoinder Brief, along with the Second Witness Statement of Mr. Endri Puka, Exhibits R-162 to R-188, Legal authorities RL-3 to RL-24, Rebuttal Expert Report of Gervase MacGregor (BDO) and Rebuttal Expert Report of Stephen Rogers (Arthur D. Little).

183. Between 7 and 16 November 2018, the Tribunal and the Parties exchanged emails concerning the organization of the Hearing and of the Pre-Hearing Conference Call.

184. In a letter to the Tribunal dated 13 November 2018, Claimant argued that Respondents had introduced numerous new factual allegations, submitted new factual exhibits and a 14-page witness statement and raised new issues in their Rejoinder Brief. Claimant notified the Tribunal that it intended to submit a request to strike from the record "*what appear*[ed] *to be new factual allegations and evidence submitted in breach of Procedural Order no. 1 and* [its] *due process rights*" by 19 November 2018 and requested the Tribunal to specify whether it expected this request to be submitted prior to this date.

185. On 15 November 2018, Respondents required until 3 December 2018 to respond to Claimant's Request of 19 November 2018 and to potentially file a Counter-Request to strike from the record potential new facts that were pleaded by the Claimant in its Reply, and/or the Claimant's Witness-/Expert Statements and/or the Exhibits filed with the Reply.

186. On 16 November 2018, the Tribunal took note of Respondents' email of 15 November 2018 and indicated that it would make a decision on appropriate delays for Respondents' reply after receiving Claimant's request, on or before 19 November 2018. The Tribunal also requested that the Parties refrain from making unsolicited submission on the matter.

187. On 19 November 2018, Claimant submitted a Motion to Strike/Reply to new evidence contained in the Witness Statement of Endri Puka dated 7 November 2018 and Respondents' Rejoinder Brief.

188. On 21 November 2018, Claimant and Respondents provided the Tribunal with their notice of witnesses and experts to be examined at the Hearing, pursuant to Procedural Order no. 1.

189. On 27 November 2018, the Tribunal took note of the fact that the Parties needed one more day to revert to it regarding the hearing schedule and, on 28 and 29 November 2018, Claimant and Respondents sent to the Tribunal their respective proposals for the hearing schedule, along with explanations on their position.

190. On 3 December 2018, Respondents submitted their Reply to Claimant's Motion to Strike dated 19 November 2018, in which they requested that such motion be rejected.

191. The Pre-Hearing Conference Call took place on 5 December 2018, following which, on 11 December 2018, the Tribunal sent a letter to the Parties noting the Parties' points of agreements and deciding the remaining issues on the organization of the Hearing.

192. On 12 December 2018, Claimant requested clarification on the organization of the Hearing.

193. On 14 December 2018, the Tribunal issued Procedural Order no. 6 in which it notably dismissed Claimant's request to strike from the record certain paragraphs of the Second Puka Witness Statement and Respondents' Rejoinder Brief, and granted Claimant the opportunity to file short witness statements from Mr. Grezda and/or Mr. Crawford on or before 24 December 2018 that would be strictly limited to responding to the pararagraphs that Claimant had requested to strike. In its email dated 14 December 2018, the Tribunal also confirmed some elements after Claimant sought clarification regarding the organization of the Hearing.

194. On 24 December 2018, Claimant submitted additional witness statements pursuant to Procedural Order no. 6, namely the Second Witness Statement of Mark Crawford and the Third Witness Statement of Kreshnik Grezda. Hard copies followed on 28 December 2018.

195. On 2 January 2019, the Tribunal informed the Parties that Ms. Garin would no longer act as Administrative Secretary and proposed to appoint Ms. Camille Teynier, an associate of BETTO SERAGLINI. The Tribunal invited the Parties to communicate their agreement or potential objections to such appointment by 4 January 2019.

196. On 2 January 2019, the Tribunal acknowledged receipt of the electronic copy and the hard copy of the additional witness statements sent by Claimant on 24 December 2018 and noted that Claimant filed new evidence along with these two witness statements, despite paragraph 17(e) of Procedural Order no. 6. The Tribunal invited Respondents to indicate their views on the issue by 4 January 2019 and to confirm whether they intended to request an authorization to file a Third Puka Witness Statement as per paragraph 17(c) of Procedural Order no. 6 or to make procedural observations on Claimant's submission.

197. On 2 January 2019, Claimant stated that it did not file any new factual exhibits but only witness statements along with documents the witnesses relied on, in compliance with Procedural Order no. 1, paragraph 19(v). Claimant argued that its mandatory right to be heard in adversarial proceedings granted it the right to respond to Respondents' allegations, to discuss the evidence submitted by Respondents and to rebut the evidence with its own evidence, and Claimant objected to such right being limited by Procedural Order no. 6.

198. On 4 January 2019, Respondents reverted to the Tribunal on Claimant's additional witness statements. They requested the authorization to file a third Witness Statement by Mr Puka strictly limited to responding to the Claimant's additional witness statements along with supporting documentation, pursuant to paragraph 17(c) of Procedural Order no. 6 and paragraph 41 of the Rules of procedure. Respondents also agreed to allow the Claimant's new documentary evidence on the records "*under the proviso that the Tribunal grants the Respondents' request* […] *to file supporting documentation with the additional Puka Witness Statement*". Furthermore, Respondents stated they had no objections against the appointment of Ms. Teynier as Administrative Secretary.

199. On 4 January 2019, the Tribunal informed the Parties that, considering that Respondents had not objected to the filing of exhibits by Claimant with the two additional witness statements, and the need to ensure the equality of the Parties' procedural rights, the Tribunal decided to grant to Respondents the right to submit a third Witness Statement by Mr Puka , along with supporting documentation. The Tribunal added that such additional witness statement should be "*short and strictly limited to responding to the Claimant's Additional Witness Statements*" and should be submitted by 11 January 2019.

200. On 4 January 2019, Claimant informed the Tribunal that it had no objection to the appointment of Ms. Teynier as Secretary to the Tribunal.

201. On 7 January 2019, both Parties sent their list of participants and attendees to the Hearing.

202. On 8 January 2019, the Tribunal sent to the Parties Ms. Teynier's signed declaration of independence and impartiality and undertaking to act in accordance with the Secretariat of the ICC's revised Note on the Appointment, Duties and Remuneration of Administrative Secretaries.

203. On 8 January 2019, Claimant informed the Tribunal that it had concerns about the inclusion by Respondents of eight previously undisclosed individuals as participants and attendees of the Hearing, even though Claimant indicated in its 28 November communication that the venue was booked for twenty-five persons.

204. On 9 January 2019, Respondents requested that Claimant's "*move to limit the attendees for the Respondents in the oral hearing*" be rejected. Respondents stated that it would be unrealistic for Claimant to assume the presence of only one party out of the three that it sued. Respondents added that, nevertheless, they indicated in their letter of 7 January 2019 that not all attendees would be present in the Hearing room at all times, and that they would liaise with Claimant's counsel to accommodate a reasonable number of attendees in the hearing room by 11 January 2011.

205. On 9 January 2019, the Tribunal acknowledged receipt of Claimant's and Respondents' emails regarding the organization of the hearing and indicated that it awaited the Parties' proposals by 11 January 2011, as suggested by Respondents.

206. On 11 January 2019, Respondents sent an updated list of participants and attendees to the Hearing.

207. On 11 January 2019, Respondents submitted the Third Witness Statement of Mr. Puka.

208. On 11 January 2019, Claimant informed the Tribunal of a disagreement between the Parties regarding a protocol suggested by Claimant on 9 January 2019 for the introduction of underlying information from the expert reports during the experts' examinations, further to the Parties' agreement to share native data used in these reports

and further to the Tribunal's view that the Parties should make available all basic information on which their experts' statements relied. After Respondents objected to this suggestion to file important amounts of data one week before the hearing, Claimant asked the Tribunal to give direction regarding the proposed protocol.

209. On 11 January 2019, Respondents informed the Tribunal that, in March 2018, the Parties agreed to exchange native data/primary data to facilitate the work of the experts. According to Respondents, the discussion on such data could have taken place in previous submissons. Respondents then pointed out that Claimant chose to wait one week before the hearing to introduce numerous electronic files, which Respondents considered an "*ambush jeopardizing the objective to conduct efficient proceedings and seriously violating the Respondents' right to be heard and to prepare their defence in line with the Procedural Timetable and the Procedural Rule*".

210. Respondents thus asked the Tribunal to reject Claimant's request to introduce new documents in the arbitration because (i) they did not form part of the Expert Reports, (ii) Claimant's request came one week after the cut-of date for submitting new documentary evidence, *i.e.* 8 November 2018 when Respondents' Rejoinder was filed or – at the latest – Claimant's 24 December 2018 deadline to submit additional evidence, (iii) they did not respect the Parties' agreement to share native data to facilitate the work of experts. Respondents added that the use of electronic data was neither foreseen in Procedural Order no. 1, nor in any other Procedural Order or direction of the Tribunal, and was not a question raised during the Pre-Hearing Conference Call of 5 December 2018. Finally, Respondents argued that Claimant had withheld evidence they intended to submit and that Respondents and their experts had already prepared for the Hearing.

211. On 12 January 2019, Claimant sent to the Tribunal exchanges of emails between Claimant and Respondents which, according to Claimant, proved that native/primary data sought to be referenced by Claimant had been provided on 28 November 2018. Claimant also contested that the data prepared and relied upon by Respondents' experts in the development and publication of their reports did not form part of those reports. Claimant added it would amount to a violation of its right to be heard and would frustrate the proper adjudication of the case if the Tribunal were to strike Claimant's request.

212. On 12 January 2019, the Tribunal asked the Parties to clarify (i) the nature of the native/primary data sought to be referenced by the Claimant and the number of documents it would amount to, (ii) the reason for which the matter of the production and/or addition to the record of this material at the Hearing was not addressed earlier, and (iii) whether Respondents' view was that only the pdf versions of the excel sheets or the excels sheets without formulas were part of the record.

213. On 14 January 2019, Claimant answered to the Tribunal's questions relating to the data exchanged. It notably indicated that a large volume of underlying data had been exchanged but only a small fraction was sought to be referenced and that the issue had been raised with Respondents at the earliest possible time.

214. On 14 January 2019, Respondents contested Claimant's email but informed the Tribunal that to end the debate on this issue, they would agree on Claimant's motion to be allowed to refer to native data at the hearing under the conditions that (i) the native data was introduced by way of printout only, and (ii) Respondents could also rely on the native data if so advised. Respondents also stated that the formulas and models on which the expert assessments relied could be subject to potential scrutiny by the Tribunal and the Parties.

215. On 14 January 2019, both Parties sent to the Tribunal their updated list of main factual and legal issues to be determined by the Tribunal and the Parties' joint chronological list of all factual exhibits, as requested in the Tribunal's letter dated 11 December 2018.

216. On 15 January 2019, Tribunal acknowledged receipt of Parties' respective email and declared (i) that the native data could be introduced by way of printouts only, and (ii) that Respondents could also rely on so-called native data if so advised. The Tribunal also invited the Parties to confirm that all the practical matters related to the hearing had been settled and that there was no unresolved issue in that respect.

217. The Hearing took place between 21 and 24 January 2019 in Paris, France.

218. On 28 January 2019, the Tribunal issued Procedural Order no. 7 regarding the transcript and the Parties' Post-Hearing Briefs and Statements of Costs.

219. On 29 January 2019, Claimant acknowledged receipt of Procedural Order no. 7 and asked the Tribunal to confirm its understanding at the Hearing that (i) new legal exhibits could be submitted not only in reply to the Tribunal's questions but also in response to a pleading prior to the Post-Hearing Brief and (ii) that no new factual exhibits could be submitted.

220. On 31 January 2019, the Tribunal communicated to the Parties a list of questions to be answered in the Post-Hearing Briefs and a clarification on the points raised in Claimant's email dated 29 January 2019 regarding the submission of new factual and legal exhibits in the Post-Hearing Briefs.

221. On 1 February 2019, Claimant requested that question no. 2 to be answered by Respondents in their Post-Hearing Brief be struck, on the ground that the cut-off date for producing evidence had passed. Claimant argued that granting Respondents to further expand on the subject would violate Claimant's right to equal treatment and that should question no. 2 not be struck, the Tribunal would be respectfully requested to take note of Claimant's email as a formal protest pursuant to Article 40 ICC Rules and Swiss Supreme Court precedent.

222. On 1 February 2019, the Tribunal acknowledged receipt of Claimant's email of the same day and invited Respondent to provide their comments on Claimant's position by 6 February 2019.

223. On 6 February 2019, Respondents requested that Claimant's motion to strike question no. 2 be rejected. Among several reasons, Respondents indicated that (i) the Tribunal had the right and power to establish the facts of the case, and thus to summon any party to provide additional evidence at any time during the proceedings, pursuant to Article 25 of the ICC Rules, and that (ii) Respondents would only elaborate on and clarify the origin of the photographs and videos already on record, and would not introduce factual evidence on new topics.

224. On 6 February 2019, Respondents communicated to the Tribunal their experts' questions for guidance on question no. 6 to be answered by the Parties in their Post-Hearing Briefs.

225. On 11 February 2019, the Tribunal acknowledged receipt of Respondents' email and their requests for clarification, and invited Claimant to provide its opinion on such requests by 15 February 2019.

226. On 15 February 2019, Respondents informed the Tribunal that the Parties were discussing potential corrections to the transcript and would then forward them to the court reporters, in accordance with Procedural Order no. 7.

227. On 15 February 2019, Claimant addressed its experts' understanding and questions to the Tribunal. In particular, Claimant asked whether the experts should conduct a sensitivity analysis or just a calculation without adjusting the lost-profits analysis. Claimant further offered to convene a telephone conference with the Tribunal, counsel and experts in order to clarify the scope of the experts' tasks efficiently.

228. On 17 February 2019, the Tribunal issued Procedural Order no. 8 in which it rejected Claimant's request to strike question no. 2 and maintained question no. 2 to be answered by Respondents in their Post-Hearing Brief.

229. On 21 February 2019, Respondents referred to Claimant's email dated 15 February 2019 regarding clarifications on calculations, and set out some issues that, according to them, would occur with Claimant's suggestion of a "*value sensitivity analysis*". Claimant also agreed with Claimant on the necessity of a phone call between the Tribunal members, the experts and counsel.

230. On 22 February 2019, Claimant sent to the Tribunal the party-approved version of the Hearing transcripts.

231. On 4 March 2019, the Tribunal reverted to the Parties and specified that its question no. 6 aimed at understanding the implications of each of the four experts' testimony. The Tribunal gave further instructions as to how the Parties' experts should make the calculations and indicated that should the Parties consider that they could not perform the exercise in relation to one or several questions, they should provide the reason why.

232. On 14 March 2019, Respondents informed the Tribunal that the Parties had liaised and were in agreement as to the length of each Party's Post-Hearing Brief. The Tribunal took note of this on 15 March 2019.

233. On 15 April 2019, the Parties submitted their Post-Hearing Brief along with appendices, of which the Tribunal acknowledged receipt on 16 April 2019.

234. On 25 April 2019, the Secretariat informed the Tribunal and the Parties that, on 11 April 2019, the ICC Court had extended the time limit for rendering the final award until 31 July 2019 as per Article 31(2) of the ICC Rules.

235. On 26 April 2019, Dr. Konrad wrote to the Parties to make a disclosure.

236. On the same day, Claimant thanked Dr. Konrad for her disclosure and stated that it had no concerns regarding her impartiality in the matter. Respondents did not comment on Dr. Konrad's disclosure.

237. On 7 May 2019, Respondents sent a letter to the Tribunal and to Claimant, complaining of violations of the Tribunal's instructions and the procedural rules in Claimant's Post-Hearing Brief. In essence, Respondents argued that Claimant corrected Respondents' experts' data to provide the calculations requested by the Tribunal.

238. On 9 May 2019, the Tribunal acknowledged receipt of Respondents' letter dated 7 May 2019 and invited Claimant to provide its comments by 17 May 2019.

239. In light of the above, on 9 May 2019, Claimant requested an extension of the deadline for the submission of the Statements of Costs until 24 May 2019.

240. On 10 May 2019, the Tribunal granted to both Claimant and an extension of the deadline to submit their Statement of Costs until 24 May 2019.

241. On 17 May 2019, Claimant submitted its answer to Respondents' Motion to Strike dated 7 May 2019.

242. On 24 May 2019, Claimant and Respondents submitted their Statement of Costs.

243. On 12 June 2019, the Tribunal issued Procedural Order no. 9, in which it granted Respondents' Motion that paragraphs 262-263, 286-290 and 291-295 of Claimant's Post-Hearing Brief be struck from the record, and rejected Respondents' Motion that paragraphs 300(c) of Claimant's Post-Hearing Brief be struck from the record.

244. On 10 July 2019, the Secretariat informed the Tribunal and the Parties that, on 4 July 2019, the ICC Court had extended the time limit for rendering the final award until 30 August 2019 as per Article 31(2) of the ICC Rules.

245. On 29 August 2019, the Secretariat informed the Tribunal and the Parties that, on 1 August 2019, the ICC Court had extended the time limit for rendering the final award until 30 September 2019 as per Article 31(2) of the ICC Rules.

246. On 3 September 2019, Dr. Konrad informed the Parties that she had joined Morgan, Lewis & Bockius LLP as of 1 September 2019 and that there were no conflicts of interests with the present case.

247. On 19 September 2019, the Secretariat informed the Tribunal and the Parties that, on 19 September 2019, the ICC Court had extended the time limit for rendering the final award until 31 October 2019 as per Article 31(2) of the ICC Rules.

248. On 16 October 2019, Prof. Seraglini informed the Parties that he had joined Freshfields Bruckhaus Deringer LLP as of 2 October 2019 and, in this context, made a disclosure to the Parties. The Parties did not comment on Prof. Seraglini's disclosure.

249. On 29 October 2019, the Secretariat informed the Tribunal and the Parties that, on 24 October 2019, the ICC Court had extended the time limit for rendering the final award until 29 November 2019 as per Article 31(2) of the ICC Rules.

250. On 12 November 2019, the Tribunal requested that Respondents clarify a point regarding the Ministry involved in this case, in light of the change of name from the Ministry of Energy and Industry to the Ministry of Infrastructure and Energy in Respondents' submissions.

251. As detailed in section 1.2 above, several emails and letters were exchanged on this issue between 20 November 2019 and 28 January 2020.

252. On 28 November 2019, the Secretariat informed the Tribunal and the Parties that, on 28 November 2019, the ICC Court had extended the time limit for rendering the final award until 31 December 2019 as per Article 31(2) of the ICC Rules.

253. On 19 December 2019, the Secretariat informed the Tribunal and the Parties that, on 19 December 2019, the ICC Court had extended the time limit for rendering the final award until 31 January 2020 as per Article 31(2) of the ICC Rules.

254. On 30 January 2020, the Secretariat informed the Tribunal and the Parties that, on 30 January 2020, the ICC Court had extended the time limit for rendering the final award until 31 March 2020 as per Article 31(2) of the ICC Rules.

255. On 20 March 2020, the Secretariat informed the Parties that, on 18 March 2020, it had received a draft award submitted by the Tribunal.

256. On 27 March 2020, the Secretariat informed the Tribunal and the Parties that, on 5 March 2020, the ICC Court had extended the time limit for rendering the final award

until 30 April 2020 as per Article 31(2) of the ICC Rules, to cover the scrutiny and notification process.

257. On 30 April 2020, the Secretariat informed the Tribunal and the Parties that, on 2 April 2020, the ICC Court had extended the time limit for rendering the final award until 29 May 2020 as per Article 31(2) of the ICC Rules, to cover the scrutiny and notification process.

258. On 30 April 2020, the Secretariat informed the Parties that, on that day, the ICC Court had approved the draft award submitted by the Tribunal, which would be notified after being finalized and signed by the Tribunal.

259. On 5 May 2020, the Tribunal invited the Parties to indicate whether they agreed to the Final Award being (i) signed electronically by the members of the Tribunal and/or (ii) notified to the Parties electronically by the ICC Court, in order to avoid important delays due to the Covid-19 pandemic.

260. After Claimant's counsel expressed the wish that only receipt of the signed originals of the Final Award would trigger any time limits, on 6 May 2020, the Secretariat informed the Parties that it would follow its usual practice and notify the signed originals of the Final Award upon receipt from the Tribunal, and send a courtesy copy of the Final Award by email.

261. On 11 May 2020, the Tribunal informed the Parties that after Claimant's counsel provided the ICC and the Tribunal with Claimant's banking information on 1 May 2020, the Tribunal noted that the name of the entity on that document was Omni Bridgeway Limited. The Tribunal thus enquired whether Omni Bridgeway Limited was a new funder or simply the new corporate name of Bentham IMF Capital Ltd, with no change of legal entity. Dr. Konrad also made a disclosure in this context.

262. On 11 May 2011, Claimant's counsel stated that, in November 2019, Omni Bridgeway Limited merged with IMF Bentham Ltd, the parent company to Bentham IMF Capital Ltd, and that all entities adopted the name Omni Bridgeway in February 2020.

263. On 15 May 2020, the Tribunal took note of the information provided by Claimant's counsel on 11 May 2020 and invited Respondents to provide their comments on this information and on Dr. Konrad's disclosure by 22 May 2020.

264. On 20 May 2020, Respondents submitted a further Request for Disclosure.

265. On 28 May 2020, the Secretariat informed the Tribunal and the Parties that, on 7 May 2020, the ICC Court had extended the time limit for rendering the final award until 30 June 2020 as per Article 31(2) of the ICC Rules, to cover the notification process.

266. On 29 May 2020, the members of the Tribunal responded to Respondents' Request for Disclosure of 20 May 2020.

267. On 26 June 2020, the Secretariat informed the Tribunal and the Parties that, on 4 June 2020, the ICC Court had extended the time limit for rendering the final award until 31 July 2020 as per Article 31(2) of the ICC Rules, to cover the notification process.

268. On 1 July 2020, the Tribunal declared the proceedings closed, as per Article 27 of the ICC Rules.

3. SUMMARY OF RELEVANT FACTS

3.1. The Legislative Context of the Dispute

269. The present dispute relates to the operation of three State-owned oilfields in southwestern Albania to which Claimant has ownership rights, namely the Cakran Oilfield, the Gorisht Oilfield and the Ballsh Oilfield.[19] According to Claimant, the Oilfields have first come into production in the 1960s and 1970s.[20]

270. The granting of the Oilfields' ownership rights to Claimant occurred in the following legislative context.

271. Pursuant to Albania's Petroleum Law (Exploration and Production) No. 7746 of 28 July 1993 (hereafter, the "**Petroleum Law**"), all petroleum deposits existing in their natural condition within the jurisdiction of Albania are the exclusive property of the Albanian State, as represented by the appropriate Ministry, and are to be used for the benefit of the people of Albania.[21]

272. The Petroleum Law designates the Ministry of Industry, Natural Resources and Energy as the responsible authority for supervision of oil and gas activities in Albania and permits the Ministry of Industry, Natural Resources and Energy to "*enter into a Petroleum Agreement with any Person authorizing that Person on the terms and conditions set out* [in Article 2 of the Petroleum Law] *to explore for, develop and produce Petroleum in the Contract Area*".[22] Article 2 of the Petroleum Law defines as the **Petroleum Operations** all or any of the operations related to the exploration for development, extraction, production, separation and treatment, storage and transportation and sale or disposal of petroleum up to the point of export, or to the agreed delivery point in Albania or the point of entry into a refinery and includes natural gas processing operations but does not include petroleum refining operations.[23] Claimant states that such agreement is subject to approval by Albania's Council of Ministers, and Respondents do not dispute this fact.[24]

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[19] Statement of Claim, para. 2, p. 1, para. 45, p. 6; Statement of Defence, para. 97, p. 36.
[20] Statement of Claim, para. 45, p. 6.
[21] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 3, p. 3.
[22] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5, p. 4.
[23] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 2, p. 3, definition of "Petroleum Operations".
[24] Statement of Claim, para. 48, p. 6.

273. In conjunction with the enactment of the Petroleum Law, the Albanian Government established a national oil and gas company, Albpetrol.[25]

274. On 26 July 1993, the Ministry of Industry, Natural Resources and Energy and Albpetrol entered into an agreement (hereafter, the "**Albpetrol Agreement**") whereby the Ministry of Industry, Natural Resources and Energy authorized Albpetrol to carry out petroleum operations pursuant to a license to be issued by the Ministry of Industry, Natural Resources and Energy in respect of each oil and gas field existing at the time.[26] Claimant states that the existing fields included the Cakran Oilfield, the Gorisht Oilfield and the Ballsh Oilfield, and Respondents do not dispute this fact.[27]

275. The Albpetrol Agreement was incorporated into the Petroleum Law by an amendment dated 29 July 1994 (hereafter, the "**Petroleum Law Amendment**").[28]

276. Pursuant to the Petroleum Law Amendment, the Ministry of Industry, Natural Resources and Energy granted Albpetrol the right to "*cooperate with juridical for*[e]*ign and native persons and international financial institutions in accordance with the best standar*[d]*s and practices of international oil industry*".[29]

277. On 3 September 1993, AKBN was set up as an institution under the control of the Ministry of Industry, Natural Resources and Energy. Its duties, modified by decree in 2006, were *inter alia* the following:

- Consult, propose and cooperate with relevant government structures for drafting policies in the field of mining, oil and hydropower;

- Implement the government policies in the field of mining, oil and hydropower;

- Promote mineral and oil resources, negotiate oil and mining agreements and pursuing implementation of their development plans;

- Prepare the documentation for issuing licenses and authorizations in compliance with the law;

- Supervise the mining, post-mining, oil and hydropower activities;

[25] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 2, p. 2, definition of "Albpetrol".
[26] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Albpetrol Agreement, pp. 13-16.
[27] Statement of Claim, para. 51, p. 7.
[28] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 2, pp. 11-12.
[29] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Albpetrol Agreement, Section 1, p. 13; **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Petroleum Law Amendment, Article 1, amending Article 12 of the Petroleum Law, p. 11.

- Monitor exploited areas, mining risk and post-mining activity.[30]

278. In 1994, a law on the Fiscal System in the Hydrocarbons Sector (Exploration – Production) was adopted (hereafter, the "**Petroleum Fiscal Law**").[31] According to Claimant, it was adopted to give effect to the provision of the Petroleum Law pursuant to which "*a Petroleum Agreement to which a Foreign Investor is a party may contain provisions for the purpose of ensuring the stability of the fiscal regime*". This is not disputed by Respondents.[32]

3.2. Contractual mechanisms between the Parties: the License Agreements and Petroleum Agreements

279. In 2007, GBC (then known as Stream) entered into negotiations with AKBN and Albpetrol regarding the conduct of operations in the Cakran Oilfield, the Gorisht Oilfield and the Ballsh Oilfield.[33]

280. On 4 July 2007, pursuant to the Petroleum Law, a License Agreement for each of the Oilfields was thus issued by the METE,[34] "*as represented by*" AKBN, to Albpetrol. The License Agreement was designed to provide for the rights and obligations of the Licensor (the METE at the time of conclusion) and the Licensee (Albetrol at the time of conclusion) regarding the exploration and production of oil.[35]

281. The License Agreements defined the term "*Licensee*" as "*Albpetrol and, in conformity with 'Albpetrol Agreement' provisions, any its permitted transferee, successor or assignee*".[36]

282. Article 6.1 of the License Agreements provides that Albpetrol, as Licensee, is authorized to conduct Petroleum Operations for the Project in the Contract Area (see definitions below) only on the basis of a Petroleum Agreement.[37]

283. Albpetrol and Stream then entered into a Petroleum Agreement for each of the Oilfields. As mentioned above, the date of signature of the Petroleum Agreements is 8 August 2007 according to Claimant,[38] and 19 July 2007 according to Respondents.[39] The Parties

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[30] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Decree No. 445 dated 03.09.1993, p. 24, replaced by **CL-2** – The Decree of the Council of Ministers No. 547 dated 09.03.2006.
[31] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Petroleum Fiscal Law, p. 21.
[32] Statement of Claim, paras. 57-58, p. 8, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5(3)(d), p. 4.
[33] Statement of Claim, para. 60, p. 8.
[34] As mentioned in section 1.2, the legal successor of the METE was the MEI pursuant to Decision No. 833 of the Council of Ministers dated 18 September 2013.
[35] **C-2**, **C-3** and **C-4** – License Agreements.
[36] **C-2**, **C-3** and **C-4** – License Agreements, Article 1.1, p. 10, definition of "Licensee".
[37] **C-2**, **C-3** and **C-4** – License Agreements, Article 6.1, p. 21.
[38] **C-5**, **C-6** and **C-7** – Petroleum Agreements.
[39] **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements.

agree that there appears to be no difference between the two versions of the Petroleum Agreements, except for the diverging dates.[40]

284. The Petroleum Agreements refer to Stream as "*Contractor*", which is defined as "*Contractor and its respective successors or permitted assignees according to Article 16* [of the Petroleum Agreement]".[41]

285. Concurrently to the signature of the Petroleum Agreements, Albpetrol, Stream and AKBN entered into instruments of transfer for each Oilfield whereby Albpetrol transferred "*all its rights, privileges and obligations under the Licen*[s]*e Agreement* […] *to Stream subject to* [the] *Petroleum Agreement*" (hereafter, the "**Instrument of Transfer**").[42] The Instruments of Transfer are part of the Petroleum Agreements, as their Annex E.

286. On 8 August 2007, the Council of Ministers approved the License Agreements, the Petroleum Agreements and the Instruments of Transfer, to be effective on the date the decision approving the Petroleum Agreements became effective (hereafter, the "**Effective Date**").[43] According to Claimant, the Effective Date is 24 August 2007, which Respondents do not contest.[44]

287. The Parties agree that, as a result of entering into the Instruments of Transfer, Stream became a party to the respective License Agreements.[45] However, the Parties disagree as to the purpose, the scope and the interplay of the License Agreements and the Petroleum Agreements, and in particular as to which relationships are governed by each agreement.

288. According to Claimant, the purpose of the signature of the Petroleum Agreements was to implement the License Agreements.[46] Claimant considers that the License Agreements are the title documents which grant the rights to and set out the obligations of the Licensee, and that they contemplate the creation of the Petroleum Agreements for

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[40] Statement of Defence, para. 76, p. 31; Reply, para. 76, p. 12.
[41] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 1.17, p. 4, definition of "Contractor".
[42] **C-8** – Instrument of Transfer for the License Agreement for the Cakran-Mollaj Oilfield, dated 8 August 2007 among Albpetrol Sh. A., Stream Oil & Gas Ltd. and The National Agency of Natural Resources, p. 1.
[43] **CL-3** – Decree of the Council of Ministers No. 509, dated 08.08.2007; **C-2**, **C-3** and **C-4** – License Agreements, Article 27.1, p. 67: "*This License Agreement shall be binding upon each of the Parties hereto from the date when the Council of Ministers issues a decision approving the Petroleum Agreement, reached on the basis of this License Agreement, between LICENSEE and a foreign company selected in accordance with the Petroleum Law. The date the decision approving the Petroleum Agreement carries shall be the 'Effective Date'*"; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 1.30, p. 5: "*'Effective Date' means the date on which the Council of Ministers in accordance with the Petroleum Law issues a decision approving this Agreement*".
[44] Statement of Claim, para. 65, p. 9, referring to First Witness Statement of Mark Crawford, para. 20, p. 5.
[45] Statement of Claim, para. 64, p. 9; Statement of Defence, para. 102, p. 37.
[46] Statement of Claim, paras. 61-62, p. 8.

the purposes of implementing the License Agreements and providing the operational terms necessary to undertake the Petroleum Operations.[47]

289. Claimant thus considers that as a result of the Instrument of Transfer, Stream became a party to each License Agreement and that Albpetrol and Stream each became a Licensee in respect of each of the Oilfields.[48]

290. Claimant refers collectively to the License Agreements and the Petroleum Agreements as the Production Sharing Agreements ("**PSAs**") throughout its submissions,[49] a term that Respondents contest by stating that "[t]*his 'one-size-fits-all' approach* […] *disregards the interplay between the License Agreements and the Petroleum Agreements*".[50] The term "*PSAs*" will thus only be used by the Tribunal when summarizing Claimant's position on the matter.

291. For their part, Respondents consider that the License Agreements govern the relationship between the Ministry (the Licensor) and Albpetrol / Claimant (both Licensees), whereas the Petroleum Agreements govern the internal relationship between Albpetrol and Claimant (Licensees).

292. According to Respondents, the License Agreements are designed to grant licenses from the competent Ministry to Albpetrol to conduct petroleum operations, and to give Albpetrol the power to assign its license rights to third parties.[51] Respondents argue that according to Article 5 of the Petroleum Law, the Ministry may enter into such agreements with third parties to authorize them to conduct petroleum operations, and that, according to Recital D of the License Agreements and pursuant to Article 12 of the Petroleum Law, Albpetrol may "*transfer and pass all or part of its rights to a legal, local or foreign, financial institution* […]".[52]

293. In support of their position that the License Agreements govern the relationship between the Ministry as the Licensor and Albpetrol / Claimant as Licensees, Respondents argue that Article 6.1 of the License Agreements "*allows the conclusion of a Petroleum Agreement between Albpetrol as the Licensee and the 'Contractor' (Article 1.1 of the License Agreements), if Albpetrol decides to sub-contract a third party like the Claimant GBC*". Thus, according to Article 6.1 (c)(iv), the Petroleum Agreement shall regulate the contractual relationship between Albpetrol as the Licensee and the Contractor GBC.[53] Respondents further argue that the Preamble of the Petroleum Agreements repeats this purpose by stating that "*Contractor and Albpetrol intend this Agreement to*

[47] Statement of Claim, para. 67, p. 9.
[48] Statement of Claim, para. 64, p. 9.
[49] Statement of Claim, para. 3, p. 1.
[50] Statement of Defence, para. 117, p. 40.
[51] Statement of Defence, para. 103, p. 37.
[52] Statement of Defence, paras. 104-105, pp. 37-38, referring to **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017).
[53] Statement of Defence, paras. 107-108, p. 38.

record the terms upon which Contractor will join Albpetrol in the conduct of Petroleum Operations […]".[54]

294. According to Respondents, the Petroleum Agreements do not grant Claimant the right to conduct petroleum operations, a right that was granted solely to Albpetrol through the License Agreements. Thus, in order to vest Claimant with the right to conduct petroleum obligations, the Parties assigned such rights to Claimant via the Instrument of Transfer.[55]

A. The main terms of the License Agreements and the Petroleum Agreements

295. Article 3.2 of the License Agreements provides that "[p]*ursuant to and in accordance with the terms and conditions of the Petroleum Law and* [the] *License Agreement the Ministry authorizes and grants the Licensee the exclusive right to:*

> *a) conduct Petroleum Operations in the Contract Area;*
> *b) treat, store and transport the Petroleum extracted from the Contract Area;*
> *c) to construct and install all facilities and equipment (including storage, treatment, pipelines and other means of transportation) required for the Petroleum Operations; and*
> *d) use for its own account, sell, exchange, export, realize or possess the Petroleum extracted from the Contract Area, and take Profit from and title to such extracted Petroleum* […]".[56]

296. Under the License Agreements, the Licensee is also entitled to use:

> *a)* "*exclusively, free of charge, all the existing facilities and equipment in the Contract Area for the performance of the Petroleum Operations* […]*;*
> *b) free of charge and for the performance of the Petroleum Operations, all other assets, equipment, means and infrastructure under its administration (including roads, electricity power lines and water, oil and gas pipelines) existing on the Effective Date of this License Agreement in the Contract Area or elsewhere as described in Article 12 of the Petroleum Agreement, on an "as is" basis and available for delivery, but (unless otherwise agreed with the supplier) subject to the applicable payments and on a non-discriminatory basis, at reasonable cost for electricity, water, oil and gas used;*
> *c) under commercially reasonable terms and conditions, the pipelines that transport the Petroleum produced in the Contract Area to the ports and refineries in Albania; and*
> d) *all technical data available to AKBN pertaining to the Contract Area provided that LICENSEE shall reimburse AKBN for all reasonable cost*

[54] Statement of Defence, para. 109, p. 38.
[55] Statement of Defence, para. 113, pp. 38-39.
[56] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.2, pp. 15-16.

incurred for the preparation of such data transfer and the cost of copying such data".[57]

297. Under the Petroleum Agreements, the Contractor is entitled to use:

a) "*exclusively, free of charge, all the existing facilities and equipment in the Contract Area for the performance of the Petroleum Operations* […]*;*

b) *free of charge and for the performance of the Petroleum Operations, all other assets, equipment, means and infrastructure (including roads, electricity power lines and water, oil and gas pipelines) existing in the Contract Area or located at the region around or close to the Contract Area on the Effective Date of this Agreement, but (unless otherwise agreed with the supplier) subject to the payment, on a non-discriminatory basis, at reasonable cost for electricity, water, oil and gas used;*

c) *under commercially reasonable terms and conditions, the pipelines that transport the Petroleum produced in the Contract Area to the ports and refineries in Albania and shall have the right to construct, lay and operate pipelines within Albania subject to the requirement to provide access to excess capacity, if available, to third parties on commercial terms; and*

d) *all technical data available to AKBN pertaining to the Contract Area provided that Contractor shall reimburse AKBN for all reasonable cost incurred for the preparation of such data transfer and the cost of copying such data*".[58]

298. Article 6.1 of the License Agreements provides that the Licensee is authorized to conduct Petroleum Operations for the Project in the Contract Area only on the basis of a Petroleum Agreement which: (i) shall be in full accordance with the License Agreement and, pursuant to Article 13(2) of the Petroleum Law, will enter into full force and effect upon the Effective Date; (ii) shall incorporate the exclusive rights to the Contract Area granted in accordance with the License Agreements; and (iii) will contain and/or define some matters concerning certain obligations and schedules.[59]

299. As far as the obligations of the Licensee / Contractor are concerned, the License Agreements provide that the Licensee shall *inter alia* "*secure all financial resources and pay one hundred percent (100%) of all costs and expenses associated with the Petroleum Operations in respect to the Contract Area subject to the Cost Recovery Petroleum provisions of* [the] *License Agreement*",[60] and the Petroleum Agreements provide that "*Contractor shall provide all necessary funds and shall bear all costs and*

[57] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.4, pp. 17-18.
[58] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 12.1, p. 22.
[59] **C-2**, **C-3** and **C-4** – License Agreements, Article 6.1, p. 21.
[60] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.3(a)(i), p. 16.

expenses required in carrying out Petroleum Operations under [the Petroleum] *Agreement except to the extent as is otherwise provided in* [the Petroleum] *Agreement*".[61]

300. As for the duration for which the License Agreements and the Petroleum Agreements are granted, there is an initial eighteen-month evaluation period starting from the Effective Date (the "**Evaluation Period**"), during which the Licensee / the Contractor shall carry out an **Evaluation Program**.[62] The Evaluation Period can be extended for six months at the request of the Licensee for the License Agreements[63] or upon request and approval of AKBN for the Petroleum Agreements.[64]

301. The License Agreements and Petroleum Agreements further provide that, if the Evaluation Operations were successful,[65] within sixty days following the completion of the Evaluation Period,[66] or before the end of the Evaluation Period,[67] a plan for the Contract Area is submitted to AKBN (the "**Development Plan**").[68] The Development Plan must contain, *inter alia*: (i) details and the area extent of the proposed Development and Production Area; (ii) proposals relating to the spacing, drilling and completion of wells, the production and storage installations, and transportation and delivery facilities required for the production, storage and transportation of Petroleum; (iii) proposals relating to necessary infrastructure investments; (iv) a production forecast and an estimate of the investment and expenses involved; (v) an estimate of the time required to complete each phase of the Development Plan; and (vi) the proposed Delivery Point and Measurement Point.[69]

302. Upon approval of the Development Plan by AKBN, a twenty-five-year development and production period begins (the "**Development and Production Period**").[70] Pursuant to the License Agreements, the Development and Production Period can be extended for successive five-year periods, upon request of Licensee and approval of AKBN, as long as any portion of the Contract Area continues to produce petroleum in commercial quantities, and so long as the Licensee has not breached any material clause of the

[61] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 12.3, p. 22.
[62] **C-2**, **C-3** and **C-4** – License Agreements, Articles 7.3(b)-(c), pp. 26-27; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.2, pp. 10-11.
[63] **C-2**, **C-3** and **C-4** – License Agreements, Article 7.3(b), p. 26.
[64] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.2, pp. 10-11.
[65] The Evaluation Operations are defined as "*Petroleum Operations related to the Evaluation of* [Improved/Enhanced Oil Recovery Methods] *during the Evaluation Period in the Contract Area*" (**C-2**, **C-3** and **C-4** – License Agreements, Article 1.1, p. 9).
[66] **C-2**, **C-3** and **C-4** – License Agreements, Article 7.4(a), pp. 27-28.
[67] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.4.1, p. 11.
[68] **C-2**, **C-3** and **C-4** – License Agreements, Article 7.4(a), pp. 27-28; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 3.4.1-3.4.2, p. 11.
[69] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.1(a), p. 29; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 7.2, pp. 16-17.
[70] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.3(a), p. 30; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.4.2, p. 11.

License Agreements.[71] Pursuant to the Petroleum Agreements, the Development and Production Period can be extended in the same conditions as the ones provided for in the License Agreements.[72]

303. Finally, for a period of five years after the Development Plan has been approved, the Licensee / Contractor is allowed to further propose and design new evaluation areas within the Contract Area but outside of any existing Development Area for a new Evaluation Period, which, subject to AKBN's approval, involves a **New Evaluation Program** and a **New Evaluation Area**.[73]

304. The Petroleum Agreements also provide that, in conducting the Evaluation Program, the Development Plan and any New Evaluation Program, the Contractor shall be entitled to take over any existing wells, assets and leases in the **Project Area**, in compliance with a procedure set out in the Annex F of each Petroleum Agreement (the "**Takeover Procedure**").[74]

305. Pursuant to Article 2.5 of the Petroleum Agreements, the Contractor is responsible for the execution of Petroleum Operations only in the Project Area, separately from Petroleum Operations concluded by Albpetrol alone in **Albpetrol Operations Zone**, *i.e.* parts of the Contract Area that are not part of the Project Area, in which the Contractor retains no right or interest.[75]

306. The License Agreements also contain provisions relating to the Licensee's / Contractor's obligation to prepare and submit to AKBN Annual Programs and Budgets (an "**ABP**") providing the Petroleum Operations to be carried out during the succeeding fiscal year and the related budget.[76]

307. Finally, the License Agreements and Petroleum Agreements provide for the necessity to establish an Advisory Committee for the purpose of the proper implementation of the

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[71] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.3(a), 8.3(c), pp. 30-31; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.4.2, p. 11, Article 3.8, p. 13.
[72] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.8, p. 13.
[73] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.4, pp. 31-32; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.4.6, p. 12.
[74] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.5, pp. 12-13. The Project Area is defined in the Petroleum Agreements as follows: (i) "*during the Evaluation Period, that portion of the Contract Area which is designated from time to time as the Evaluation Area*"; (ii) "*during the Development and Production Period, that portion of the Contract Area which is designated from time to time as Development and Production Area*"; and (iii) "*if Contractor undertakes a new Evaluation Program, that portion of the Contract Area which is designated from time to time as New Evaluation Area*" (**C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 1.55, p. 7, definition of "Project Area").
[75] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 2.5, pp. 9-10.
[76] **C-2**, **C-3** and **C-4** – License Agreements, Article 7.2, pp. 24-26; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 8.3, p. 18.

License and Petroleum Agreements.[77] The Advisory Committee is composed of representatives of both Albpetrol and the Contractor.[78]

308. Pursuant to the Petroleum Agreements, the Advisory Committee has the following functions and responsibilities:

- "*to provide the opportunity for and to encourage the exchange of information, views, ideas and suggestions regarding plans, performance and results obtained under the Agreement;*"

- "*to review principles established by Contractor from time to time governing various aspects or activities of the Petroleum Operations and to propose, for this purpose, procedures and guidelines as it may deem necessary;*"

- "*to review and approve Annual Programs and Budgets proposed by Contractor for the Development and Production Period, and propose revisions in accordance with Article 8.3;*"

- "*to review Annual Programs and Budgets proposed by Contractor for the Evaluation Period and any New Evaluation Period;*"

- "*to review and approve Development and Production Areas and the Development Plan that Contractor, on behalf of the Parties, plans to propose to AKBN for its approval;*"

- "*to cooperate towards implementation of the Annual Programs and Budgets and Development Plans; and"*

- *"such other functions as entrusted to it by the Parties."*[79]

309. However, the Licensee is solely entitled to make decisions as to (i) the location, drilling, testing, completion, take-over of wells for re-completion of any well, either for production or other Petroleum Operations, (ii) Annual Programs and Budgets during the Evaluation Period and (iii) the areas for relinquishment under the Petroleum Agreement.[80]

B. <u>The fiscal framework of the License Agreements and the Petroleum Agreements</u>

310. The License Agreements provide for a fiscal organization based on the principle that the Licensee, which bears all the costs and expenses incurred in operating each Oilfield (the

[77] **C-2**, **C-3** and **C-4** – License Agreements, Article 7.1, p. 24; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 5, pp. 14-16.
[78] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 5.1.2, p. 14.
[79] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 5.1.5, p. 15.
[80] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 5.1.6, p. 15.

"**Petroleum Costs**"),[81] can recover certain costs after some petroleum has been allocated to Albpetrol.

311. Thus, Albpetrol is allocated a share of deemed production ("**PEP**") of petroleum, calculated pursuant to a formula contained in the Petroleum Agreements.[82] According to Claimant, the deemed production is justified in recognition of the existing production from the Oilfield prior to the grant of each License Agreement.[83]

312. After deduction of PEP, the remaining petroleum that was not used in Petroleum Operations, flared or injected (the "**Available Petroleum**") is allocated between the Licensee / Contractor and Albpetrol, pursuant to a formula in each Petroleum Agreement based on the "*R factor*".[84] Albpetrol's percentage share of the Available Petroleum is called the "**Albpetrol Share of Production**" ("**ASP**"), and the Licensee's / Contractor's percentage share is called the "**Cost Recovery Petroleum**".[85]

313. The Petroleum Agreements provide that the "*Contractor shall be entitled to the Cost Recovery Petroleum to recover all Petroleum Costs borne by it inside or related to the Project Area ('Cost Recovery')* […] *To the extent that in a given Calendar Year the outstanding Petroleum Operations Costs recoverable exceed the value of Cost Recovery Petroleum for such Calendar year, the excess shall be carried forward for recovery in the next succeeding Calendar Year and in each succeeding Calendar Year thereafter until fully recovered*".[86] The License Agreements contain a similar provision.[87]

314. Finally, after the Licensee / Contractor has recovered all of its Petroleum Costs from the Cost Recovery Petroleum, the remaining Cost Recovery Petroleum is "**Profit Petroleum**", which is divided between Albpetrol and the Licensee / Contractor as follows:

- Albpetrol: 1/5 of the corresponding calculated Albpetrol % share based on Calendar Quarter R used to calculate ASP;[88]

- Contractor: the remaining, subject to a 50% Petroleum Profit Tax due to AKBN.[89]

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[81] Details of what is included in the Petroleum Costs – as well as other types of costs – are set out in **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Annex B, Article 2, pp. 2-8.
[82] **C-2**, **C-3** and **C-4** – License Agreements, Article 10.1, p. 36; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.5.1, pp. 12-13.
[83] Statement of Claim, para. 80, p. 12.
[84] **C-2**, **C-3** and **C-4** – License Agreements, Article 10.2, p. 36; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 9.2, 9.3, pp. 19-20.
[85] **C-2**, **C-3** and **C-4** – License Agreements, Articles 10.1, 10.2, p. 36; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 9.2, 9.3, pp. 19-20.
[86] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 9.3, p. 20.
[87] **C-2**, **C-3** and **C-4** – License Agreements, Articles 10.2(a), 10.2(b), p. 36.
[88] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 9.4, p. 20.
[89] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 9.4, p. 20; **C-2**, **C-3** and **C-4** – License Agreements, Article 10.3, p. 37, Article 14.1, p. 43; **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Petroleum Fiscal Law, Article 1, p. 22.

315. In implementing this organization, at the beginning of each calendar quarter, the Licensee is required to prepare and furnish to AKBN a production forecast setting out the total quantity of Available Petroleum estimated to be produced from the Contract Area in the next four quarters.[90] Pursuant to the Petroleum Agreements, the Contractor must provide to Albpetrol weekly reports of estimated Petroleum production, monthly reports on the Petroleum production and Petroleum Operations and quarterly reports on Petroleum costs.[91]

316. The Licensee must provide Albpetrol with weekly reports on estimated production, monthly reports on production and Petroleum Operations,[92] and quarterly reports on Petroleum Costs.[93]

317. In addition, the Licensee must prepare the Petroleum Costs in accordance with the accounting procedure annexed to the Petroleum Agreement (the "**Accounting Procedure**")[94] and is required to provide to AKBN copies of its accounting records reflecting the Petroleum Costs every six months, along with copies of main Petroleum Costs incurred.[95]

318. Finally, AKBN has the right to audit the Licensee with regard to the Petroleum Operations, no later than three years after the closure of a specific fiscal year,[96] and the Licensee must provide AKBN with a declaration of income and losses no later than ninety days following the end of a fiscal year, in order to reveal its net profit or loss with respect to the Petroleum Operations for that fiscal year.[97]

C. <u>Termination Provisions of the License Agreements and Petroleum Agreements</u>

1. <u>Breach and termination provisions in the License Agreements</u>

319. Article 24.1 of the License Agreement grants AKBN the right to cancel the agreement in the event of the following:

> (a) *"if LICENSEE knowingly submitted any false statements to AKBN where such statements were a material consideration for the conclusion and/or execution of this License Agreements;*
>
> (b) *if LICENSEE transfers any right, privilege, duty or obligation to a Person contrary to the provisions of Article 22 hereof;*

[90] **C-2**, **C-3** and **C-4** – License Agreements, Article 14.2(d), p. 43.
[91] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 12.7, p. 23.
[92] Statement of Claim, para. 82, p. 13, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 12.7(e), 12.7(f), p. 23.
[93] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 12.7(g), p. 23.
[94] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Annex B.
[95] **C-2**, **C-3** and **C-4** – License Agreements, Article 15.2, p. 45.
[96] **C-2**, **C-3** and **C-4** – License Agreements, Article 15.3, p. 46.
[97] **C-2**, **C-3** and **C-4** – License Agreements, Article 15.4, p. 46.

(c) if LICENSEE is adjudicated bankrupt by a court of competent jurisdiction;

(d) if LICENSEE does not comply with any final arbitrage decision;

(e) if LICENSEE intentionally extracts ay mineral other than Petroleum or sulfur, in whatever form, produced in association with Natural Gas, not authorized by this License Agreement or without the authority of AKBN except such extractions as may be unavoidable using accepted petroleum industry practices, and which shall be notified to AKBN or its representatives as soon as possible;

(f) if LICENSEE commits and (sic) *material breach of this License Agreement; and*

(g) if LICENSEE repeatedly employs illegal means of applying pressure upon AKBN in order to hinder it from the regular performance of its duties.

(h) if LICENSEE unreasonably and repeatedly makes an intentional and conscious violation of Albanian Law, AKBN instruction or this License Agreement provisions".[98]

320. Article 24.3 of the License Agreements provides that "[i]*f AKBN deems that one of the aforesaid clauses (other than ARTICLE 23) exists to cancel this License Agreement, AKBN shall give LICENSEE written notice personally served to LICENSEE informing LICENSEE that LICENSEE is in breach of one or more of the provisions of this License Agreement, and specifying the precise cause and nature of the breach. LICENSEE shall attempt to repair such breach within ninety (90) days. If such breach is not cured within the ninety (90) days, this License Agreement shall be terminated in conformity with terms and provisions herein*".[99]

2. <u>Breach and termination provisions in the Petroleum Agreements</u>

321. Articles 24.2 and 24.3 of the Petroleum Agreement provide as follows:

"This Agreement may be terminated by Albpetrol by giving no less than one hundred and twenty (120) days written notice to Contractor in the following events:

24.2.1 if Contractor has repeatedly committed a material breach of its fundamental duties and obligations under this Agreement and has been advised by Albpetrol of Albpetrol's intention to terminate this Agreeement. Such notice of termination shall only be given if Contractor upon receiving notice from Albpetrol that it is in material breach and

[98] **C-2**, **C-3** and **C-4** – License Agreements, Article 24.1, p. 61.
[99] **C-2**, **C-3** and **C-4** – License Agreements, Article 24.3, p. 62.

does not rectify or has not commenced to substantially rectify such breach within (6) months; or

24.2.2 if Contractor does not substantially comply with any final decision resulting from an arbitration procedure pursuant to Article 19 hereof;

24.2.3 if Contractor is adjudged bankrupt by a competent court or, if there is more than one entity constituting Contractor, any of them has been declare bankrupt without the other entities or entity taking appropriate action to remedy the situation with regard to this Agreement.

Termination by Albpetrol pursuant to this Article 24.2 shall not relieve Contractor from any unfulfilled commitment or other obligation under this Agreement accrued prior to such termination, including without limitation payment of monetary obligations for unfulfilled work commitments, surface restoration, environmental remediation and abandonment.

24.3 Subject to earlier termination pursuant to Articles 24.1 or 24.2, this Agreement shall automatically terminate in its entirety if all of the Contract Area has been relinquished or the Development and Production Period or any subsequent extension has lapsed pursuant to Articles 3.4 and 3.7".

3.3. Overview of the facts leading to the present dispute

322. It is undisputed by the Parties that, whereas the only tax borne by Claimant as of the Effective Date was the Petroleum Profit Tax pursuant to the Petroleum Fiscal Law,[100] on or about 28 July 2008, the Government introduced the Royalty Tax, a tax on available production payable at the rate of 10% tax of the sale value of crude oil.[101]

323. According to Claimant, on or about 21 July 2011, the Government introduced a per liter carbon tax on fuels,[102] and in the Government's national budget for 2014, the following exemptions for operators of Albanian oilfields were removed (hereafter, the "**EEC Tax Changes**"):

- an exemption from the excise tax on imported petroleum products used in Petroleum Operations;

- income tax exemptions provided to subcontractors who provide goods and services related to the Petroleum Operations;

[100] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Petroleum Fiscal Law, pp. 22-23.
[101] Statement of Claim, para. 109, p. 19, referring to **CL-4** – *On National Taxes*, Law No. 9975 dated 28/07/2008; Statement of Defence, paras. 322-326, pp. 88-89.
[102] Statement of Claim, para. 110, p. 19, referring to **CL-5** – *On Amendments and Additions to Law No. 9975 dated 28 July 2008 "On National Taxes"*, Law No. 10 458 dated 21 July 2011.

- exemptions from the carbon tax and circulation tax (a per liter tax on fuel products) on petroleum products purchased for Petroleum Operations; and

- an exemption from the VAT on goods and services procured for Petroleum Operations.[103]

324. According to Claimant, the Government also increased the circulation tax by 10 Lek/liter in its national budget for 2015.[104]

325. As will be developed below, Claimant considers that it has been suffering from negative economic effects due to the above changes and claims that Respondents violated what Claimant refers to as a "*Fiscal Stabilization Covenant*" contained in Article 3.1(c) of the License Agreements.[105]

326. In addition to the dispute over the fiscal changes, the present arbitration proceedings deal with Claimant's liabilities for delivery of PEP&ASP obligations in respect of the Cakran and Gorisht Oilfields (hereinafter the "**PEP&ASP Liability**") which, according to Claimant, led Respondents to wrongfully confiscate the Gorisht Oilfield on 26 January 2017 and the Cakran Oilfield on 1 February 2017. Claimant refers to such events as the Wrongful Terminations.

327. Claimant also alleges that Respondents have refused to hand over parts of the Contract Area relating to the Ballsh Oilfield, have interfered with Claimant's rights of access to gathering facilities where Claimant's petroleum was located, and have wrongfully taken Claimant's share of petroleum delivered to the gathering facilities.

4. THE PARTIES' REQUESTS FOR RELIEF

4.1. Claimant

- The relief sought by Claimant in its Statement of Claim is the following:

"*The Claimant respectfully requests that the Arbitral Tribunal:*

a. award monetary damages, sufficient to put the Claimant in the position it would have been in but for the Respondents' various breaches of the Cakran and Gorisht Licence Agreements, in the amount of USD $56,386,000;

b. direct Albpetrol to hand over the balance of the Ballsh Field to the Claimant, and further, or in the alternative, direct the AKBN and the MEI to compel Albpetrol to

[103] Statement of Claim, para. 111, pp. 19-20, referring to **CL-6** – *On Amendments and Additions to Law No. 9975 dated 28 July 2008 "On National Taxes"*, Law No. 178/2013 dated 28 December 2013; **CL-7** – *On Amendments and Additions to Law No. 61/2012 "On Excise Tax in the Republic of Albania"*, Law No. 180/2013 dated 28 December 2013.
[104] Statement of Claim, para. 114, p. 20, referring to **CL-8** – *On Amendments and Additions to Law No. 9975 dated 28 July 2008 "On National Taxes"*, Law No. 157/2014 dated 27 November 2014.
[105] Statement of Claim, paras. 117 *et seq.*, p. 21.

hand over the balance of the Ballsh Field to the Claimant, and award monetary damages sufficient to put the Claimant in the position it would have been in if the Respondents had timely handed over the Ballsh Field and for the time period until the hand-over is completed, in an amount to be determined in accordance with the Deloitte Report; in the alternative, award monetary damages, sufficient to put the Claimant in the position it would have been in if the Respondents had timely handed over the Ballsh Field and for the time period until the end of the term of the License Agreement, in the amount of $56,986,000;

c. award the Claimant its legal fees, costs and expenses in connection with this arbitration, including but not limited to the fees and expenses of the Arbitral Tribunal; and

d. such further and other relief as the Arbitral Tribunal may deem appropriate."[106]

- The relief sought by Claimant in its Reply is the following:

"*The Claimant respectfully requests that the Arbitral Tribunal:*

a. award monetary damages, sufficient to put the Claimant in the position it would have been in but for the Respondents' various breaches of the Cakran and Gorisht License Agreements, in the amount of USD $44,698,000;

b. award monetary damages, sufficient to put the Claimant in the position it would have been in if the Respondents had timely handed over the Ballsh Field and for the time period until the hand-over is completed, in an amount to be determined in accordance with the Deloitte Lost Profits Rebuttal Report; in the alternative, award monetary damages, sufficient to put the Claimant in the position it would have been in if the Respondents had timely handed over the Ballsh Field and for the time period until the end of the term of the License Agreement, in the amount of $43,241,000;

c. award the Claimant its legal fees, costs and expenses in connection with this arbitration, including but not limited to the fees and expenses of the Arbitral Tribunal; and

d. such further and other relief as the Arbitral Tribunal may deem appropriate."[107]

- The relief sought by Claimant in its Post-Hearing Brief is the following:

"*The Claimant respectfully requests that the Arbitral Tribunal:*

a. award monetary damages, sufficient to put the Claimant in the position it would have been in but for the Respondents' various breaches of the Cakran and Gorisht License Agreements, in the amount of USD $44,698,000;

b. award monetary damages sufficient to put the Claimant in the position it would have been in if the Respondents had timely handed over the Ballsh Field and for the time

[106] Statement of Claim, para. 313, p. 50.
[107] Reply, para. 202, pp. 34-35.

period until the hand-over is completed, in an amount to be determined in accordance with the Deloitte Report; in the alternative, award monetary damages, sufficient to put the Claimant in the position it would have been in if the Respondents had timely handed over the Ballsh Field and for the time period until the end of the term of the License Agreement, in the amount of $43,241,000;

c. *award monetary damages for the present value of G&A expenditures incurred since the loss dates in the amount of USD $425,000*[108]*;*

d. *award the Claimant its legal fees, costs and expenses in connection with this arbitration, including but not limited to the fees and expenses of the Arbitral Tribunal; and*

e. *such further and other relief as the Arbitral Tribunal may deem appropriate".*[109]

4.2. <u>Respondents</u>

- <u>The relief sought by Respondents in their Objections to Jurisdiction and Statement of Defence is the following:</u>

"*The Respondents respectfully request the Arbitral Tribunal to decide as follows:*

1. *The Arbitral Tribunal declines jurisdiction to hear all of the Claimant's claims brought against the Ministry of Infrastructure and Energy (Republic of Albania), the National Agency of Natural Resources (Republic of Albania), and against Albpetrol sh.a. (Republic of Albania).*

2. *The Claimant has to bear the entire costs of the arbitration.*

In the event and to the extent the Arbitral Tribunal confirms its jurisdiction:

3. *All of the Claimant's claims against the Ministry of Infrastructure and Energy (Republic of Albania) are dismissed.*

4. *All the Claimant's claims against the National Agency of Natural Resources (Republic of Albania) are dismissed.*

5. *All of the Claimant's claims against Albpetrol sh.a. (Republic of Albania) are dismissed.*

6. *The Claimant has to bear the entire costs of the arbitration*".[110]

- <u>The relief sought by Respondents in their Rejoinder Brief is the following:</u>

"*The Respondents respectfully request the Arbitral Tribunal to decide as follows:*

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[108] "*This amount does not seem to be disputed by the Respondents; see BDO Second Report at para. 6.7* ***[Exhibit RER-3]****".*
[109] Claimant's Post-Hearing Brief, para. 300, pp. 60-61.
[110] Statement of Defence, para. 8, p. 8.

1. *The Arbitral Tribunal declines jurisdiction to hear all of the Claimant's claims brought against the Ministry of Infrastructure and Energy (Republic of Albania), the National Agency of Natural Resources (Republic of Albania), and against Albpetrol sh.a. (Republic of Albania).*

2. *The Claimant has to bear the entire costs of the arbitration.*

   In the event and to the extent the Arbitral Tribunal confirms its jurisdiction:

3. *All of the Claimant's claims against the Ministry of Infrastructure and Energy (Republic of Albania) are dismissed.*

4. *All of the Claimant's claims against the National Agency of Natural Resources (Republic of Albania) are dismissed.*

5. *All of the Claimant's claims against Albpetrol sh.a. (Republic of Albania) are dismissed.*

6. *The Claimant has to bear the entire costs of the arbitration*".[111]

- The relief sought by Respondents in their Post-Hearing Brief is the following:

"*The Respondents respectfully request the Arbitral Tribunal to decide as follows:*

1. *The Arbitral Tribunal declines jurisdiction to hear all of the Claimant's claims brought against the Ministry of Infrastructure and Energy (Republic of Albania), the National Agency of Natural Resources (Republic of Albania), and against Albpetrol sh.a. (Republic of Albania).*

2. *The Claimant has to bear the entire costs of the arbitration.*

   In the event and to the extent the Arbitral Tribunal confirms its jurisdiction:

3. *All of the Claimant's claims against the Ministry of Infrastructure and Energy (Republic of Albania) are dismissed.*

4. *All of the Claimant's claims against the National Agency of Natural Resources (Republic of Albania) are dismissed.*

5. *All of the Claimant's claims against Albpetrol sh.a. (Republic of Albania) are dismissed.*

6. *The Claimant has to bear the entire costs of the arbitration*".[112]

328. In the sections below, the Tribunal will assess the facts and address the legal arguments of the Parties. Given that the Parties have pleaded this case extensively, the summaries

[111] Rejoinder Brief, paras. 18-19, p. 12.
[112] Respondents' Post-Hearing Brief, paras. 298-299, p. 86.

of the Parties' positions do not necessarily contain all arguments submitted by the Parties. However, the Tribunal has carefully examined and considered all the Parties' arguments.

5. RESPONDENTS' CLAIM THAT THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE BROUGHT BY CLAIMANT

329. The Tribunal will successively analyse its jurisdiction over the dispute in light of Respondents' allegations of illegality in awarding the Agreements (**5.1.**), its jurisdiction over the Parties and (**5.2.**) and its jurisdiction over the claims against Respondents (**5.3.**).

5.1. Jurisdiction of the Tribunal over the dispute in light of allegations of illegality in awarding the License Agreements and Petroleum Agreements

A. Respondents' position

330. Respondents contend that Claimant "*tries to frame this controversy as a* normal commercial dispute *between a* diligent and competent oil company *and a* mighty State *that has not only imposed additional taxes on the oil company's investment, but that has even harmed – for no cause and reason – the foreign investor by* expropriating *its oil extraction rights*".[113] According to Respondents, this is not a commercial dispute as "*too many indicators point at a case of illegality and abuse of office by the Claimant in collusion with representatives of the State that the Claimant blames today – in 2007, and possibly even in the first years of the contractual period until Summer 2013, when the Democratic Party was still leading the Albanian Government and controlling the heads of the Ministry, AKBN, and Albpetrol*".[114]

331. Respondents' position is that, given that the License and Petroleum Agreements were illegally awarded to Claimant, these Agreements are invalid, respectively under Swiss law[115] and English law.[116]

332. In response to Claimant's allegation that the issue of illegality of the License Agreements and the Petroleum Agreements was never mentioned since 2007,[117] Respondents argue that this is not an adequate rebuttal given the strong indicators for illegality. According to Respondents, "[i]*llegality will normally not be laid down in documents, e-mails or correspondence, as it comes with the nature of illegal acts that they are not put on record, but rather concealed in a way that time is needed to investigate the setting*".[118] Respondents also argue that Claimant's statement is wrong, as, in 2006, the Albanian Minister of Economy, Trade and Energy did complain about

[113] Statement of Defence, para. 37, p. 14. Emphasis in the original.
[114] Statement of Defence, para. 38, pp. 14-15. Emphasis in the original.
[115] Rejoinder Brief, paras. 209 *et seq.*, pp. 59-62.
[116] Rejoinder Brief, paras. 224 *et seq.*, pp. 62-66.
[117] Reply, para. 52, p. 8.
[118] Rejoinder Brief, para. 165, p. 48.

the negotiation exclusivity that was awarded to Claimant without proper reason and in contradiction to Albanian Law.[119]

333. Respondents add that Claimant's argument that other license agreements for other oilfields were awarded in the same way does not make the award to Claimant legal, there is no "*equality in illegality*".[120]

334. To support their claim, Respondents list ten red flags which in their view raise the suspicion of illegal activities (1.), draw the legal consequences of illegality (2.), and provide the Tribunal with "*ways of dealing*" with suspicions of illegality (3.).

1. The Red Flags alleged by Respondents

a) Claimant had no installed oil extraction capacity

335. The first red flag alleged by Respondents is that "*Claimant had no installed oil extraction capacity*", but was nevertheless awarded the licenses and oil exploitation rights for the absolute period of twenty-five years.[121] Claimant used Albpetrol's team and equipment to continue the oil extraction activities, but did not drill any wells on the Oilfields, in violation of Article 5(2) of the Petroleum Law which requires the "*exploration, development, and production of hydrocarbons*".[122] Respondents consider this behavior to be "*a typical pattern how to channel off profits from state-owned enterprises*".[123]

b) Claimant lacked the financial and technical expertise

336. The second red flag alleged by Respondents is that "*Claimant lacked the financial and technical expertise*" to "*do better than*" Albpetrol, in compliance with Article 5(2) of the Petroleum Law, which requested Claimant to furnish proof for its financial resources and technical competence to carry out the envisaged oil operations.[124] Respondents allege that Claimant was an "*empty shell without financial and technical capacities*",[125] and emphasize the "*striking disproportion*" between the consideration that Claimant "*paid*" in 2007 for the license rights ("*Zero USD*") and Claimant's submissions on the alleged "*last profit* (sic)/*value of these extraction rights*" (USD 87.9 million) in this arbitration.[126]

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[119] Rejoinder Brief, para. 166, p. 48, referring to Statement of Defence, para. 41, p. 16; **R-2** – Letter of the Minister of Economy, Trade and Energy (Mr. Genc Ruli) of 5 October 2006, Prot. No. 3765/3.
[120] Rejoinder Brief, par. 168, pp. 48-49.
[121] Statement of Defence, para. 40, p. 15.
[122] Rejoinder Brief, para. 179, pp. 51-52.
[123] Statement of Defence, para. 40, p. 15.
[124] Statement of Defence, para. 40, pp. 15-16; Rejoinder Brief, para. 172, p. 50, referring to **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017).
[125] Rejoinder Brief, para. 169, p. 49.
[126] Rejoinder Brief, para. 167, p. 48.

337. According to Respondents, Claimant has not and could not provide the required proof of its resources because it has neither (i) the financial resources nor (ii) the technical competence and experience to develop the Oilfields, so that the Oilfields were not "'*developed', but the existing installations were 'exploited' in the negative sense of the word, from the beginning to the end"*.[127]

338. Respondents dispute the veracity and authenticity of the letter from Haywood Securities (UK) Limited to Stream Oil & Gas Ltd which was submitted by Claimant, which it calls "*likely a forgery or at least a financial placebo*".[128] Respondents contend that the letter (i) does not look like a regular credit support letter by a financial institution,[129] (ii) contains "*at least eight linguistic flaws that are highly unusual for an English native speaker and CEO like the purported signatory, Mr. Daniel P. Brooks*",[130] (iii) contains a reference to "*other areas licensed*" whereas bank attestations usually only refer to known investment opportunities that the bank can evaluate,[131] and (iv) does not contain a financing undertaking but only a "*vague and entirely intransparent promise to finance under certain unclear conditions*".[132] The quality of the financing support cannot be evaluated without the "*agreement*", which had not been produced.[133] Respondents also contend that the amounts of the funds allegedly available under unclear conditions do not mirror the funds necessary to invest in the oilfields to be able to conduct international standard oil operations.[134]

339. Based on the above, Respondents requested in their Rejoinder Brief that Claimant present the original letter, bearing the original signature of Mr. Brooks, and a notarized witness statement from Mr. Brooks.[135]

340. Regarding the issue of whether Claimant has paid dividends or distributions to its shareholders, Respondents claim that Mr. Kreshnik Grezda cannot have enough knowledge to testify[136] that Claimant has never paid dividends to its shareholders, as he only joined Claimant on 29 February 2016.[137] Respondents argue that "*all the money owed to the Respondents and third parties in Albania was wrongfully transferred to the Claimant's shareholders and to other parties via dividends and/or fake contracts. Otherwise, the Claimant who has even misappropriated oil of a value of millions of USD would not be virtually bankrupt today, carrying debts* vis-à-vis *Albpetrol in an amount*

[127] Statement of Defence, para. 40, pp. 15-16.
[128] Rejoinder Brief, para. 173, p. 50, referring to **C-169** – Letter from Haywood Securities (UK) Limited to Stream Oil & Gas Ltd. dated June 12, 2007.
[129] Rejoinder Brief, para. 173, p. 50.
[130] Rejoinder Brief, para. 173, p. 50.
[131] Rejoinder Brief, para. 173, p. 50.
[132] Rejoinder Brief, para. 174, p. 50, referring to **C-169** – Letter from Haywood Securities (UK) Limited to Stream Oil & Gas Ltd. dated June 12, 2007 which provides that "*Haywood under the terms of the agreement wishes to certify that the following funds will be available upon closing to Stream for its commitments to the work program and in reference to Stream's required mother company guarantee*".
[133] Rejoinder Brief, para. 175, pp. 50-51.
[134] Rejoinder Brief, para. 176, p. 51.
[135] Rejoinder Brief, para. 177, p. 51.
[136] See Reply, para. 61, p. 10, referring to Second Witness Statement of Kreshnik Grezda, para. 15, p. 4.
[137] Rejoinder Brief, para. 180, p. 52.

of USD 25,526,428.45 (LEK 2,437,501,234 plus LEK 242,773,753) and short-term debts in the amount of USD 62,347,845.81 (LEK 6,546,523,810) vis-à-vis *many other creditors as of 31 December 2017*".[138]

341. As for Claimant's lack of technical expertise, Respondents argue that, contrary to what Claimant suggests, the study of Deloitte Albania dated 15 December 2015 that it submits[139] does not state that contractors in Albania "*have generally been start-up companies with limited or no financial resources or technical resources"*. Claimant's allegation is disproven by the fact that other contractors of Respondents are *inter alia* Royal Dutch Shell plc & Petromanas Inc., Petromanas Energy Inc (now Royal Dutch Shell plc & Petromanas Energy Inc.) and Bankers Petroleum Ltd, which are "*professional, large companies and big players in the oil and gas industry*".[140]

342. Respondents further contend that Claimant's argument that its head office was located in Vancouver (see below para. 384) does not result from the document submitted by Claimant,[141] is irrelevant and "*lacks any kind of substance*", as Claimant does not claim or prove that it actually had retained any people with that kind of experience. There were simply no technical capabilities within Claimant's organization, which was "*just an empty shell company with a Mr. Kapotas and three or four others, and the rest of the staff to run the oil extraction operations were to be the same Albpetrol staff as had been operating the oilfields in the past*".[142]

c) <u>Claimant was awarded negotiation exclusivity for no reason and in violation of the law</u>

343. The third red flag alleged by Respondents is that "*Claimant was awarded negotiation exclusivity for no reason and in violation of the law*" in September or October 2006, "*as if somebody feared that a more sophisticated bidder might turn up*".[143] Respondents refer to the official protest sent by the Minister of Economy, Trade and Energy to the Chairman of Albpetrol's Supervisory Council and to Albpetrol's CEO in which the Minister pointed out that he and the National Agency of Natural Resources had not been consulted, in violation of the legislation and practices of that time.[144] Respondents add that the Supervisory Council's decision could not be retrieved in Albpetrol's files and that at least one member of the Council maintained "*very close personal relations*" with a representative of Claimant.[145]

d) <u>Claimant engaged in conduct triggering suspicion of criminal activity</u>

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[138] Rejoinder Brief, para. 180, p. 52, referring to **R-162** – Claimant's Financial Statements as of 31 December 2017 (1 USD equals 105 Albanian LEK).
[139] Reply, para. 55, p. 8.
[140] Rejoinder Brief, para. 169, p. 49, referring to **C-167** – Deloitte, Albania Extractive Industries Transparency Initiative in Albania, Report for the year 2013 and 2014 (December 2015), p. 31.
[141] **C-170** – News Release: LGR signs definitive agreement with Stream Oil & Gas Ltd. dated June 12, 2007.
[142] Rejoinder Brief, para. 178, p. 51.
[143] Statement of Defence, para. 41, p. 16.
[144] Statement of Defence, para. 41, p. 16, referring to **R-2** – Letter of the Minister of Economy, Trade and Energy (Mr. Genc Ruli) of 5 October 2006, Prot. No. 3765/3.
[145] Statement of Defence, para. 42, p. 16.

344. The fourth red flag alleged by Respondents is that "*Claimant engaged in conduct triggering suspicion of criminal activity*". According to Respondents, Claimant (i) sold on its own account oil in huge quantities that was not available to it, nor its property,[146] and does not dispute it,[147] (ii) "*simulated its willingness and ability*" to perform contracts and grant security for its contractual debt when it was unable or unwilling to do so, which caused harm to the MIE and Albpetrol, and (iii) engaged in "*cash generation*" by promising payment in case invoices were issued, which it did not pay, and then claiming not paying invoices and claimant for a VAT refund from the tax office.[148] Respondents add that Claimant's current Director, Mr. Kasa, is currently being subject to criminal proceedings *inter alia* for fraud and falsification of documents in connection with petroleum operations.[149]

e) <u>The environmental situation of the oil fields and the condition of equipment were untenable</u>

345. The fifth red flag alleged by Respondents is that "[the] *environmental situation of* [the] *oil fields and* [the] *condition of equipment* [were] *untenable*", which constitutes a proof that Claimant was "*neither trustworthy nor financially and technically able to run the oil extraction activities in a sustainable way*".[150] In this regard, during an inspection in late January/early February 2017, it appeared that the Cakran and Gorisht Oilfields handed over by Albpetrol were in "*devastating condition*".[151] Respondents submit pictures from the Albanian oilfield of Patos-Marinza operated by the company Bankers Petroleum (Albania) Ltd, indicating that the comparison "*could not be more striking*".[152] Respondents add that Claimant has not disputed the untenable condition of the equipment and the devastating environmental situation of the oilfields following Claimant's "*destructive activities*" since 2007.[153] The facts are thus undisputed and admitted.

f) <u>Claimant's absence of fear of prosecution</u>

346. The sixth red flag alleged by Respondents is Claimant's "*absence of fear of prosecution*", which "*typically occurs where the wrongdoers* […] *believe that high-ranking people are protecting them*".[154]

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[146] Statement of Defence, para. 43, p. 17.
[147] Rejoinder Brief, para. 162, pp. 46-47.
[148] Statement of Defence, para. 44, p. 17.
[149] Statement of Defence, para. 45, p. 17.
[150] Statement of Defence, para. 46, p. 17.
[151] Statement of Defence, para. 47, pp. 17-18, referring to **R-3** – Photos of the Cakran-Mollaj oilfield of late January/early February 2017; **R-4** – Photos of the Gorisht-Kocul oilfield of late January/early February 2017; **RWS-1** – First Witness Statement of Endri Puka.
[152] Statement of Defence, para. 48, p. 18; Rejoinder Brief, paras. 170-171, pp. 49-50, referring to **R-5** – Selection of photos from the Albanian oilfield Patos-Marinza operated by the company Bankers Petroleum (Albania) Ltd.
[153] Rejoinder Brief, paras. 162-163, pp. 46-47.
[154] Statement of Defence, para. 49, p. 18.

g) The files of Respondents looked cleansed

347. The seventh red flag alleged by Respondents is that "[the] *files of the Respondents look cleansed*", as they do not contain the information typically available after the conclusion of major contracts in the public sector.[155]

348. The information referred to by Respondents includes: (i) the lack of "*real contract negotiations*", such as exchanges of positions on contractual provisions or correspondence/arguments of lawyers, (ii) "*application documents of the Claimant*" (Respondents claim that they were only provided with a "*questionnaire*" answered by another company, Stream Petroleum Ltd. London, that "'backed' *its application with the info that it neither had experience nor funding available*"), (iii) "*correspondence of a single lawyer acting for the Claimant*", which was only represented by a Greek business man and his Albanian partners who applied for complex multi-million USD-agreements with the Albanian State, (iv) "*targeted requests of a professional contractor*", as only exploration licenses for the Delvina, Dumre, Panaja and Velca blocs were initially requested, whereas Claimant was suddenly awarded oil extraction licenses for the Gorisht, Cakran and Ballsh Oilfields, and (v) documents concerning Claimant "*that would have allowed a serious representative of the Albanian State to award the License/Petroleum Agreements to the Claimant*", such as proof for financial resources or technical competence.[156]

349. Respondents argue that, during the document production phase in this arbitration, Claimant was ordered to produce the application file showing all documents and correspondence related to the bidding process, but the file produced by Claimant contained only four documents. This is "*entirely insufficient for a full-fledged bidding process for three oil fields*", and is evidence of the fact that Mr. Arjan Tartari, Ms. Albana Vokshi, Mr. Sali Berisha and Ms. Argita Malltezi "*were the only relevant reason for the contract award, and not any petroleum operation experience of the newly founded Claimant*".[157]

h) Claimant's direct and indirect shareholders and ultimate beneficiaries are not known

350. The eighth red flag alleged by Respondents is that "[n]*obody knows the Claimant's direct and indirect shareholders and ultimate beneficiaries*".[158] Respondents claim that under their governance of 2007, they entirely failed to conduct appropriate "*know your contractor*" measures and to diligently review the power of attorney of Claimant's representatives and its proof of incorporation. Therefore, Respondents do not believe that Claimant and its shareholders: (i) were and are effectively incorporated in the Cayman Islands, in British Columbia, in the British Virgin Islands and in the State of

[155] Statement of Defence, para. 50, pp. 19-20.
[156] Statement of Defence, para. 50, pp. 19-20.
[157] Rejoinder Brief, paras. 190-196, pp. 55-56, referring to **R-163** – Full set of four (4) "bidding documents" of 2006/2007 produced by the Claimant.
[158] Statement of Defence, para. 51, p. 20.

Delaware and (ii) together with Claimant's ultimate beneficiaries, "*do not cause any concerns from a money laundering and anti-corruption perspective*".[159]

351. According to Respondents, it is relevant to identify the ultimate shareholders and beneficiaries, "*i.e. the natural persons behind that suspicious structure*", because it is "*the only way to reduce the risk that the moneys claimed in this arbitration are eventually used 'to pay off' persons who were involved in the award of the three oil licenses in questions*", especially in the light of suspicions of illegality.[160]

352. In their Post-Hearing Brief, Respondents argue that "[i]*t has become transparent in the proceedings and in the hearing*" that Claimant obtained contracts "*by an act of nepotism*".[161] Respondents refer notably to the fact that at the hearing, both Mr. Grezda and Mr. Crawford refused to quantify their indirect shareholding in Claimant, "*thereby indicating that the benefits from the Claimant are entirely secret even in a non-public arbitration, just as one would expect in an illegal scenario*".[162]

i) <u>Claimant's corporate structure conceals shareholders and beneficiaries</u>

353. The ninth red flag alleged by Respondents is that the "[c]*orporate structure of Claimant serves the purpose to set up an irresponsible business and to conceal shareholders and beneficiaries*". Claimant is incorporated in a "*tax heaven*", *i.e.* the Cayman Islands. Moreover, its shares are held by a company incorporated in British Columbia/Canada, whose shares are held by a company incorporated in the British Virgin Islands, whose shares are in turn held by a company incorporated in the State of Delaware.[163] Respondents seem to suggest that Claimant set up such a company – instead of an Albanian company - in order to preserve the identity of its shareholder or beneficial owner and to save taxes. Claimant must provide full transparency of its organization on the date of the award of the License Agreements and Petroleum Agreements and on the date of the initiation of the arbitration proceedings.[164]

j) <u>Political involvement and political risk</u>

354. The tenth red flag raised by Respondents is the "[p]*olitical involvement and political risk*", and in particular how figures in the Albanian petroleum business have interacted with high-ranking politicians and administrative officers in this matter.[165] Respondents refer in particular to the following individuals:

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[159] Statement of Defence, para. 52, p. 20.
[160] Rejoinder Brief, paras. 203-204, p. 58.
[161] Respondents' Post-Hearing Brief, para. 103, p. 32.
[162] Respondents' Post-Hearing Brief, para. 103, p. 32, referring to Hearing Transcript Day 1, pp. 167:10 *et seq.*, 169:15 *et seq.*; Hearing Transcript Day 2, pp. 20:25 *et seq.*
[163] Statement of Defence, para. 54, p. 21; Rejoinder Brief, para. 202, p. 58.
[164] Statement of Defence, para. 54, p. 21.
[165] Statement of Defence, para. 55, p. 22.

- Mr. Fatbardh Ademi was the Director - and therefore the head - of AKBN[166] when Claimant approached Respondents in 2006. He played a leading role in the contract negotiations, in approving the contractor for the Cakran, Gorisht and Ballsh Oilfields, and in negotiating with Claimant.[167] According to Respondents, Mr. Ademi joined Claimant after the License and Petroleum Agreements were awarded in the summer 2007 and stayed with Claimant until today, irrespective of the change in shareholders, an appointment that could only have been possible with the support of the MIE, led by the Democratic Party at that time.[168] In summary, Respondents' position is that "[i]*t was Mr. Ademi who helped to award the three oilfields licenses to the Claimant without proper selection- or tender procedure, and – undisputedly – later joined the Claimant and was paid by the Claimant*".[169]

- Mr. Arjan Tartari, Claimant's Director General of its Albanian branch in the early years of the License and Petroleum Agreements, has a close personal connection with Ms. Albana Vokshi, a high-ranking party official of the Democratic Party that was in power in 2007, at the time the Agreements were awarded.[170] Ms. Vokshi was also a Supervisory Board member of Albpetrol in 2006-2007 when the Albpetrol Board approved the Petroleum Agreements with Claimant. Respondents further contend that "[i]*t was impossible to find*" the minutes of the meetings in which Albpetrol's Supervisory Board voted for the Petroleum Agreements, as "*somebody must have cleansed the files*".[171]

- Mr. Naim Kasa, an Albanian citizen now registered as the Administrator of Claimant's Albanian Branch, TransatlanticAlbania Ltd, was awarded exploitation rights with regard to nine oil fields with Albania in August 2013.[172] According to Respondents, the agglomeration of oil exploitation rights in the hands of one individual is "*already suspicious*". Moreover, the nine transactions were reportedly performed just after the Albanian parliamentary elections of 23 June 2013, which the actual Government – the Democratic Party under then Prime Minister Sali

[166] Statement of Defence, para. 56, p. 22; Respondents explain that the Albanian National Agency of Hydrocarbons (AKH), which was the agency responsible for the oil and gas fields in 2006/2007 was later integrated as a part of the AKBN (Rejoinder Brief, para. 181, p. 52).
[167] Rejoinder Brief, para. 182, p. 53, referring to referring to **R-165** – Letter of Mr. Ademi (Director of National Agency of Hydrocarbons) to Mr. Genc Ruli (Minister of Economy, Trade and Energy) to dated 22 May 2006 and **R-166** – Letter of Mr. Genc Ruli (Minister of Economy, Trade and Energy) to Mr. Ademi (Director of National Agency of Hydrocarbons) dated 5 June 2006.
[168] Statement of Defence, para. 57, p. 22.
[169] Rejoinder Brief, para. 183, p. 53.
[170] Statement of Defence, paras. 58-59, pp. 22-23, referring to **R-6** – Website article of 1 September 2010 http://ps.al/te-reja/vokshi-i-jep-partnerit-4-nga-6-puset-e-naftes-01-09-2010 in Albanian and passages translated into English (as downloaded on 8 April 2018); **R-7** – Website article of 21 August 2010 http://lajmetshqip.com/ps-brace-tartari-mori-gjashte-hidrocentrale-per-1-dite-nga-berisha/ in Albanian and passages translated into English (as downloaded on 8 April 2018).
[171] Statement of Defence, para. 59, pp. 22-23.
[172] Statement of Defence, para. 60, p. 23.

Berisha – had lost, so that a new government was to be installed.[173] According to Respondents, the following facts and circumstances put in question the legality of the award of the License Agreements and although they "*stand proof for the way the Claimant has conducted and still conducts business in Albania*", Claimant did not substantially respond to them:[174]

(i). newspapers reported about Mr. Kasa's connections and petroleum contract award; [175]

(ii). the transfer of a substantial amount of exploitation rights to Claimant's Branch administrator in the transitional period before a new government takes over is "*very unusual*",[176]

(iii). Albpetrol discovered in 2015 that, in his position of director of the Phoenix Petroleum firm, Mr. Kasa is suspected of having misappropriated a high quantity of oil at the oilfield of Amonica by making false declarations to the customs offices. Mr. Kasa is also suspected of having falsified invoices from U.S. company Black Swan Energy Services belonging to Ms. Eva Peza, by pretending that Phoenix Petroleum had made investments to which it was obliged towards Albpetrol and AKBN. Albpetrol filed a criminal complaint in both these instances.[177] Respondents submit a letter of the U.S. Department of Justice to the Albanian Ministry of Justice of September 2017 in which the U.S. Department of Justice reports about an FBI witness interview with Ms. Peza, in which she confirmed that Mr. Kasa issued fake invoices of her company to Phoenix Petroleum in the amount of USD 1,290,000 for services that had never been performed,[178] and emails in which she made the same allegations.[179] Respondents consider that these criminal proceedings are relevant to this arbitration because (a) Phoenix Petroleum, under Mr. Kasa's leadership, is another contractor of Albpetrol and holds oil licenses for nine gas and oilfields,

[173] Statement of Defence, para. 60, pp. 23-24, referring to **R-8** – Information on Albanian parliamentary election 2013; **R-9** – Newspaper article from Agenzia Nova (online) of 26 January 2017 and translation [*in lieu* of many other articles].
[174] Rejoinder Brief, para. 184, p. 53.
[175] Statement of Defence, para. 61, p. 24, referring to **R-10** – Transcript of video news from the Top Channel investigative reports "fiks fare" of 14 March 2017 (http://top-channel.tv/2017/03/14/fiks-fare-sheiku-vjedh-naften-ne-vlore/) (as downloaded on 5 April 2018); **R-11** – Investigative newspaper article in Gazeta Dita of 15 April 2016 (http://www.gazetadita.al/njihni-sheikun-qe-mbiu-nga-hici/) (as downloaded on 5 April 2018).
[176] Statement of Defence, para. 62, p. 24.
[177] Statement of Defence, para. 63, pp. 24-25, referring to **RWS-1** – First Witness Statement of Endri Puka; **R-12** – Newspaper article in Lexo.al of 29 April 2017 (http://www.lexo.al/faksimile-skandali-shitjes-se-9-burimeve-shqiptare-te-naftes-tek-phoenix-petroleum/) (as downloaded on 5 April 2018).
[178] Rejoinder Brief, paras. 185-186, p. 53, referring to **R-167** – Letter of the U.S. Department of Justice to the Albanian Ministry of Justice dated 28 September 2017, including FBI witness interview with Ms. Eva Peza dated 9 July 2017.
[179] Statement of Defence, paras. 415-416, pp. 106-107, referring to **R-143** – E-Mail by Ms. Eva Pez to Mr. Gjiknuri, the Albanian Minister of Infrastructure and Energy, Mr. Dervishi, the Administrator of AKBN, Mr. Puka, and others dated 17 May 2016 with eight invoices; **R-144** – E-mail of Ms. Eva Peza to Mr. Endri Puka dated 10 May 2016.

(b) the purpose of the fake invoices to Phoenix Petroleum was to "*prove*" investments of Phoenix Petroleum in the amount of USD 1,290,000 in the oilfields *vis-à-vis* Respondents, which never happened, and (c) Respondent sees a pattern which was also followed by Claimant and "*have reason to believe*" that the biggest part of Claimant's alleged investments in the oilfields of claimed USD 81 million "*equally only happened 'on paper'*".[180]

(iv). Mr. Kasa is also accused of maintaining controversial contacts with government officials and, as CEO of Phoenix Petroleum, to have contracted with Superstar WB, a company owned by Mr. Bardhi Meli, who was previously the Deputy Director of AKBN.[181]

(v). Respondents have recently learned that Mr. Kasa was charged with the criminal offence of "*concealment of income*" because of undeclared sale of oil by-products connected to Phoenix Petroleum.[182]

- Mr. Sali Berisha, the Prime Minister who authorized the Petroleum Agreements with Claimant by signing the Decree No. 509 dated 8 August 2007,[183] had "*certain preoccupations with the oil sector*" as he established the AKBN by Decree No. 547 of 9 August 2006,[184] promulgated Decree No. 900 dated 4 August 1994 in his capacity as President of the Republic of Albania which referred to the so-called "Albpetrol Agreement" and was a "*significant step towards the privati*[z]*ation of the Albanian oil sector*",[185] and worked in favour of the privatization of Albpetrol in October 2012.[186]

- Ms. Argita Malltezi from the law firm Kola & Associates, acted for the company that Claimant's shareholders initially used to obtain the Licenses in 2006/2007 (Stream Petroleum (Albania) Limited)[187] and invoiced services of a value of approximately 57,485 EUR in 2007/2008, although she is the daughter of then Prime Minister Sali Berisha. She was accused in a confidential US Embassy cable published by WikiLeaks of abusing her father's powerful position to solicit clients and work in other matters.[188]

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[180] Rejoinder Brief, para. 187, pp. 53-54.
[181] Statement of Defence, para. 64, p. 25, referring to **R-13** – Newspaper article in Gazeta Dita of 19 May 2017 (http://www.gazetadita.al/nendrejtori-i-akbn-se-ben-biznes-me-firmen-nen-hetim-per-kontrabande/) (as downloaded on 5 April 2018) .
[182] Rejoinder Brief, para. 189, p. 54.
[183] **CL-3** – Decree of the Council of Ministers No. 509, dated 08.08.2007.
[184] **CL-2** – The Decree of the Council of Ministers No. 547 dated 09.08.2006.
[185] Statement of Defence, para. 65, pp. 25-26.
[186] Statement of Defence, para. 66, p. 26, referring to **R-14** – Website article of 15 October 2012 https://oilprice.com/Finance/investing-and-trading-reports/Albanian-Tycoon-Shakes-Up-the-Countrys-Booming-Oil-Market.html (as downloaded on 29 March 2018).
[187] Statement of Defence, para. 67, pp. 26-27, referring to **R-18** – Letter of Mr. Sotiris Kapotas from Stream Petroleum Ltd/Stream Petroleum (Albania) Ltd to Mr. Fatbardh Ademi of the National Petroleum Agency of 10 May 2016.
[188] Statement of Defence, para. 67, pp. 26-27, referring to **R-15** – Website article of 16 July 2014

355. With regard to the individuals listed above, Respondents argue that Claimant has not disputed the criminal activities of its Director Mr. Kasa but considers such activities as "*irrelevant*", and has failed to respond to the political involvement of Mr. Arjan Tartari, Ms. Albana Vokshi, Mr. Sali Berisha and Ms. Argita Malltezi,[189] so that these facts are to be considered admitted.[190]

2. Legal consequences of illegality in awarding the Agreements

356. Respondents object to Claimant denying any legal consequences irrespective of whether the conclusion of the Agreements and Claimant's conduct in connection with its oil operations were tainted by illegality, and argue that the illegality surrounding the award of the License and Petroleum Agreements leads to their invalidity.[191]

a) The License Agreements are invalid under the applicable Swiss law[192]

357. Respondents contend that under Article 20 of the Swiss Code of Obligations ("**SCO**"), a contract is void if it is against the law or contrary to *bonos mores* and/or *ordre public*,[193] and argue that acts of corruption violate the *ordre public* according to Article 190(2) lit. e IPRG[194] and that such a violation renders the related contract void.[195]

358. Respondents argue that, as the various indications for illegality show in the case at hand, it is to be assumed that Claimant was only awarded the License Agreements due to corruption and/or breach of trust, which are criminal offenses that "*infect the legal translation triggered by the illegal act, rendering it void as it is contrary to public policy*".[196]

359. Respondents state that pursuant to French and German law, the invalidity of the "*corruption agreement*" is inseparable from the "*main*" contract, *i.e.* the contract which was supposed to be triggered by the corruption agreement, meaning that the "*main*" contract is equally invalid in case of corruption.[197] If, "*at first glance*", as Claimant highlights, Swiss law regards the validity of the "*corruption agreement*" and the "*main*" agreement separately as decided by the Swiss Federal Supreme Court in a decision of 21 February 2003,[198] in this decision, the Court acknowledged that "*corruptive*

http://balkanblog.org/2014/07/16/salih-berishas-racketeers-argita-berisha-j-malltezi-flutura-kola-brecani-malltezi/ (as downloaded on 8 April 2018); **R-16** – Website article of 16 July 2014 http://www.balkaninsight.com/en/article/vajza-e-ish-kryeministrit-t%C3%AB-shqip%C3%ABris%C3%AB-ndjek-rrug%C3%ABn-ligjore-drejt-pasuris%C3%AB (as downloaded on 5 April 2018).

[189] Rejoinder Brief, para. 162, p. 47.

[190] Rejoinder Brief, para. 163, p. 47.

[191] Rejoinder Brief, paras. 207-208, p. 59.

[192] Swiss law is applicable to the License Agreements pursuant to **C-2**, **C-3** and **C-4** – License Agreements, Article 26.1, p. 66.

[193] Rejoinder Brief, para. 210, p. 59.

[194] Rejoinder Brief, para. 211, pp. 59-60, referring to **RL-10** –Swiss Federal Court, BGE 138 III 322 S. 327.

[195] Rejoinder Brief, para. 211, pp. 59-60, referring to **RL-11** – Swiss Federal Supreme Court, 4A_50/2017, Decision of 11 July 2017, para. 4.3.2.

[196] Rejoinder Brief, para. 212, p. 60.

[197] Rejoinder Brief, para. 213, p. 60.

[198] **CL-19** – Decision of Swiss Supreme Court, 21 February 2003, BGE 129 III 320, para. 5.2, pp. 324.

agreements" which materialize in the terms of the "*main*" contract render the "*main*" contract void due to breach of *bono mores*.[199]

360. Respondents argue that Claimant did not merely obtain a "*better*" contract, but "*only got awarded the License Agreements due to a corruptive act in the first place*". There are no objective reasons to award oil licenses, so that the award of the License Agreements was "*a corruptive act of nepotism* without any commercial reason".[200]

361. Respondents therefore argue that in accordance with Article 42 of the ICC Rules that provides that "*the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*", an arbitral tribunal must not render an award based on an illegal contract and inconsistent with the *ordre public* of the seat of arbitration, which in this case is Switzerland.[201]

362. Respondents contend that, in any event, even if the invalid contract "*would have been rectified*", Article 60(3) of Swiss Code of Obligations provides Respondents with "*a right of retention against any of the Claimant's alleged claims*" because the contract was obtained by tortious acts.[202] Respondents allege that they already exercised their right of retention by denying the alleged claims of Claimant based on the void License Agreements.[203]

b) <u>The Petroleum Agreements are invalid under the applicable English law</u>[204]

363. According to Respondent, the "*ex turpi causa doctrine*", sanctioned by case law and endorsed by English doctrine, prevents a claimant from obtaining benefits in court from its own wrongful conduct, which includes conclusion of a contract obtained by corruption.[205]

364. Respondents further argue that under English law, corruption is a "*quasi-criminal act*" that contravenes *ordre public*.[206]

365. In addition, Respondents contend that the Petroleum Agreements are collateral agreements tainted by the illegality of the corruption agreement, as they are "*remotely*

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[199] Rejoinder Brief, para. 214, p. 60, referring to **CL-19** – Decision of Swiss Supreme Court, 21 February 2003, BGE 129 III 320, para. 5.2, pp. 324.
[200] Rejoinder Brief, paras. 216-217, p. 61.
[201] Rejoinder Brief, paras. 218-219, pp. 61-62.
[202] Rejoinder Brief, para. 220, p. 62.
[203] Rejoinder Brief, para. 221, p. 62.
[204] English law is applicable to the Petroleum Agreements pursuant to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 18.1, p. 28.
[205] Rejoinder Brief, paras. 225-229, p. 63, referring to **RL-12** – Patel v Mirza [2016] UKSC 42, para. 120; **RL-13** – Holman v Johnson (1775) 1 Cowp 341, para. 343; **RL-14** – Les Laboratoires Servier v Apotex [2014] 3 WLR 1257, para. 23; **RL-15** – Edwin Peel, The Law of Contract, 14th ed., Sweet & Maxwell, paras. 11-111.
[206] Rejoinder Brief, paras. 230-231, p. 64, referring to **RL-14** – Les Laboratoires Servier v Apotex [2014] 3 WLR 1257, para. 25; **RL-16** – World Duty Free v Republic of Kenya, ICSID Case No. ARB/007, 4 October 2006, para. 157.

connected" to the corruption agreement, as required by English law.[207] In the case at hand, the Petroleum Agreements were only awarded due to corruptive acts set out above (see above at paras. 335 *et seq.*).[208]

366. Without the fraudulent acts of corruption, Claimant would have never been awarded the licenses.[209]

367. Finally, Respondents argue that English law binds the Tribunal to render an award "*consistent with* ordre public".[210]

c) <u>The Tribunal lacks jurisdiction because the award of the Agreements was tainted by illegality</u>

368. Respondents allege that because the award of the License Agreements and Petroleum Agreements was tainted by illegality, the Tribunal lacks jurisdiction to decide on Claimant's claims. Respondents argue that "[i]*t is widely accepted that in case of illegality due to corruptive acts and breach of trust, the principle of 'separability' does not 'save' the arbitration agreements as the defect adversely affects both agreements*".[211]

3. <u>Ways of dealing with the suspicion of illegality</u>

369. Respondents admit that the defence of corruption and illegality in cases of investment in the public sector is "*sometimes controversial*" as it enforces the rule of law but typically favours the State which has often benefitted from investments already made. However, the case at hand is based on a very different scenario, because the "*investor*" never exposed itself to making a loss, for the reasons set out in Respondents' position throughout this arbitration.[212]

370. Respondents list a number of "*ways of dealing with the suspicion of illegality*":[213]

- "*To do a simple commercial check*": Respondents invite the Tribunal to examine the consideration that Claimant paid for the extraction licenses obtained in 2007: "*What is the consideration the Claimant has paid for the oil extraction licenses obtained in 2007 that, according to the Claimant, allow its shareholders to pocket unknown proceeds from the oil operations and approx. USD 45 million following the sale to the TransAtlantic Group plus USD 113 million+ requested in this arbitration? The Respondents suggest that these figures are not in proportion*".[214]

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[207] Rejoinder Brief, paras. 232-234, pp. 64-65, referring to **RL-17** – Chitty on Contracts, Vol. I, 32nd ed., Sweet & Maxwell, para. 16-182; **RL-18** – Treitel, The Law of Contract, para. 11-167.
[208] Rejoinder Brief, paras. 235-236, p. 65.
[209] **CL-3** – Decree of the Council of Ministers No. 509, dated 08.08.2007.
[210] Rejoinder Brief, para. 237, pp. 65-66, referring to **RL-19** – Soleimany v Soleimany [1999] Q.B. 785, para. 49.
[211] Rejoinder Brief, paras. 23-25, p. 13.
[212] Statement of Defence, paras. 69-70, pp. 27-28.
[213] Statement of Defence, para. 71, pp. 28-29.
[214] Statement of Defence, para. 71, p. 28.

- "*To follow the money anr* (sic) *to provide for full transparency*": Respondents state that the Tribunal must wonder who benefitted from the contract award, the earnings, the misappropriations of crude oils and argue that all direct or indirect shareholders must be identified.[215]

- "*To revisit the customary standards of interpretation and burden of proof*": Respondents invite the Tribunal to examine whether the customary standards of interpretation and burden of proof are appropriate in situations where a contract was not really negotiated but in which a contract seems to have come "*par ordre de mufti*", and where the party not bearing the burden of proof is in the position to clear up the suspicion of illegality, in particular to the arbitration clause.[216] Claimant bear the negative consequences resulting from the failure to really negotiate.[217]

- "*To strictly apply formal requirements and protective mechanisms that are installed to prevent the abuse of office/illegality*" and are typically infringed in illegality scenarios: Respondents contend that the parties' interests are not aligned and the dispute is characterized by a conflicting interest because States officials and private investors concluded a contract in which the State interests are "*obviously neglected*".[218]

- "*To grant time for the assessment of facts*": In their Statement of Defence, Respondents stated that they reserved their right to argue the illegality/nullity of the arbitration clauses and License and Petroleum Agreements, and indicated they would do so "*once sufficient evidence is available*".[219]

371. In their Post-Hearing Brief, Respondents put forward that arbitral tribunals "*must not look away in red flag scenarios*" in a context where standards for dealing with the suspicion of illegality in arbitration have become stricter in the recent past.[220] Respondents submit legal exhibits in support of their position, proposing a deviation from the traditional approach to the standard of burden of proof in cases that are suspicious of corruption, by proposing to eliminate unfair evidentiary advantages of suspects of illegality.[221]

[215] Statement of Defence, para. 71, p. 29.
[216] Statement of Defence, para. 71, p. 29.
[217] Statement of Defence, para. 71, p. 29.
[218] Statement of Defence, para. 71, p. 29.
[219] Statement of Defence, para. 71, p. 29.
[220] Respondents' Post-Hearing Brief, para. 104, pp. 32-33.
[221] Respondents' Post-Hearing Brief, para. 105, p. 33, referring to **RL-32** – Vladimir Khvalei, Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption, ICC Int'l Court of Arbitration Bulletin, Vol 24/Special Supplement 2013, p. 15, p. 23.

372. In response to the Tribunal's question of 31 January 2019[222] on the potential effects on the case of the principle of *effet utile*, Respondents argue that, although this concept does not exist under Swiss law, Swiss law recognizes the legitimacy of a teleological interpretation of contracts.[223] Respondents specify that a teleological interpretation is "*subsidiary*" to an interpretation of the wording and does not permit to "*cure*" major deficiencies like invalidity or unreasonableness that typically results from contracts that are "*imposed*" by nepotism.[224] The Tribunal should thus avoid a "*teleological interpretation*" of the LAs/PAs as "*this would mean to honor an act of nepotism and the party-cadres' attempt to misuse the Albanian petroleum resources for their private benefits*".[225]

373. Respondents also argue that courts too have adopted a stricter standard for dealing with the suspicion of illegality. In this regard, Respondents rely on a judgment of the Paris Court of Appeal dated 10 April 2018 which vacated an exequatur order on the basis that the suspicion of bribery payments had not been investigated by the arbitral tribunal, whereas the court had the duty to consider all facts and laws relevant to public policy.[226]

374. Respondents submit that the red flags identified by the Paris Court of Appeal "*mirror*" some of the indicators for illegality that Respondents have shown in this arbitration, such as incompleteness of documents, inadequate capacities, country risk and contractor's implication for corrupt practices and inexplicability of contract awarding[227] (see details above at paras. 335 *et seq.*).

B. <u>Claimant's position</u>

375. Claimant calls Respondents' allegations of contract illegality "*embarrassing*", and argues that Respondents never raised these suspicions before the filing of their Statement of Defence, despite the fact that Respondents were parties to the License Agreements since 2007 and that the current Government has been in power since the summer of 2013.[228]

1. <u>Claimant's response to the red flags alleged by Respondents</u>

376. As to the <u>first three red flags</u> alleged by Respondents, Claimant states that by Decree of the Council of Ministers, it was part of the duties and responsibilities remitted by the

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[222] Tribunal's email of 31 January 2019, Question 3: "*Does the principle of* effet utile *apply to contract interpretation under Swiss Law? If so, what is the effect of such provision or doctrine on the case at hand, regarding both the jurisdiction and the merits of the claims?*".
[223] Respondents' Post-Hearing Brief, paras. 35-36, p. 13.
[224] Respondents' Post-Hearing Brief, para. 37, p. 14, referring to **RL-30** – Basler Kommentar/Wiegand, OR I 2015, Art. 18 note 40; **RL-31** – Jäggi/Gauch/Hartmann, Zürcher Kommentar, Obligationenrecht, 2014, note 491 ad Art. 18 CO.
[225] Respondents' Post-Hearing Brief, paras. 38-42, pp. 14-16.
[226] Respondents' Post-Hearing Brief, para. 106, p. 33, referring to **RL-38** – Alstom vs. Alexander Brothers Ltd, Revue de l'arbitrage 2018, pp. 574 *et seq.*
[227] Respondents' Post-Hearing Brief, paras. 107-112, pp. 34-35.
[228] Reply, para. 52, p. 8.

MEI to AKBN to develop and negotiate model hydrocarbon agreements, including agreements such as the License Agreements and Petroleum Agreements.[229]

377. Claimant argues that the License Agreements and Petroleum Agreements are based on a model form established by Respondents since at least 2004, when Respondents entered into a PSA with Saxon International Energy Ltd. (now BPAL) for the Patos-Marinza Oilfield,[230] that the AKBN was legally tasked with developing,[231] and that such model agreement is based "*on an international production sharing concept whereby a foreign investor provides capital for the operations of a field while the state collects benefits through an income stream, in this case PEP&ASP plus a Profit Tax, once its operational costs and expenses are recovered*".[232] The model hydrocarbon agreements contemplate no cash consideration being paid by a contractor in exchange for the license rights, in response to Respondents' allegation that Claimant gave no consideration in exchange for the award of the PSAs.[233]

378. Claimant also asserts that the bidding process for oil and gas fields in Albania between 2007 and 2013 was very similar to past practice: Respondents directly negotiated with bidders, which have generally been start-up companies with limited or no financial resources or technical resources, but which thereafter pursue capital and procure expertise.[234] Claimant adds that almost every PSA signed until 2014 has been awarded through *ad hoc* negotiations, rather than competitive bidding.[235]

379. According to Claimant, "*most if not all oil and gas fields*" awarded between 2004 and 2013 use virtually the same model contracts, with minor differences reflecting disputing mechanisms and technical specifics of fields.[236]

380. Claimant contends that since Respondents employed an *ad hoc* negotiation process when the model PSAs were entered into in respect of the Oilfields, it is "*not surprising*" that there may be little documentation by way of negotiations between the parties, and

[229] Reply, para. 53, p. 8, referring to Statement of Claim, para. 55, p. 7.
[230] **C-165** – License Agreement for the Development of Petroleum in the Patos-Marinza Oilfield, dated ____, 2004, between the Ministry of Industry and Energy, as represented by The National Petroleum Agency and Albpetrol Sh. A.; **C-166** – Petroleum Agreement for the Development and Production of Petroleum in Patos-Marinza Oilfield, dated 19 June 2004 between Albpetrol Sh. A. and Saxon International Energy Ltd.
[231] Claimant's Post-Hearing Brief, para. 119, p. 24.
[232] Reply, para. 54, p. 8; Claimant's Post-Hearing Brief, para. 119, p. 24.
[233] Claimant's Post-Hearing Brief, para. 120, p. 25: "*This makes sense, as the purpose of a production sharing agreement is to have an investor provide capital for the operations of the concession while the state collects benefits through a royalty stream (in this case the PEP, ASP and Profit Tax)*".
[234] Reply, para. 55, p. 8, referring to **C-167** – Deloitte, Albania Extractive Industries Transparency Initiative in Albania, Report for the year 2013 and 2014 (December 2015), pp. 29-31.
[235] Reply, para. 55, p. 8; Claimant's Post-Hearing Brief, para. 121, p. 25, referring to **C-167** – Deloitte, Albania Extractive Industries Transparency Initiative in Albania, Report for the year 2013 and 2014 (December 2015), pp. 29, 31, 110.
[236] Reply, para. 56, p. 9, referring to **C-167** – Deloitte, Albania Extractive Industries Transparency Initiative in Albania, Report for the year 2013 and 2014 (December 2015), p. 31; **C-168** – List of Resource Contracts in Albanian between 2004 and 2014.

Respondents themselves have not produced redacted copies of standard form negotiation documents.[237]

381. In addition, Claimant submits that having had three ownership groups since 2007, it cannot be expected to have maintained all documents for all time, particularly the documents relating to contracts which have been performed for nearly a decade "*without a whisper of illegality*".[238] During the document production phase, Claimant informed Respondents that it had unsuccessfully contacted the prior ownership group of TAT.[239] On the other hand, Respondents have made unsubstantiated allegations concerning the cleansing of their files (see details below at para. 392).[240]

382. Regarding Respondents' allegation that, under Article 5(2) of the Petroleum Law, Claimant should have provided proof of financial and technical competence, Claimant argues that there is no evidence that it was ever asked to do so, and contends that Article 5(2) requires that the potential contractor can satisfy the MEI that it has "*or can acquire*" the financial resources and technical competence required to discharge the obligations under the License Agreements.[241]

383. Claimant contends that at the time the License Agreements were bid on, negotiated and awarded, it had the ability to raise capital to invest in each of the Oilfields through Haywood Securities (UK) Limited ("**Haywood**").[242] In response to Respondents' allegations of lack of authenticity of the letter from Haywood to Stream Oil & Gas Ltd certifying that funds would be made available to Stream,[243] Claimant argues that the letter affixes a news release dated 19 June 2007 that refers to Haywood entities intending to carry out a brokered private placement to raise between CDN $2 and $4 million in connection with Claimant's proposed business combination with a publicly-traded Canadian company. Claimant adds: "*If the Respondents and this Tribunal turn to Canada's publicly available System for Electronic Document Analysis and Retrieval ("**SEDAR**"),*[244] *the Respondents' allegations – made in the Rejoinder only – are easily rebutted by searching SEDAR records relating to 'Stream Oil & Gas' in 2007, which confirm the raising of CDN $2.495 million on 16 August 2007 by the Haywood entities*".[245]

384. As indicated above, Claimant also argues that its head office was located in Vancouver, British Columbia, Canada, "*in close proximity to Calgary, Alberta, Canada, which is internationally recognized as a center for oil and gas financial expertise*". According to

[237] Claimant's Post-Hearing Brief, para. 122, p. 25.
[238] Claimant's Post-Hearing Brief, para. 123, p. 25.
[239] Claimant's Post-Hearing Brief, para. 123, p. 25, referring to Email from Claimant to Respondents regarding Claimant's Ordered Document Production dated 25 June 2018, Request No. 12.
[240] Claimant's Post-Hearing Brief, para. 123, p. 25.
[241] Reply, para. 57, p. 9; Claimant's Post-Hearing Brief, para. 124, pp. 25-26.
[242] Reply, para. 58, p. 9, referring to **C-169** – Letter from Haywood Securities (UK) Limited to Stream Oil & Gas Ltd. dated June 12, 2007.
[243] **C-169** – Letter from Haywood Securities (UK) Limited to Stream Oil & Gas Ltd. dated June 12, 2007.
[244] http://sedar.com/search/search_form_pc.htm.
[245] Claimant's Post-Hearing Brief, para. 125, p. 26.

Claimant, this gave Claimant access to personal, consultants and advisors with experience in the types of fields acquired by Claimant. Between August and December 2007, Claimant engaged Sproule International Limited to review Claimant's work program for the Evaluation Period of each of the Oilfields.[246]

385. Claimant contends that this evidence "*circumstantially suggests*" that the MEI "*rationally*" concluded that Claimant could acquire the financial resources and technical competence required to discharge its obligations and hence moved forward with the award of the PSAs to Claimant.[247]

386. Claimant further contends that the drilling of new wells has never been required under the License Agreements[248] and that, since 2007, it has invested millions into the Oilfields, reinvesting all revenues into Claimant and its operations,[249] and has paid neither dividends nor any other form of distributions to its shareholders during its existence.[250]

387. In response to Respondents' argument concerning the negotiation exclusivity,[251] Claimant contends that Respondents provide no evidence of any law prohibiting negotiation exclusivity or direct, *ad hoc*, negotiations in the licensing of oilfields in Albania.[252] Respondents provide no evidence that after the MEI's 5 October 2006 protest letter on the subject, Claimant was actually awarded exclusive negotiations following this letter. According to Claimant, "[t]*o the extent there was any exclusivity period (*quod non*), according to Exhibit R-2, it would have fallen away before the licenses were awarded to the Claimant*".[253]

388. Claimant concludes that in any case, all three Respondents and the Council of Ministers ultimately approved the award of the License Agreements and Petroleum Agreements to Claimant,[254] and that "*beyond political innuendo in some news article from 2010 and 2014*", Respondents have provided no evidence of illegal conduct by any of the Respondents, Claimant or their respective personnel at the time of bidding or award of the PSAs.[255]

389. In response to the <u>fourth red flag</u> raised by Respondents regarding the allegation that Claimant engaged in conduct triggering suspicion of criminal activity, and in particular Mr. Kasa's conduct, Claimant also notes that as of the date of the Reply, no criminal

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[246] Reply, para. 59, p. 10; Claimant's Post-Hearing Brief, para. 126, p. 26, referring to **C-171** – Sproule International Limited, *Review of Evaluation Period Work Programs for Certain Petroleum and Natural Gas Fields, Albania for Stream Oil &Gas Ltd.* (As of December 31, 2007).
[247] Claimant's Post-Hearing Brief, para. 127, p. 26.
[248] Reply, para. 60, p. 10.
[249] Reply, para. 60, p. 10.
[250] Reply, para. 61, p. 10, referring to Second Witness Statement of Kreshnik Grezda, para. 15, p. 4.
[251] Statement of Defence, para. 41, p. 16.
[252] Reply, para. 62, p. 10.
[253] Reply, para. 63, p. 10.
[254] Reply, para. 64, p. 10; Claimant's Post-Hearing Brief, para. 129, p. 26.
[255] Claimant's Post-Hearing Brief, para. 129, pp. 26-27.

charges had been filed against Mr. Kasa and that the allegations made by Respondents were filed by Albpetrol as complaints with the authorities in Albania, which have not culminated in charges or proceedings against Mr. Kasa. Claimant thus requests that the Tribunal ignore these allegations which, in any case, concern irrelevant matters.[256]

390. Claimant's response to the fifth red flag alleged by Respondents is more oriented towards the merits than the alleged illegality, which is why the Tribunal will summarize it in the section concerning the merits of Claimant's claims.[257] In a nutshell, Claimant argues that under the Petroleum Agreements, it is not responsible for any environmental damages incurred prior to the date of approval of a baseline study,[258] that Claimant had a single instance of non-compliance levied against it by a Government entity on 11 November 2016[259] and that Albpetrol is not the Government entity responsible for the environment, so that it cannot qualitatively speak to the environmental condition of the Oilfields.[260] Claimant also disputed that the photographs submitted by Respondents were taken on the Gorisht and Cakran Oilfields and that they were taken at the date in January and February 2017.[261]

391. The sixth red flag alleged by Respondents concerning Claimant's alleged absence of fear of prosecution is not specifically addressed by Claimant.

392. In response to the seventh red flag alleged by Respondents regarding the cleansing of Respondents' files, Claimant qualifies it as "*empty*" and unsubstantiated, although Respondents had the time to examine the records of three separate institutions and could have provided the witness statement from record keepers or archival librarians testifying to the fact that records have been cleansed.[262] Claimant argues that it cannot be held responsible for Respondents' "*collective inability to maintain their records*", or should it suffer prejudice to its credibility "*from what very well may be politically-charged allegations tendered by governmental entities against their predecessors and their perceived allies*".[263]

393. Claimant therefore requests the Tribunal to draw adverse inference against Respondents in respect of the allegations that their files have been cleansed.[264]

394. In response to the eighth and ninth red flags alleged by Respondents, Claimant asserts that it is validly incorporated pursuant to the laws of the Cayman Islands,[265] and specifies that (i) up to the end of 2014, it had an office in Calgary, Alberta with technical

[256] Reply, para. 193, p. 33.
[257] See the summary of Claimant's position on the environmental and safety obliations paras. 937-944 below.
[258] Reply, para. 109, p. 17.
[259] Reply, para. 110, pp. 17-18.
[260] Reply, para. 111, p. 18.
[261] Claimant's counsel's email dated 1 February 2019.
[262] Reply, paras. 71-72, pp. 11-12.
[263] Reply, para. 73, p. 12.
[264] Reply, para. 74, p. 12.
[265] Reply, para. 69, p. 11, referring to **C-163** – Certificate of Good Standing of GBC Oil Company Ltd., dated 28 March 2018.

support and financial staff and an office in Vancouver, British Columbia with technical staff,[266] and (ii) from 2015 to 2016, it was technically and financially supported by affiliate corporation offices in Dallas, Texas and Istanbul, Turkey. Claimant adds that "[d]*uring these periods, there were also a number of ex-patriot workers in the Oilfields operated by the company*".[267]

395. Claimant submits that it is irrelevant to this arbitration to know who its shareholders were in 2007, or are today, and why Claimant did not have its branch registration name updated from Transatlantic Albania Ltd. to GBC Oil Company Ltd.[268]

396. In response to the tenth red flag alleged by Respondents, Claimant specifies that Mr. Fatbardh Ademi was not the "*head*" of AKBN but the Director of the Petroleum Department, that he had no decision-making authority with respect to the grants of hydrocarbon agreements and, in any case, did not join Claimant until 2011, four years after Claimant had begun conducting Petroleum Operations in respect of the Oilfields.[269]

397. Claimant also argues that any allegations relating to events after the award of the PSAs, or the purported conduct of individuals in connection with entities unrelated to Claimant at the time of the award are "*entirely irrelevant*" for the assessment of the alleged illegality of the award. For instance, Claimant indicates that "*Respondents' bizarre preoccupation with Mr. Naim Kasa (who had nothing to do with the award of the PSAs or the Claimant prior to February 2016) suggests the Respondents may be motivated by political animus*".[270]

2. Legal consequence of illegality in awarding the Agreements and ways of dealing with suspicions of illegality

398. Claimant contends that "*it is not clear what relief, if any, the Respondents claim*" in relation to the "*unjustified and spurious suspicions of illegality*". According to Claimant, Respondents have long taken the benefits of the PSAs and cannot now claim to disavow them on grounds of illegality, especially when Claimant has had three different owners and the Government has seen a change of regime over the eleven-year period since the grant of the PSAs.[271]

a) Allegations of illegality under Swiss law

399. Concerning the burden of proof, Claimant argues that Respondents bear the burden of proving their allegations of illegality because under Swiss law, (i) the party alleging illegal conduct, such as corrupt acts, as a defense to a claim, must prove these

[266] Reply, para. 69, p. 11, referring to **C-172** – News Release: Stream Oil & Gas Appoints New Chief Financial Officer, Moves Head Office to Calgary (31 May 2010); Second Witness Statement of Kreshnik Grezda, para. 11.
[267] Reply, para. 69, p. 11, referring to Second Witness Statement of Kreshnik Grezda, para. 12, p. 3.
[268] Reply, para. 70, p. 11.
[269] Reply, para. 65, p. 10, referring to Second Witness Statement of Kreshnik Grezda, para. 9, p. 3.
[270] Claimant's Post-Hearing Brief, para. 130, p. 27.
[271] Reply, para. 66, p. 10.

allegations[272] and (ii) the ordinary standard of proof applies to the proof of the allegations of illegality and corruption, which standard is "*beyond reasonable doubt*".[273]

400. According to Claimant, "[i]*t is obvious*" that Respondents fall short of meeting their burden of substantiating their allegations of illegality beyond a reasonable doubt, as they have "*failed to put forward even a scintilla of evidence*" regarding the alleged conduct, and Claimant has tendered evidence that positively rebuts their allegations.[274]

401. Claimant contends that, even if Respondents' factual allegations were true, the PSAs would not be illegal under Swiss law.[275] According to the Swiss Supreme Court, a contract procured by an illegal act such as bribery is neither illegal nor immoral under Swiss law as long as the illegal act conducted "*in the forefront*" of the conclusion of the contract is not reflected in the content of the main contract,[276] which is also the prevailing view of Swiss scholars.[277] Only an actual promise to pay a bribe, *i.e.*, a "*bribery contract*", would be void.[278]

402. Claimant contends that Respondents have also failed to prove that any purported illegal act is reflected in the License Agreements, which are standard agreements used by the Albanian government since 2004, as indicated above. According to Claimant, "*counsel for the Respondents' understanding at the hearing was the same License Agreements would be transferred to those contractors bidding for the Oilfields that were illegally taken away from the Claimant. The Respondents thereby confirm that the License Agreements do not reflect any illegal acts. It follows that the License Agreements are valid*".[279]

403. Claimant argues that under Swiss law, a party that attempts to exercise a remedy pursuant to a voidable contract thereby ratifies such contract, thus precluding the

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[272] Claimant's Post-Hearing Brief, para. 116, p. 24, referring to **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 39; **CL-48** – Baizeau & Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, in: International Arbitration and the Rule of Law (Menaker ed., 2017), pp. 258-259; **CL-49** – Zuberbühler & Schregenberger, *Corruption in Arbitration – The Arbitrator's Duty to Investigate*, in: New Developments in International Commercial Arbitration 2016 (Müller et al. eds., 2016), paras. 24-26.

[273] Claimant's Post-Hearing Brief, para. 116, p. 24, referring to **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 39; **CL-49** – Zuberbühler & Schregenberger, *Corruption in Arbitration – The Arbitrator's Duty to Investigate*, in: New Developments in International Commercial Arbitration 2016 (Müller et al. eds., 2016), para. 31.

[274] Claimant's Post-Hearing Brief, paras. 117-118, p. 24.

[275] Reply, para. 67, p. 11, referring to **CL-19** – Decision of Swiss Supreme Court, 21 February 2003, BGE 129 III 320, para. 5.2, pp. 324 *et seq*.

[276] Claimant's Post-Hearing Brief, para. 131, p. 27, referring to **CL-19** – Decision of Swiss Supreme Court, 21 February 2003, BGE 129 III 320, para. 5.2, pp. 324 *et seq*.; **CL-25** – Decision of Swiss Supreme Court, BGE 199 II 380, para. 4c, p. 385; **CL-50** – Decision of Swiss Supreme Court, BGE 47 II 86, para. 2, pp. 88 *et seq*.

[277] Claimant's Post-Hearing Brief, para. 131, p. 27, referring to **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 14; **CL-51** – Huguenin & Meiser, Art. 19/20, in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), para. 39.

[278] Claimant's Post-Hearing Brief, para. 131, p. 27, referring to **CL-25** – Decision of Swiss Supreme Court, BGE 199 II 380, para. 4c, p. 385.

[279] Claimant's Post-Hearing Brief, para. 132, p. 27, referring to Hearing Transcript Day 1, p. 102:5-9.

voidance of the contract.[280] Respondents have attempted to enforce rights and remedies under the PSAs, such as invoking purported material breaches, requesting Claimant to remedy the same, and purporting to terminate the Petroleum Agreements for alleged material breach.[281]

404. Claimant further claims that, under Swiss law, a party may invoke deceit or fundamental error to void a contract that has been procured by an illegal act if that party was unaware of the illegal act at the time when it entered into the contract. In order to void the contract, that party would need to declare voidance within one year upon discovery of the withheld or erroneous act and would need to show that it would not have entered into the contract or not pursuant to the same terms if it had known of the illegal act.[282]

405. Claimant argues that, in the present case, Respondents (i) have not declared voidance of the License Agreements based on deceit or error, (ii) have failed to substantiate and prove that there was any withheld or erroneous fact and that they would not have entered into the License Agreements or not pursuant to the same terms if they had known of any withheld or erroneous fact, so that they have no right to invoke deceit or fundamental error.[283]

406. Claimant contends that, in any event, a party forfeits the right to invoke deceit and fundamental error if it ratifies the contract after becoming aware of the withheld or erroneous fact, such ratification occurring impliedly by conduct, such as invoking contractual remedies.[284]

407. According to Claimant, Respondents have ratified the License Agreements and the Petroleum Agreements on several occasions.

408. First, after the 2013 change in government, Albpetrol, led by its new CEO Mr. Puka, agreed to the Settlement Agreement with Claimant concerning the PEP&ASP Liability and the royalty tax in July 2015.[285] Claimant contends that, although Respondents

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[280] Reply, para. 67, p. 11, referring to **CL-20** – Decision of Swiss Federal Supreme Court, 14 December 2000, BGE 127 III 83.

[281] Reply, para. 67, p. 11, referring to **C-15** – Letter from Albpetrol Sh. A. regarding Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated February 10, 2016; **C-16** – Letter from Albpetrol Sh. A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016; **C-17** – Letter from Albpetrol Sh. A. regarding Notice of Termination of the Petroleum Agreement for Cakran-Mollaj Oilfield dated September 19, 2016 (English translation); **C-18** – Letter from Albpetrol Sh. A. regarding Notice of Termination of the Petroleum Agreement for Gorisht-Kocul Oilfield dated September 19, 2016 (English translation); **C-19** – Letter from the Ministry of Energy and Industry regarding Confiscation of the Cakran-Mollaj and Gorisht-Kocul Oilfields (English Translation).

[282] Claimant's Post-Hearing Brief, para. 133, p. 27, referring to **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 14.

[283] Claimant's Post-Hearing Brief, para. 134, pp. 27-28.

[284] Claimant's Post-Hearing Brief, para. 135, p. 28, referring to **CL-20** – Decision of Swiss Federal Supreme Court, 14 December 2000, BGE 127 III 83.

[285] Claimant's Post-Hearing Brief, para. 136, p. 28, referring to Statement of Claim, para. 143, p. 25; **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh. A., TransAtlantic Albania Ltd.

expressed dissatisfaction with various alleged circumstances concerning Claimant's performance of the PSAs, they never notified Claimant of any alleged illegality and they invoked counterclaims in the context in this arbitration.[286] At the hearing, Respondents' counsel stated that he understood that Respondents would transfer the same License Agreements to which Claimant had become a party in 2007 to new parties,[287] whereas if the License Agreements had been tainted with illegal acts, Respondents would have entered into new or different License Agreements. According to Claimant, all of this shows that Respondents have ratified the License Agreements on several occasions and have therefore waived any right to void the License Agreements based on deceit or fundamental error.[288]

409. As to Respondents' argument that they have a right to withhold payment of Claimant's claims based on Article 60(3) of the Swiss Code of Obligations even if the License Agreements are ratified,[289] Claimant argues that this provision provides a party with a right to withhold performance of another party's claim if a tort has given rise to the other party's claim even if the injured party's own tort claim is time-barred, and does not apply if the contract is ratified.[290] In any event, the primary condition for invoking this retention right is a tort claim of the injured party against the other party,[291] to which Respondents are not entitled, and do not allege, as Respondents "*in fact have refrained from substantiating and proving any counterclaim or set-off defense in this arbitration*".[292]

b) <u>Allegations of illegality under English law</u>

410. Claimant accuses Respondents of materially misstating English law in respect of illegality.[293]

411. First, Claimant argues that a contract that is illegal as to formation, *i.e.* procured by bribery or corruption, is unenforceable at the option of the innocent party, not void *ab initio*.[294] The English High Court has declared that there is no English public policy

(formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015.

[286] Claimant's Post-Hearing Brief, para. 136, p. 28, referring to Terms of Reference, paras. 107, 119, 122(c)-(d), pp. 19-21.

[287] Hearing Transcript Day 1, p. 102:5-9.

[288] Claimant's Post-Hearing Brief, para. 136, p. 28.

[289] Rejoinder Brief, para. 221, p. 62.

[290] Claimant's Post-Hearing Brief, para. 137, p. 28, referring to **CL-20** – Decision of Swiss Federal Supreme Court, 14 December 2000, BGE 127 III 83, para. 1a, pp. 85-86. Claimant specifies: "*mere expiry of the one-year time limit to void the contract is insufficient, but ratification e.g. by conduct such as invoking contractual remedies precludes invoking the retention right*".

[291] Claimant's Post-Hearing Brief, para. 138, pp. 28-29, referring to **CL-52** – Brehm, Art. 60, in: Berner Kommentar Art. 41-61 OR (Hausheer & Walter eds., 4th ed. 2013), para. 111.

[292] Claimant's Post-Hearing Brief, para. 138, pp. 28-29.

[293] Claimant's Post-Hearing Brief, para. 139, p. 29.

[294] Claimant's Post-Hearing Brief, para. 140, p. 29, referring to **CL-53** – Beale, *Chitty on Contracts* (33ed., 2018), paras. 16-034, 16-205; **CL-54** – *Honeywell International Middle East Ltd v Meydan Group LLC*, [2014] EWHC 1344 (TCC), paras. 183-185; **CL-55** – National Iranian Oil Company v Crescent Petroleum Company International Ltd, [2016] EWHC 510 (Comm), para. 49.

precluding enforcement of a contract procured by corruption, being distinct from an illegal contract itself, *i.e.* a contract to pay a bribe, and, rather a contract procured by an illegal act may be voidable at the instance of an innocent party.[295]

412. Second, Claimant argues that the *Patel v. Mirza*[296] and *Les Laboratoires Servier*[297] decisions cited by Respondents concern contract with illegal purposes, not contract procured by illegality.[298]

413. Third, Claimant argues that a respondent bears the burden of proving its allegations of illegality.[299]

414. Claimant argues that, in the present case, there is no evidence that the Petroleum Agreements were awarded due to corruptive acts and that, even if they were, and the Tribunal concluded they were obtained as a result of corruptive acts, the Petroleum Agreements would not be void *ab initio*. Claimant adds that Albpetrol is not an "*innocent*" party and would therefore have no right to void the Petroleum Agreements *post facto* and that, in any case, Albpetrol has not earlier exercised any right to void the Petroleum Agreements. Accordingly, Claimant contends that the Petroleum Agreements are not illegal, or tainted by illegality, and are enforceable.[300]

c) <u>The Tribunal has jurisdiction irrespective of the alleged illegality</u>

415. In response to Respondents' argument that the Tribunal lacks jurisdiction to decide on Claimant's claims because the License Agreements are tainted by illegality and that the principle of separability does not "*save*" the arbitration agreements because the defect affects both agreements,[301] Claimant argues that the principle of separability of the arbitration agreement applies even if the License Agreements were void *ab initio* and even if the License Agreements were tainted by corruption.[302]

416. According to Claimant, Article 178(3) of the Swiss Private International Law Act ("**SPILA**") provides that "[t]*he arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen*". Moreover, the Swiss Supreme Court held in a leading case that, even if the arbitral tribunal had found that bribes paid to President Marcos of the Philippines had led to the conclusion of the contracts in dispute, the Supreme Court would have rejected the challenge of the award for alleged lack of

[295] Claimant's Post-Hearing Brief, para. 140, p. 29.
[296] **RL-12** – Patel v Mirza [2016] UKSC 42.
[297] **RL-14** – Les Laboratoires Servier v Apotex [2014] 3 WLR 1257.
[298] Claimant's Post-Hearing Brief, para. 141, p. 29.
[299] Claimant's Post-Hearing Brief, para. 142, p. 29, referring to **CL-56** – Beale, *Chitty on Contracts* (33d ed., 2018), para. 16-246.
[300] Claimant's Post-Hearing Brief, para. 143, p. 29.
[301] Rejoinder Brief, paras. 24-25, p. 13.
[302] Claimant's Post-Hearing Brief, para. 64, p. 12.

jurisdiction.[303] Recent legal writings from Swiss scholars support the view that the separability of the arbitration agreement justifies that the arbitral tribunal retains jurisdiction over a contract whose illegality is alleged.[304]

417. Claimant thus contends that Respondents fail to substantiate why the purported illegality would affect the arbitration agreements, and that, consequently, the arbitration agreements contained in the License Agreements are valid irrespective of whether the License Agreements are void *ab initio* (*quod non*) and irrespective of whether they are tainted by corruption (*quod non*).[305]

C. Decision of the Tribunal on the alleged consequences of illegality on jurisdiction

418. The Tribunal will first make some general considerations on Respondents' allegations of illegality (1.), before setting out its analysis concerning each of the red flags alleged by Respondents (2.) and drawing the legal consequences of the alleged illegality, if any, concerning its jurisdiction (3.).

1. General considerations on allegations of illegality

419. Within the context of an international arbitration, when ruling on corruption allegations, an arbitral tribunal has to determine the rules of law applicable to the issue.

420. In the case at hand, the Tribunal will apply Swiss law, as the law of the seat of the arbitration and as the law applicable to the License Agreements containing the arbitration clause on which the jurisdiction of the Tribunal is based. These are the Agreements whose illegality resulting from corruption is alleged by Respondents.

421. The Tribunal will also take into account international arbitration doctrine related to illegality and corruption.

[303] Claimant's Post-Hearing Brief, para. 65, p. 12, referring to **CL-25** – Decision of Swiss Supreme Court, BGE 199 II 380, para. 4b, p. 385; see also Claimant's Post-Hearing Brief, para. 66, pp. 12-13, referring to **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 23, fn. 22.

[304] Claimant's Post-Hearing Brief, para. 67, p. 13, referring to **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 23; **CL-27** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 251; **CL-28** – Gränicher, Art. 178, in: Basler Kommentar IPRG (Honsell et al. eds., 3d ed. 2013), para. 90.

[305] Claimant's Post-Hearing Brief, paras. 68-69, p. 13.

422. It is undisputed between the Parties that where a party makes allegations of illegality in relation to a contract, the tribunal has the power and duty to examine such allegations[306] and even to sanction the illegality if it is established.[307]

423. Regarding the burden of proof, the party which alleges illegality as a defense bears the burden of proof and must provide the necessary evidence supporting its allegations.[308]

424. In that regard, although indicators of illegality, or red flags, can be used by the party that has the burden of proof, such red flags are not *per se* conclusive evidence of illegality but must be supported by relevant facts and evidence. As noted by two scholars on which Claimant relies:

> "*While red flags may help the tribunal to identify* prima facie *evidence of corrupt deadlings under an intermediary agreement, they are not conclusive evidence that a corrupt payment was made or offered. Naturally, according to the procedural law concepts of most jurisdictions, the duty to substantiate the relevant facts, and even more critical, the burden of proof remain with the parties of the dispute* [...]".[309]

425. As to the standard of proof, Claimant argues that, where Swiss law is applicable, allegations of illegality must be proven beyond a reasonable doubt, as this is the ordinary standard of proof under Swiss law.[310] The Tribunal notes that, while one of the publications which Claimant has filed with its submissions does indeed adopt this position,[311] this is not as clear in another legal authority filed by Claimant with its exhibits, which mentions other standards of proof, such as the "*balance of probabilities*" or the "*clear and convincing evidence*" standards.[312] This shows that the theory that the

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[306] **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2ed. 2018), paras. 21-23, p. 2712; **CL-48** – Baizeau & Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, in: International Arbitration and the Rule of Law (Menaker ed., 2017), p. 234: "*It is uncontroversial that the tribunal may, and indeed should, examine allegations of corruption when raised by a party*".

[307] **CL-27** – *International and Domestic Arbitration in Switzerland*, para. 251, p. 14: "*If the arbitral tribunal has its seat in Switzerland, the mere fact or eve the mere allegation that the contested transaction could possibly have served corrupt purposes does not entail that the difference is not capable of settlement by arbitration under PILS, Chap. 12. In these types of cases, there is no reason to abandon the principle that any dispute of 'financial interest' may be the subject of an arbitration under PILS, Art. 177(1).* ***Thus, the arbitral tribunal shall decide whether and to what extent the main contract in dispute is indeed null and void due to an illegal or immoral objectve*** [...]".

[308] **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2ed. 2018), para. 39, pp. 2717-2718; **CL-49** – Zuberbüler & Schregenberger, *Corruption in Arbitration – The Arbitrator's Duty to Investigate*, in: New Developments in International Commercial Arbitration 2016 (Müller et al. eds., 2016), paras. 24-26.

[309] **CL-49** – Zuberbüler & Schregenberger, *Corruption in Arbitration – The Arbitrator's Duty to Investigate*, in: New Developments in International Commercial Arbitration 2016 (Müller et al. eds., 2016), para. 21.

[310] Claimant's Post-Hearing Brief, para. 116, p. 24.

[311] **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 39.

[312] **CL-49** – Zuberbühler & Schregenberger, *Corruption in Arbitration – The Arbitrator's Duty to Investigate*, in: New Developments in International Commercial Arbitration 2016 (Müller et al. eds., 2016), para. 31.

standard of proof beyond a reasonable doubt applies when it comes to a showing of corruption under Swiss law is not uniformly accepted.

426. As recalled above, in the case at hand, Respondents point to several red flags which, in their view, are strong indicators of illegality in the award of the License Agreements and Petroleum Agreements. The Tribunal will review these red flags in turn to see if, in the light of the evidence in the record, they do indeed indicate that illegal conduct took place resulting in the invalidity of the Agreements.

2. Analysis of the red flags alleged by Respondents

427. The Tribunal will jointly analyse the first and second red flags alleged by Respondents, *i.e.* that Claimant had no "*installed oil extraction capacity*" and lacked the financial and technical expertise when being awarded the licenses and oil exploitation rights.

428. The Tribunal first notes that, as pointed out by Claimant, Article 5(2) of the Petroleum Law invoked by Respondents[313] does not require that the Person[314] with whom the Petroleum Agreement is to be made already has established oil extraction capacity and particular financial and technical expertise.

429. In fact, Article 5(2) of the Petroleum Law indicates that, in order to enter into a Petroleum Agreement with a Person, the Ministry must be satisfied that such Person "*has **or can acquire** the financial resources and technical competence required to discharge the obligations of the Contractor under the Petroleum Agreement*" (emphasis added). Therefore, this provision does not impose a strict requirement that the Person has the necessary financial resources and technical skills at the time it enters into a Petroleum Agreement, but it also expressly foresees that these could be acquired subsequently.

430. As to Respondents' allegation that Claimant has not and could not provide the required proof of its financial resources, the Tribunal has carefully analysed the letter from Haywood to Stream Oil & Gas Limited that was submitted by Claimant[315] and it considers that Respondents have not submitted sufficient elements to establish or suggest that such letter is "*likely a forgery or at least a financial placebo*".[316]

431. Indeed, the existence of linguistic flaws on a letter is not sufficient to successfully contest its authenticity. Besides, the System for Electronic Documents Analysis and Retrieval (SEDAR) contains a press release similar to the one attached to the letter from Haywood, dated 11 June 2017, which mentions a reverse take-over by Stream supposed

[313] **RL-01** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017).
[314] A "*Person*" is defined as a "*natural person, partnership, body corporate or other association*" in the 1993 Petroleum Law and as a "*legal person*" in the 2017 Petroleum Law (**RL-01** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 2.18).
[315] **C-169** – Letter from Haywood Securities (UK) Limited to Stream Oil & Gas Ltd. dated June 12, 2007.
[316] Rejoinder Brief, para. 173, p. 50.

to raise between CAN $2 and $4 millions through Haywood entities.[317] Similarly, another press release dated 16 August 2007 confirms that the amount of CAN $2,494,694 was raised through Haywood entities.[318] In the Tribunal's opinion, these elements tend to establish the accuracy of the content of the letter and reinforce the fact that Claimant did obtain financing and therefore met the requirements of the Petroleum Law in this regard.

432. Moreover, Respondents provide no evidence suggesting that the award of the License Agreements and Petroleum Agreements to Claimant did not follow the same bidding process as for the other oil and gas fields in Albania at the time, which is described in the "*Extractive Industries – Transparency Initiative in Albania*" Deloitte report for the years 2013 and 2014.[319] In particular, this third-party report indicates: "*almost all PSAs signed until the end of 2014 were awarded through ad-hoc negotiations. Main technical and financial terms negotiated are not disclosed for public access*".[320] No mention is made of anything unusual concerning the award of the Agreements.

433. In that respect, the Tribunal also notes that the License Agreements and Petroleum Agreements seem to be based on a model form established by Respondents, as evidenced by exhibits C-165 and C-166.[321] These model agreements, just like the License Agreements and Petroleum Agreements granted to Claimant, do not contemplate cash consideration to be paid by the contractor in exchange for the license rights. Respondents' argument that Claimant did not give any consideration in exchange for the award of the License Agreements and Petroleum Agreements is thus unfounded.

434. It follows that Respondents did not provide evidence that Claimant did not have the required financial and technical resources when it was awarded the License Agreements and the Petroleum Agreements, even assuming that such resources were a requirement. Further, Respondents failed to prove that the award of the License Agreements and Petroleum Agreements to Claimant occurred in circumstances that were different from the award of other similar contracts.

435. Regarding the third red flag alleged by Respondents, *i.e.* that Claimant was awarded negotiation exclusivity for no particular reason and in violation of the law, the Tribunal notes that, as pointed out by Claimant, Respondents do not refer to any part of the

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https://www.sedar.com/GetFile.do?lang=EN&docClass=8&issuerNo=00022735&issuerType=03&projectNo=01143747&docId=2026926.

[318] https://www.sedar.com/GetFile.do?lang=EN&docClass=8&issuerNo=00022735&issuerType=03&projectNo=01143747&docId=2026926.

[319] **C-167** – Deloitte, Albania Extractive Industries Transparency Initiative in Albania, Report for the year 2013 and 2014 (December 2015).

[320] **C-167** – Deloitte, Albania Extractive Industries Transparency Initiative in Albania, Report for the year 2013 and 2014 (December 2015), pp. 31, 110.

[321] **C-165** – License Agreement for the Development of Petroleum in the Patos-Marinza Oilfield, dated ____, 2004, between the Ministry of Industry and Energy, as represented by The National Petroleum Agency and Albpetrol Sh. A.; **C-166** – Petroleum Agreement for the Development and Production of Petroleum in Patos-Marinza Oilfield, dated 19 June 2004 between Albpetrol Sh. A. and Saxon International Energy Ltd.

Petroleum Law or any other law which would prohibit the holding of exclusive negotiations.

436. Moreover, although the letter sent by the Minister of Economy, Trade and Energy to the Chairman of Albpetrol's Supervisory Council and to Albpetrol's CEO cited by Respondents can be considered as an objection to the granting of exclusivity to negotiate to Stream, since the Minister indicates that this is "*not in accordance with the provisions of the legislation in force and the practices followed so far*",[322] there is no proof that Stream did enjoy such exclusivity. In addition, the letter does not refer to any specific provisions of the Petroleum Law or any other legislation prohibiting negotiations conducted on the basis of exclusivity.

437. The Tribunal thus finds that Respondents failed to prove that there was any negotiation exclusivity. Furthermore, even assuming that such exclusivity was indeed awarded to Claimant, Respondents have not proven that it would constitute a violation of Albanian law. It follows that Respondents' allegation of illegality arising from the third flag must fail for lack of evidence.

438. Concerning the fourth red flag alleged by Respondents, *i.e.* that Claimant engaged in conduct triggering suspicion of criminal activity, the Tribunal notes that all aspects of the conduct mentioned by Respondents concern the performance of the License and Petroleum Agreements, as opposed to suspicions of corruption at the time of their conclusion. Therefore, if established, the illegal conduct could lead to the termination of the agreements but would not affect their validity *ab initio*. This is all the more true since Respondents invoke substantially the same facts to allege that Claimant materially breached the Petroleum Agreements.[323]

439. Similarly, with regard to the fifth red flag alleged by Respondents, *i.e.* that the environmental situation of the oil fields and the condition of equipment was allegedly untenable, the Tribunal finds that if these allegations were established, they would only concern the performance of the License and Petroleum Agreements, as opposed to suspicions of corruption at the time of their conclusion. Therefore, if established, as in the case of the fourth red flag, the illegality would lead to the termination of the agreements but would not affect their validity *ab initio*. This is all the more true that Respondents invoke substantially the same facts to allege that Claimant materially breached the Petroleum Agreements.[324]

440. As to Claimant's alleged absence of fear of prosecution (the sixth red flag), this allegation is very general, does not point to any specific examples, and is not supported by any evidence or explanation. Rather, this can be characterized as an argument of a

[322] **R-2** – Letter of the Minister of Economy, Trade and Energy (Mr. Genc Ruli) of 5 October 2006, Prot. No. 3765/3.
[323] Statement of Defence, paras. 43-45, p. 17; Rejoinder, paras. 264 *et seq*.; Statement of Defence, paras. 195 *et seq*.
[324] Statement of Defence, paras. 43-45, p. 17; Statement of Defence, paras. 227 *et seq*.

psychological nature, which is very difficult to prove. The Tribunal also notes that this argument seems difficult to reconcile with Respondents' argument that Mr. Naim Kasa, an Albanian citizen registered as the Administrator of Claimant's Albanian branch, was charged with a criminal offence in relation to another oilfield. Indeed, the latter argument seems to establish that the administrator of Claimant's Albanian branch is already at risk of being prosecuted by the Albanian authorities in criminal proceedings.[325]

441. Therefore, the Tribunal does not consider the sixth red flag alleged by Respondents to be sufficient to prove an indication of corruption or other criminal activity.

442. Respondents allege as a seventh red flag the fact that the files of Respondents look cleansed.

443. The Tribunal finds that Respondents do not adduce concrete evidence nor do they convincingly explain how Claimant could be blamed for the cleansing of Respondents' files. This is particularly true in light of the fact that the absence of some information in Respondents' files could be due to multiple reasons which do not involve Claimant, including poor record keeping by Respondents themselves. Respondents' position also does not take into account the fact that it is probably not more difficult for governmental entities to maintain their files than it is for private companies that have changed ownerships several times.

444. Therefore, the Tribunal finds that the seventh red flag alleged by Respondents is not an indication of illegality.

445. The Tribunal will jointly analyse the eighth and ninth red flags alleged by Respondents which relate to Claimant's corporate structure.

446. In this regard, the Tribunal notes that exhibit R-188 contains a list of direct shareholders of Claimant and their addresses as of 28 March 2018, as well as specifications regarding transfers of shares since 2007.[326]

447. Claimant has also submitted a certificate dated 28 March 2018 indicating that it is incorporated pursuant to the laws of the Cayman Islands,[327] which challenges Respondents' argument concerning the uncertainty of Claimant's place of incorporation.

448. On the other hand, Respondents' request to pierce the corporate veil to identify the ultimate shareholders and beneficiaries of Claimant in order to "*reduce the risk that the moneys claimed in this arbitration are eventually used 'to pay off' persons who were involved in the award of the three oil licenses in questions*" is only based on the argument that Claimant is incorporated in a "*tax heaven*" and that its shares are

[325] Rejoinder Brief, para. 189, p. 54.
[326] **R-188** – Copy of the Claimant's Register of members including Incorporation Date.
[327] **C-163** – Certificate of Good Standing of GBC Oil Company Ltd., dated 28 March 2018.

indirectly held by companies incorporated in British Columbia the British Virgin Islands and the State of Delaware.[328]

449. In light of the evidence produced by Claimant and Respondents and of the Tribunal's above findings that the red flags alleged by Respondents do not amount to indications of illegality, the Tribunal considers that it is not necessary nor justified to pierce the corporate veil to identify the ultimate shareholders and beneficiaries of Claimant.[329]

450. Finally, as to the tenth red flag, the Tribunal does not find that Respondents have provided sufficient probative elements to show that political involvement and risk in the present case are indicative of corruption or other criminal activity.

451. Some elements submitted in this respect are dismissed as they do not directly relate to the present case, such as the fact that Mr. Naim Kasa was awarded exploitation rights with regard to nine oil fields in Albania in August 2003[330] or the fact that former Prime Minister Sali Berisha who authorized the Petroleum Agreements with Claimant had "*certain preoccupations with the oil sector*" and worked in favour of the privatization of Albpetrol in October 2012.[331]

452. As for the other elements submitted in support of Respondents' position, they are either evidenced only by press articles,[332] or they do not substantiate a finding of illegal activities. For example, although the exact position of Mr. Fatbardh Ademi at AKBN in 2006 and his potential role in the award of the oilfields licenses to Claimant is debated between the Parties,[333] it appears that Mr. Ademi only joined Claimant in 2011, *i.e.* four

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[328] Rejoinder, paras. 203-204, p. 58.
[329] Rejoinder Brief, paras. 203-204, p. 58.
[330] Statement of Defence, paras. 60-64, pp. 23-25.
[331] Statement of Defence, para. 66, p. 26, referring to **R-14** – Website article of 15 October 2012 https://oilprice.com/Finance/investing-and-trading-reports/Albanian-Tycoon-Shakes-Up-the-Countrys-Booming-Oil-Market.html (as downloaded on 29 March 2018).
[332] Such is the case regarding Respondents' allegations (i) that Mr. Arjan Tartari is personally close to Ms. Albana Vokshi, a high-ranking party official of he Democatic Party in 2007 who was also a Supervisory Board member of Albpetrol in 2006-2007 when the Albpetrol Board approved the Petroleum Agreements (Statement of Defence, para. 57, p. 22, referring to **R-6** – Website article of 1 September 2010 http://ps.al/te-reja/vokshi-i-jep-partnerit-4-nga-6-puset-e-naftes-01-09-2010 in Albanian and passages translated into English (as downloaded on 8 April 2018); **R-7** – Website article of 21 August 2010 http://lajmetshqip.com/ps-brace-tartari-mori-gjashte-hidrocentrale-per-1-dite-nga-berisha/ in Albanian and passages translated into English (as downloaded on 8 April 2018)), and that (ii) the lawfirm of Ms. Argita Malltezi, the daughter of then Prime Minister Sali Berisha, acted for the company that Claimant's shareholders initially used to obtain the Licenses in 2006/2007 (Stream Petroleum (Albania) Limited) and invoiced services of a value of approximately 57,485 EUR in 2007/2008 (Statement of Defence, para. 67, pp. 26-27, referring to **R-15** – Website article of 16 July 2014 http://balkanblog.org/2014/07/16/salih-berishas-racketeers-argita-berisha-j-malltezi-flutura-kola-brecani-malltezi/ (as downloaded on 8 April 2018); **R-16** – Website article of 16 July 2014 http://www.balkaninsight.com/en/article/vajza-e-ish-kryeministrit-t%C3%AB-shqip%C3%ABris%C3%AB-ndjek-rrug%C3%ABn-ligjore-drejt-pasuris%C3%AB (as downloaded on 5 April 2018)).
[333] Statement of Defence, paras. 56-57, p. 22; Rejoinder Brief, paras. 181-182, pp. 52-53, referring to **R-165** – Letter of Mr. Ademi (Director of National Agency of Hydrocarbons) to Mr. Genc Ruli (Minister of Economy, Trade and Energy) to dated 22 May 2006 and **R-166** – Letter of Mr. Genc Ruli (Minister of Econmy, Trade and Energy) to Mr. Ademi (Director of National Agency of Hydrocarbons) dated 5 June 2006; Rejoinder Brief, para. 183, p. 53; Reply, para. 65, p. 10, referring to Second Witness Statement of Kreshnik Grezda, para. 9, p. 3.

years after the License and Petroleum Agreements were awarded.[334] In view of the time lapse between the award of the licenses to Claimant and the moment Mr. Ademi joined Claimant, the Tribunal is not convinced that Mr. Ademi's position at Claimant was a reward for an undue influence that he would have exercised over AKBN for the awarding of the License Agreements and Petroleum Agreements to Claimant.

453. After analyzing Respondents' allegations of illegality in the light of the documentary record, the Tribunal finds that these allegations remain unsubstantiated and unsupported by evidence. It follows that the red flags raised by Respondents do not signal corruption in the case at hand. The Tribunal therefore considers that Respondents have failed to meet the burden of proof as to their allegations of illegality, whatever the standard of proof adopted.

454. Another element taken into account by the Tribunal is that, although the alleged illegal practices involving Claimant took place when the Albanian Democratic Party was in power, this party lost the elections in mid-2013. Yet, no allegations of illegality were made by Respondents before April 2018, when they submitted their Statement of Defence in this arbitration. The Tribunal finds this all the more surprising given that the Parties exchanged extensive correspondence in the context of the present dispute during this time period, as will be developed in the analysis of the merits.

455. Such silence reinforces the Tribunal's view as to the lack of evidence of corruption at the time of the conclusion of the Agreements.

3. Legal consequences of alleged illegality in awarding the Agreements on the jurisdiction of the Tribunal

456. The Tribunal notes that Respondents draw consequences of alleged illegality for purposes of the merits of the case. However, in the present section, the Tribunal will limit its review to the consequences of the alleged illegality on its jurisdiction. The consequences of the alleged illegality on the merits of the case will be analysed later.

457. Respondents' argument that the Tribunal lacks jurisdiction because the award of the License Agreements and the Petroleum Agreement was tainted by illegality[335] is unavailing in light of the Tribunal's ruling at paragraph 453 above that the red flags alleged by Respondents, when examined in the light of the documentary record, do not substantiate Respondents' claims of illegality.

458. In any event, even if the Tribunal had not reached this conclusion, Respondents' jurisdictional objection would necessarily have been dismissed on the basis of the principle of separability of the arbitration agreement. According to this well-established principle, invalidity of the main contract due to illegality does not automatically

[334] Reply, para. 65, p. 10, referring to Second Witness Statement of Kreshnik Grezda, paras. 7-9, pp. 2-3.
[335] Rejoinder Brief, paras. 23-25, p. 13.

translate into invalidity of the arbitration agreement. Otherwise, an arbitral tribunal would not have the power to invalidate a contract tainted by illegality.

459. This principle is in particular recognised under Swiss law which is the law applicable to the License Agreements and the law of the seat of arbitration. Moreover, both Claimant and Respondents refer to Swiss law in their analysis related to the validity of the arbitration clause. Indeed, Claimant bases its argument that the Tribunal would have jurisdiction irrespective of the alleged illegality on the principle of separability under Swiss law.[336] For their part, Respondents rely on Swiss law with regard to the alleged illegality of the License Agreements and its consequences, notably on the arbitration agreeement.[337]

460. Further, for arbitral tribunals seated in Switzerland, such as this Tribunal, as pointed out by Claimant, Article 178(3) of the SPILA provides that "[t]*he arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen*". It follows that, under Swiss law, for an arbitral tribunal to lack jurisdiction, it is thus necessary to determine that the arbitration agreement is itself independently invalid on grounds of illegality.

461. This principle is applied by the Swiss Federal Tribunal and widely accepted by legal scholars.[338]

462. Aside from the fact that Respondents' position does not reflect the arbitral practice, the Tribunal notices that Respondents do not submit any evidence in support of their assertion that "[i]*t is widely accepted that in case of illegality due to corruptive acts and breach of trust, the principle of 'separability' does not 'save' the arbitration agreements as the defect adversely affects both agreements*".[339] Respondents do not argue either that the arbitration agreements contained in the License Agreements and the Petroleum Argeements themselves are invalid due to illegality.

463. Therefore, the Tribunal rules that it does not lack jurisdiction on the ground that the award of the License Agreements and the Petroleum Agreements were allegedly tainted by illegality.

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[336] See above paras. 415 *et seq*.
[337] See above paras. 357 *et seq*.
[338] **CL-25** – Decision of Swiss Supreme Court, BGE 199 II 380, para. 4b, p. 385; **CL-26** – Hahn, *Bribery and Corruption in Arbitration*, in: Arbitration in Switzerland (Arroyo ed., 2d ed. 2018), para. 23, fn. 22: "[i]*t is today also the prevailing view at international level, at least in commercial arbitration, that an arbitral tribunal cannot decline jurisdiction over a case on the sole basis that the underlying contract may have an illegal content. Under the widely recognized theory of separability, arbitration clauses are deemed to have a separate legal existence from the contract in which they are contained (cf Art. 178(3) PILS)* […]"; see also **CL-27** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 251; **CL-28** – Gränicher, Art. 178, in: Basler Kommentar IPRG (Honsell et al. eds., 3d ed. 2013), para. 90.
[339] Rejoinder Brief, paras. 23-25, p. 13.

5.2. Jurisdiction of the Tribunal over the Parties

464. The Tribunal will first address the Parties' positions on the legal status and the relationship among Respondents (**A.**), before setting out the Parties' arguments on jurisdiction (**B.**) and its decision (**C.**).

A. Preliminary point to the matter of jurisdiction: the Parties' answer to the Tribunal's question on the legal status and the relationship of Respondents among themselves

465. The Tribunal considered that Respondents' arguments on the jurisdiction of the Tribunal over the dispute, and in particular over Respondents, required further clarification as to the legal status of the Respondents and the legal relationship amongst them.

466. Thus, in its email dated 31 January 2019, the Tribunal asked both Parties to answer the following question in their Post-Hearing Briefs:

> "*1. (a) What is the legal status of AKBN, the Ministry of Infrastructure and Energy and the Republic of Albania? What law(s) govern(s) the legal status of these entities? Which of them have legal personality under Albanian law and are able to enter into contracts in their own name?*
>
> *(b) What is the legal relationship between AKBN, the Ministry of Infrastructure and Energy and the Republic of Albania? What law(s) govern(s) this legal relationship?*"

467. The Parties' answers to the question, which are detailed below, will be taken into account *inter alia* by the Tribunal in its analysis of the jurisdictional issue at paragraphs 576 *et seq.* below. Given the nature of the question, the Tribunal will describe first the Respondents' answer.

1. Respondents' answer to the Tribunal's question

468. According to Respondents, AKBN is "*a public legal entity, entirely separate from the MIE*", which may enter into contracts in its own name.[340]

469. AKBN was established by Decision No. 547[341] on the basis of Article 100 of the Constitution and Article 10 of the Law 9000 dated 30 January 2003 "On the

[340] Respondents' Post-Hearing Brief, para. 8, p. 8, referring to **RL-25** – Arts. 24 *et seq.* of the Albanian Civil Code ("**ACC**"):
- Article 29: "*The legal person has the capacity to acquire rights and assume civil obligations from the moment it is founded and, when the law requires it to be registered, from the moment it is registered*".
- Article 24: "*Legal persons are public legal persons and private legal persons*".
- Article 25: "*Public legal persons are state institutions and enterprises, which are self-financing or financed by the state budget, as well as other public entities recognized by law as a legal person. State institutions and entities that do not follow economic purposes, do not register*".

[341] **RL-26** – Decision No. 547 of Council of Ministers of 09.08.2006 (correcting translation of Exhibit CL-2).

Organisation and Functioning of the Council of Ministers",[342] and it acquired legal personality from its establishment.[343]

470. Respondents point out that, according to the Decision of the Council of Ministers No. 547 of 8 August 2006, the scope of AKBN's activity is the development and supervision of the exploitation of Albania's natural resources, on the basis of the governmental policies, and the monitoring of post-exploitation activities, *inter alia* in the hydrocarbon sector.[344]

471. However, Respondents argue that nothing in this decision indicates that AKBN may enter into Hydrocarbon Agreements itself as a party. AKBN's role is "*limited to that of advisory, preparation, development, supervision, and monitoring*". This explains why AKBN may have been involved in the negotiations of the LAs and PAs but only signed the LAs "*in representation of*" the MIE, and not in its own name.[345] According to Respondents, one cannot draw the conclusion from the documents that AKBN signed the LAs just to become a party to the arbitration agreements in Article 25.3 of the License Agreements.[346]

472. Respondents specify that the information that AKBN's budget is financed by the State contained in the translation of Decision No. 547 submitted by Claimant[347] is correct for the period of time until its amendment in 2014. Respondents further specify that today AKBN is not financed by the State, but that it may acquire projects financed by the State or other subjects.[348]

473. Respondents also state that "[t]*o the best of* [their] *knowledge, AKBN has never been sued or even been held as a party to a LA or a PA*".[349]

474. Concerning the Ministry of Infrastructure and Energy, Respondents rely on Article 7 of the Law 9000/2003[350] pursuant to which a Ministry is a public legal entity which is represented and headed by the relevant Minister. Respondents also refer to Articles 24, 25 and 29 ACC[351] to contend that the MIE may enter into contracts in its own name.[352]

475. The MIE was established pursuant to Article 6 of the Albanian Constitution, Article 7 of the Law 9000/2003, and pursuant to Article 5 of the Law 90/2012[353] "On the

[342] **RL-27** – Law 9000/2003 "on the organization and functioning of the Council of Ministers".
[343] **RL-25** – Arts. 24 *et seq.* of the Albanian Civil Code, Article 29.
[344] Respondents' Post-Hearing Brief, para. 10, p. 9, referring to **RL-26** – Decision No. 547 of Council of Ministers of 09.08.2006 (correcting translation of Exhibit CL-2).
[345] Respondents' Post-Hearing Brief, para. 11, p. 9.
[346] Respondents' Post-Hearing Brief, para. 11, p. 9.
[347] **CL-2** – The Decree of the Council of Ministers No. 547 dated 09.03.2006.
[348] Respondents' Post-Hearing Brief, para. 12, p. 9.
[349] Respondents' Post-Hearing Brief, para. 13, p. 9.
[350] **RL-27** – Law 9000/2003 "on the organization and functioning of the Council of Ministers".
[351] See para. 468, footnote 340, above.
[352] Respondents' Post-Hearing Brief, para. 14, p. 9, referring to **RL-25** – Arts. 24 *et seq.* of the Albanian Civil Code.
[353] **RL-28** – Law 90/2012 "on the organization and functioning of the State Administration".

Organization and Functioning of the Council of Ministers", and its functions are addressed by other Albanian "*state-organisational laws*".[354]

476. The MIE is separate from AKBN and from the Republic of Albania.[355]

477. Governed by the 1998 Albanian Constitution and Albanian laws that regulate its capacity as a subject of public international law, the Republic of Albania may enter into treaties but is it neither a civil or a public legal person and cannot enter into civil law contracts with civil law subjects. Respondents state that "[i]*t is a 'system'. Public, or 'people's ownership' exists, i.e. for the ships of the Navy and for the Petroleum resources of the Republic of Albania*".[356] The status of the Republic of Albania is mainly governed by its Constitution and other laws which define its legal status and its rights and obligations, such as the Law No. 43/2016 "On International Agreements in the Republic of Albania" and the "Law No. 8743/2001 on the immoveable Properties of the State" which regulates State ownership and public ownership in the Republic of Albania.[357]

478. Concerning the legal relationship between the MIE and the Republic of Albania, Respondents argue that the Ministry is one of the pillars of the governmental system of the Republic of Albania. The main governmental link between the Republic of Albania and the MIE is the Council of Ministers, which is the State's main executive branch composed of the Prime Minister and the appointed Ministers.[358] The MIE as a public legal entity may represent the Council of Ministers in the executive activity and within its field of responsibility, but this must be authorized and disclosed.[359]

479. Respondents argue that the MIE has not represented the Republic of Albania in the conclusion of the License Agreements, that the Republic of Albania has no obligations *vis-à-vis* the Licensees under the License Agreements and that it could not even be a party to such agreements.[360]

480. According to Respondents, the legal relationship between AKBN and the MIE is predominantly defined by Decision No. 547.[361] Respondents contend in that respect that:

> "*AKBN negotiates the draft hydrocarbon agreements, prepares the relevant documents related to the issuance of licenses, authorisations, and permits which enable the conclusion of the hydrocarbon agreements, and it follows up on their implementation. AKBN has a separate legal personality from the MIE. It is*

[354] Respondents' Post-Hearing Brief, para. 15, p. 10.
[355] Respondents' Post-Hearing Brief, para. 16, p. 10.
[356] Respondents' Post-Hearing Brief, paras. 17-18, p. 10.
[357] Respondents' Post-Hearing Brief, para. 19, p. 10.
[358] Respondents' Post-Hearing Brief, paras. 20-21, pp. 10-11.
[359] Respondents' Post-Hearing Brief, para. 21, p. 11.
[360] Respondents' Post-Hearing Brief, para. 22, p. 11.
[361] Respondents' Post-Hearing Brief, para. 23, p. 11, referring to **RL-26** – Decision No. 547 of Council of Ministers of 09.08.2006 (correcting translation of Exhibit CL-2).

supervised by the MIE, but it is not 'part' of the MIE or an 'organ' of the MIE. AKBN was authorized by MIE in June 2007 to sign the LAs subject to this arbitration on behalf of MIE; [362] *no reference was made to arbitration agreements*".

481. Respondents contend that nothing in Decision No. 547 (or in any other law or in the MIE's authorisation) indicates that AKBN concludes hydrocarbon agreements in its own name or stands in for the MIE in such agreements or in arbitration agreements contained in hydrocarbon agreements.[363]

482. Finally, Respondents argue that there is no specific legal relationship between AKBN and the Republic of Albania.[364]

2. Claimant's answer to the Tribunal's question

483. In response to the Tribunal's first question on the legal status and relationship of Respondents, Claimant argues that a party derives its capacity to be a party in Swiss arbitration proceedings from its substantive legal capacity.[365] According to the Swiss Supreme Court, Chapter 12 of the SPILA does not contain any provisions governing the legal capacity of parties. Instead, the general provisions of the SPILA that determine the applicable law to the legal capacity of natural persons and legal persons apply.[366]

484. Claimant refers to Article 154(1) SPILA, which provides that companies are governed by the law of the State pursuant to whose provisions they are organized if they fulfill the prescribed publicity and registration provisions of that law or, if there are none, if they are organized pursuant to that law. Claimant also refers to Article 154(2) which provides that, if a company does not fulfill the conditions of publicity and registration of the law pursuant to whose provisions it is organized, it is subject to the law of the State in which it is in fact administered.[367] The law applicable pursuant to Article 154 SPILA determines whether a party has legal capacity, *i.e.* whether rights and obligations may be attributed to it.[368]

485. According to Claimant, no provision of the SPILA determines the law applicable to the legal capacity of State entities specifically. However, Article 177(2) SPILA contains a substantive rule providing that "[a] *state, an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, may not invoke its own law in order to contest its capacity to be a party in the arbitration or the arbitrability of*

[362] "*Authorisation of the MIE for AKBN dated June 2007, Exhibit RL-29*".
[363] Respondents' Post-Hearing Brief, para. 24, p. 11.
[364] Respondents' Post-Hearing Brief, para. 25, p. 11.
[365] Claimant's Post-Hearing Brief, para. 80, p. 16, referring to **CL-29** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 346.
[366] Claimant's Post-Hearing Brief, para. 80, p. 16, referring to **CL-30** – Decision of Swiss Supreme Court, 16 October 2012, BGE 138 III 714, para. 3.3.2, pp. 720-721.
[367] Claimant's Post-Hearing Brief, para. 81, p. 16.
[368] Claimant's Post-Hearing Brief, para. 81, p. 16, referring to **CL-31** – Oetiker, Art. 177, in: Zürcher Kommentar IPRG (Müller-Chen & Widmer eds., 3d ed. 2018), para. 80.

a dispute covered by the arbitration agreement". Claimant puts forward a legal doctrine stating that the term "*capacity to be a party*" encompasses the capacity to conclude a valid arbitration agreement,[369] the purpose of this provision being to protect the other (private) party's good faith in the ability of the State or State-controlled entity to enter into an arbitration agreement, and thus the validity of the arbitration agreement.[370]

486. However, in the present case, Claimant argues that, since all Respondents are incorporated in and/or organized under the laws of Albania, Albanian law governs the legal capacity of Respondents.[371]

487. Claimant answered the Tribunal's question with respect to the MEI and not the MIE. Claimant submits[372] that a ministry (i) is a public legal person established by the Albanian Constitution to conduct the activities within its sphere of competence;[373] (ii) undertakes legal obligations from the moment of its establishment;[374] (iii) has the legal personality and the capacity to contract in its own name within the domain of State responsibility it covers;[375] and that (iv) any act issued by a ministry pursuant to the Albanian Constitution and by its subordinate entities is the responsibility of the ministry itself.[376]

488. Claimant contends that the MEI is a legal entity that has been given the competency to handle hydrocarbon matters[377] and that it can specifically enter into "Petroleum Agreements" (*i.e.* notably license agreements) with any person to authorize that person to explore, develop and produce hydrocarbons in the contract area.[378]

489. Claimant also submits that AKBN is a "*public legal person that is under the direct dependence of the MEI*".[379] AKBN "*negotiates and monitors the implementation of the*

[369] Claimant's Post-Hearing Brief, para. 82, p. 16, referring to **CL-29** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 379.
[370] Claimant's Post-Hearing Brief, para. 82, p. 16, referring to **CL-32** – Oetiker, Art. 177, in: Zürcher Kommentar IPRG (Müller-Chen & Widmer eds., 3d ed. 2018), para. 87.
[371] Claimant's Post-Hearing Brief, para. 83, p. 16.
[372] Claimant's Post-Hearing Brief, para. 84, pp. 16-17.
[373] **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 1; **CL-34** – Law No. 9000, dated 30.1.2003, "On the organization and functioning of the Council of Ministers", Article 7.
[374] **CL-35** – Albanian Civil Code, Articles 24, 25, 29; **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 1.
[375] **CL-34** – Law No. 9000, dated 30.1.2003, "On the organization and functioning of the Council of Ministers", Article 7, p. 3; **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 2.
[376] **CL-36** – Albanian Constitution, Article 102(4); **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 2.
[377] Claimant's Post-Hearing Brief, para. 84, pp. 16-17, referring to **CL-37** – Decision of the Council of Ministers No. 504, dated 13.09.2017 "On the determination of the domain of the state responsibility area for the Ministry of Infrastructure and Energy" (in force since 19.09.2017), II, III(10); **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 2.
[378] Claimant's Post-Hearing Brief, para. 84, pp. 16-17, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5(1), p. 4; **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 5(1); **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 2.
[379] Claimant's Post-Hearing Brief, para. 85, p. 17, referring to **CL-34** – Law No. 9000, dated 30.1.2003, "On the organization and functioning of the Council of Ministers", Article 10, p. 5; **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 2.

petroleum agreements as well as monitors the development plans [and] *supports the MIE*"[380] and its relationship with the MEI is governed by Albanian public law.[381]

490. Finally, Claimant contends that Albpetrol Sh. A is a commercial company incorporated in Albania that is wholly owned by the MEI.[382]

B. The Parties' arguments on jurisdiction over Respondents and Claimant

1. Respondents' position

491. Respondents argue that the arbitration clause contained in Article 25 of the License Agreements on which Claimant relies[383] does not grant the Tribunal jurisdiction to hear any of the claims brought by Claimant because such clause is invalid for defect of consent. Respondents' argument is based on several grounds.

a) Lack of objective *essentialia negotii*

492. Respondents contend that because the arbitration agreement in Article 25.3 of the License Agreements is contained in a contract that is subject to Swiss substantive law and provides for a Swiss seat of arbitration, the arbitration agreement is governed by Swiss substantive law, which triggers the "*ineffectiveness of the arbitration agreement due to lack of consent*".[384]

493. First, Respondents argue that, according to Article 2(1) of the Swiss Code of Obligations, the parties' agreement must cover "*all essential points*" of an agreement to be concluded,[385] including the identification of the parties and their "*position in the agreement*".[386]

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[380] Claimant's Post-Hearing Brief, para. 85, p. 17, referring to **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 3.
[381] Claimant's Post-Hearing Brief, para. 85, p. 17, referring to **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 2.
[382] Claimant's Post-Hearing Brief, para. 86, p. 17, referring to Statement of Claim, para. 49, p. 6; Statement of Defence, para. 3, p. 7.
[383] **C-2**, **C-3** and **C-4** – License Agreements, Article 25, pp. 63-65.
[384] Rejoinder Brief, para. 48, p. 18, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 26.1(b)(ii), p. 65.
[385] Rejoinder Brief, para. 49, pp. 18-19, referring to **RL-6** – Art. 2(1) of the Swiss Code of Obligations:
"***Art. 2***
1 Where the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms.
2 In the event of failure to reach agreement on such secondary terms, the court must determine them with due regard to the nature of the transaction.
3 The foregoing is subject to the provisions governing the form of contracts".
See also **RL-7** – Berner Kommentar/Müller, 2018, Art. 2 OR notes 12, 13: "*12* […] *The agreement has to cover* "all essential points*" (*"tous les points essentiels*" […]). Otherwise the legal presumption of Art. 2.1 is not applicable from the outset and no contract has been concluded.*
13 The court has to consider this ex officio […], *at least in case one party argues that it is not bound to the contract"*.
[386] **RL-7** – Berner Kommentar/Müller, 2018, Art. 2 OR notes 12, 13, para. 15.

494. Respondents contend that, in the case at hand, (i) the parties have failed to agree on the signatories of the arbitration agreement[387] and (ii) that nobody concluded the arbitration agreements in Article 25.3 of the License Agreements with Albpetrol: "*AKBN, who is mentioned in Art. 25.3 of the LAs, did not become party to the LAs; it only represented the MIE, but did not conclude the LAs in its own name. And the MIE did not become party to the arbitration agreements because it is not named in them*".[388]

495. According to Respondents, because the participation of AKBN was foreseen by the "*draft*" arbitration clauses but AKBN did not become party to the License Agreements (and therefore not to the arbitration clauses), an *essentialium* is lacking and therefore Article 25.3 is "*ineffective, hence inoperable, and the Claimant cannot rely on it – neither in respect of AKBN, nor in respect of Albpetrol, nor in respect of the Ministry*".[389]

496. Respondents contend that it would be incorrect to argue that at least "*Albpetrol and [a] Foreign Partner*" had become parties to the arbitration agreements so that the required minimum of two contractual parties as *essentialia* for an arbitration agreement would have effectively consented to arbitration.[390]

497. Respondents claim that the chronology of events and the contractual interplay of the License and Petroleum Agreements run contrary to such a theory. According to Respondents, given that when the Ministry and Albpetrol concluded the License Agreements on 4 July 2007, there was no consent from a "*Foreign Partner*" that could have given effect to the "*draft*" arbitration agreement contained in Article 25.3, since the "*Foreign Partner*" (Claimant) only later became a party to the License Agreements when it entered into the Petroleum Agreements and the Instrument of Transfer in Annex E on 19 July 2007. Pursuant to the contractual mechanism agreed in the Instrument of Transfer,[391] the conclusion of the Petroleum Agreements did not create new rights under the License Agreements. On 19 July 2007, Albpetrol could have transferred to Claimant only already existing rights, privileges and obligations under the License Agreement. Respondents argue that since there were no existing rights and obligations under the "draft" arbitration agreements contained in Article 25.3 of the License Agreements, given that they "'*ran idle' due to the lack of AKBN's consent with Albpetrol*", no effective arbitration agreement under Article 25.3 could be "*transferred*" from Albetrol to Claimant when Claimant concluded the Petroleum Agreement.[392]

498. Respondents argue that it has not been established by Claimant that the Parties meant "*MIE*" by "*AKBN*" in Article 25.3 of the License Agreements and the wording of such

[387] Rejoinder Brief, para. 51, pp. 19-20.
[388] Respondents' Post-Hearing Brief, para. 83, p. 26.
[389] Rejoinder Brief, para. 53, p. 20.
[390] Rejoinder Brief, para. 54, p. 20.
[391] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Annex E, 1): "*Albpetrol hereby transfers all its rights, privileges and obligations under the Licence Agreement mentioned above to Stream subject to said Petroleum Agreement*".
[392] Rejoinder Brief, paras. 55-56, pp. 20-21.

article leaves no doubt that the Parties meant AKBN, "*perhaps unreasonably* [but] *clearly and explicitly*". Respondents also indicate that "[t]*here are many other references treating AKBN like a party in the LAs. All that may be unreasonable, but – as shown above – contract interpretation cannot cure the 'unreasonable' will of the Parties*".[393]

499. According to Respondents, it is impossible to determine from the negotiations the true intent of the Parties, in particular because Claimant did not present witnesses, drafts or supporting correspondences evidencing that the Parties intended the MIE to become a party to arbitration clauses instead of AKBN.[394] In Respondents' opinion, the only means available for the interpretation of Article 25.3 is the wording of the License Agreements itself.[395]

500. Respondents further alleges that the evidence available does not allow conclusions about the real intentions of the Parties and argues as follows: "*To the contrary, the Respondents have shown various red flags* […], *documenting nepotism and indicating breach of trust and corruption in the* 'contract award*' – all of which prohibit to assume a 'true, let alone reasonable intent' of the Parties in the act of contract conclusion. The LAs/Pas were 'octroyé' on Albpetrol which had no chance to refuse contract conclusion. All of that has been admitted by the Claimant due to its failure of substantiating anything to the contrary*".[396]

501. Respondents thus consider that the Tribunal would exceed its competence if it simply substituted "AKBN" with "MIE" on the basis of an "*assumed intention*" or on the basis of "effet utile *considerations*".[397]

502. Second, Respondents argue that even if the Parties intended to include the MIE as a party to the arbitration agreements, the formal requirements of Article 178(1) of the SPILA were not met.[398] Article 178(1) reads as follows:

> "*Art. 178*
>
> *III. Arbitration agreement*
>
> *1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text."*

503. According to Respondents, the Parties' "*chaotic and contradictory ideas about dispute resolution*" do not pass the threshold for effectiveness because, if Claimant's logic was

[393] Respondents' Post-Hearing Brief, para. 84, pp. 26-27.
[394] Respondents' Post-Hearing Brief, para. 85, p. 27.
[395] Respondents' Post-Hearing Brief, para. 86, p. 27.
[396] Respondents' Post-Hearing Brief, para. 86, p. 27.
[397] Respondents' Post-Hearing Brief, para. 86, p. 27.
[398] Respondents' Post-Hearing Brief, para. 87, pp. 27-28; Rejoinder Brief, paras. 66-68, pp. 24-25, referring to **RL-9** – Basler Kommentar/Gränicher, 2013, 3rd ed., Art. 178 note 9.

to be followed, the following formal defects would affect Article 25.3 of the License Agreements:

- The Parties mentioned one party (AKBN) as a party to the arbitration agreement that is not a party to the arbitration agreement (because AKBN only signed the License Agreements "*in representation of the Ministry",* and thereby did not become a party to the License Agreements and their arbitration agreements); and

- The Parties failed to mention a party (the Ministry) to the arbitration agreement that allegedly is a party to the arbitration agreement, thereby making the arbitration agreement invalid due to the failure to expressly state the Ministry's participation as a party in writing.[399]

b) Lack of subjective *essentialia negotii*

504. Respondents argue that in addition to the above, the arbitration clauses in Article 25.3 lack a subjective *essentialium* because the Parties failed to include a party (AKBN) in the arbitration agreements that was supposed to become a party according to the contract "*drafts*". Respondents' position is that AKBN only signed the License Agreements "*in representation*" of the MIE, not with the intention to enter into them or their arbitration clauses.[400]

505. Respondents refer to the case law of the Swiss Federal Court according to which "*subjectively essential points, i.e. points that are only according to the will of the parties essential contractual points*" also are essential points of the contract within the meaning of Article 2.1 CO.[401]

506. Respondents contend that, in the present case, it is difficult to determine what the parties intended when entering into Article 25.3 of the License Agreements.[402] Given that, in Respondents' view, the License Agreements are "*tainted by illegality*" and "*have not been negotiated between two parties with competing interests, but have been 'awarded' by former Government officials for the benefit of friends and relatives of the Government*", the will of the Parties can only be established on the basis of the wording of the "*draft*" agreements, *i.e.* Article 25.3.[403]

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[399] Rejoinder Brief, para. 69, p. 25. See also Respondents' Post-Hearing Brief, paras. 87-88, pp. 27-28. It is unclear whether point (ii) above is actually considered by Respondents as a formal defect, as para. 70 of the Rejoinder Brief reads: "*According to the Respondents' position, the formal defect is limited to stating one party (AKBN) as a party to the arbitration agreement that has not become a party to the arbitration agreement. However, this formal defect affects all arbitration agreements of Arts 25.3 of the License Agreements*".
[400] Rejoinder Brief, para. 58, pp. 21-22; Respondents' Post-Hearing Brief, para. 91, p. 29.
[401] Rejoinder Brief, paras. 59-60, pp. 22-23, referring to **RL-7** – Berner Kommentar/Müller, 2018, Art. 2 OR notes 12, 13, note 21; **RL-8** – Swiss Federal Court in BGE 110 II 287 S. 291.
[402] Rejoinder Brief, para. 61, p. 23.
[403] Rejoinder Brief, paras. 61-62, p. 23.

507. According to Respondents, "*Arts. 25.3 of the License Agreements provided not only for Albpetrol and at least one foreign partner to become a party to the arbitration agreement, but required AKBN to become a party in the first place (with Albpetrol). In other words, it was at least subjectively essential that AKBN becomes a party to the arbitration clause. The person of the contract party is usually considered an objectively essential point of a contract. However, even if there are already two parties that could theoretically give effect to an agreement (so that one might consider that the objective essentials are met* – quod non *in the case at hand), but a third party is required to also become a party of said agreement, in this case, the third party indeed becoming party to the agreement is at least a subjectively essential point*".[404] Claimant confirmed this view by initiating arbitration proceedings against AKBN personally on the basis of Article 25.3 of the License Agreements.[405]

c) <u>A teleological interpretation of the arbitration agreements does not yield to the result that there is jurisdiction over any of the Respondents under the License Agreements</u>

508. As noted at paragraph 372 above, Respondents provided an explanation on the meaning of the principle of *effet utile* under Swiss law in response to the Tribunal's question of 31 January 2019.[406] With respect to the Tribunal's jurisdiction, Respondents argue that, even without considering any red flags or the lack of normal negotiations, the principle of teleological interpretation (called by Respondents the "*principle of* favor negotii/*utility*", which the Tribunal understands to mean the principle of effectiveness) cannot help to establish jurisdiction over any of the Respondents in view of the clear formulations in Articles 25.3 of the License Agreements and the form requirement of Article 178(1) SPILA.[407]

509. First, Respondents contend that a teleological interpretation cannot correct fundamental defects, in the sense that if "*utility*" is used to interpret an arbitration agreement, such interpretation must not lead to the creation of a new contractual relationship. The Swiss Federal Supreme Court restricts the application of the concept of "*utility*" to minor deficiencies, *i.e.* the "*procedural facets*" of the clause, but not fundamental defects or arbitration clauses such as defects as to their existence or *essentialia*.[408]

510. Respondents refer to case law of the Swiss Federal Supreme Court where the principle of "*utility*" to correct minor defects where there was no doubt as to the parties' intention to have recourse to arbitration and as to who had become a party to the arbitration, so that the *essentialia negotii* of the arbitration agreements were fulfilled and clear.[409] In

[404] Rejoinder Brief, para. 63, p. 23.
[405] Rejoinder Brief, para. 64, p. 23.
[406] Tribunal's email of 31 January 2019, Question 3: "*Does the principle of* effet utile *apply to contract interpretation under Swiss Law? If so, what is the effect of such provision or doctrine on the case at hand, regarding both the jurisdiction and the merits of the claims?*".
[407] Respondents' Post-Hearing Brief, para. 43, p. 16.
[408] Respondents' Post-Hearing Brief, para. 44, p. 17.
[409] Respondents' Post-Hearing Brief, paras. 45-46, p. 17, referring to **RL-33** – BGE 138 III 29 S.36, consid. 2.2.3.

particular, Respondents submit a case in which it argues that the Swiss Federal Supreme Court held that where there is no clear manifest expression of the parties' intention to have recourse to arbitration, there is no room for "*utility*".[410]

511. Second, Respondents argue that a teleological interpretation cannot cure a lack of formal requirements like those set out in Article 178 SPILA which, requires that the parties to an arbitration agreement agree on it in writing. Thus, assuming jurisdiction over the Ministry in this arbitration would mean a violation of Article 178(1) SPILA.[411]

512. According to Respondents, Article 178(1) serves the double legal purpose of protection and clarification, so that if an agreement subject to the written form is unclear, it cannot be "*repaired*" by a teleological interpretation as the protective purpose (clarity) of the form requirements would have already been obstructed.[412] Respondents argue that "[h]*ere, there is confusion about the parties to an agreement that is subject to the written form, and where the alleged party (the MIE) is not included in writing, but rather excluded by a written list of party names in which it is not included ('reverse conclusion'). This confusion is not to be resolved by 'teleological cure', but with the nullity sanction of Art. 11 SCO. A party cannot be deemed to have waived state court jurisdiction without a clear written commitment to resort to arbitration*".[413]

513. Third, Respondents claim that a teleological interpretation cannot overrule clear wording, on the ground that another limit set by Swiss law is the prohibition of distorting clear and unambiguous clauses (*interpretatio cessat in claris*). Respondents' reasoning is the following: (i) there is no jurisdiction over the Ministry because it is clearly not mentioned as a party to the arbitration agreements in Article 25.3 of the License Agreements, "*although the Parties wanted to name the Parties and have named them*" and (ii) there is no jurisdiction over AKBN because it neither became a party to the LAs nor to the arbitration agreements contained therein but "*clearly acted as an agent, as is set out on the first-/ signature page*" of the License Agreements.[414]

514. Respondents' position is that these stipulations are unambiguous and do not require a teleological construction.[415]

d) <u>Claimant has not shown that it is a "*Foreign Partner*" as required by the Petroleum Law and the License Agreements</u>

515. Respondents refer to Article 5(3)(f) of the Petroleum Law, which provides that:

[410] Respondents' Post-Hearing Brief, para. 47, p. 17, referring to **RL-34** – Swiss Federal Supreme Court 4A_150/2017, consid. 3.5.5.
[411] Respondents' Post-Hearing Brief, para. 49, p. 18.
[412] Respondents' Post-Hearing Brief, para. 50, p. 18.
[413] Respondents' Post-Hearing Brief, para. 50, p. 18, referring to **RL-35** – Müller/Riske, in: Arbitration in Switzerland, notes 15, 29 ad Art. 178 PILA.
[414] Respondents' Post-Hearing Brief, para. 51, p. 18.
[415] Respondents' Post-Hearing Brief, para. 52, p. 19.

"*A Hydrocarbon Agreement may:* […]

Where a Foreign Investor is a party to a Petroleum Agreement make a provision for the settlement of disputes arising out of or connected with the Agreement by international arbitration."[416]

516. According to Respondents, this statutory provision can only mean that disputes may be settled by international arbitration where a Foreign Partner is a party to a Petroleum Agreement.[417]

517. Respondents contend that, consequently, in the License Agreements, the Parties have distinguished between disputes with the Albanian contractor Albpetrol "*alone*" (Article 25.2 of the License Agreements) and with "*Foreign Partner(s)*", the arbitration agreement contained in Article 25.3 of the License Agreements granting jurisdiction to ICC arbitral tribunals only in that case:

"***25.3 Arbitration between AKBN, Albpetrol and Foreign Partner(s).***

(a) All disputes arising in connection with this License Agreement between AKBN, Albetrol and foreign partner(s) shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ('ICC') […]".[418]

518. Respondents argue that for "*Albanian partners*" other than Albpetrol there is no arbitration clause, so that the courts of Albania are competent.[419]

519. Respondents submit that "*in case 'Albanian partners' simply hide behind corporate veils of companies from the Cayman Islands, British Columbia, the British Virgin Islands, and Delaware, this does not make them 'Foreign Partners' in the sense of Art. 5 of the Petroleum Law and of Art. 25.3 of the License Agreement*".[420] Given that the purpose of Article 5 of the Petroleum Law and of Article 25.3 of the License Agreement is to attract foreign investment and protect the legitimate interest of "*truly foreign investors in view of presumed 'national bias' of Albanian courts*", they cannot apply to partners which are Albanian nationals but have "*chosen to hide their identity behind exotic corporate veils*",[421] which "*increases the risks of corruption and tax evasion*".[422]

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[416] Statement of Defence, para. 11, p. 9, referring to **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017). In their Statement of Defence, Respondents replaced the words "Hydrocarbon Agreement" by "Petroleum Agreement" contained in the exhibit cited.
[417] Statement of Defence, para. 12, p. 10.
[418] Statement of Defence, para. 13, p. 10, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 25.3, pp. 63-64.
[419] Statement of Defence, para. 14, p. 10.
[420] Statement of Defence, para. 15, p. 10.
[421] Statement of Defence, para. 15, p. 10.
[422] Respondents' Post-Hearing Brief, para. 96, p. 30.

520. Respondents contend that the decisive factor to determine the nationality of the "*partner*" is the ultimate control and shareholding in Claimant, not a corporate veil or the nationality of individual workers and individual directors.[423]

521. Respondents accuse Claimant of having concealed the "*direct and indirect shareholders of the Claimant in its 4-layer-4-jurisdictional corporate structure*" and dispute that the direct and indirect control and shareholding in Claimant are held by a majority of foreign investors.[424]

522. In their Post-Hearing Brief, Respondents point out that at the Hearing, Mr. Grezda and Mr. Crawford admitted owning a "*significant stake*" directly or indirectly in Claimant but refused to give testimony as to the size of their stake, upon recommendation of counsel.[425] Contrary to what those witnesses stated, they do not have a right to refuse to testify – outside of reasons of criminal law – because their direct or indirect ownership in Claimant is "*highly relevant to judge their credibility and righteousness*" unlike a "*commercial confidentiality*".[426] Respondents consider that Mr. Grezda's and Mr. Crawford's "*inexcusable refusal*" warrants (i) disregarding their testimony or (ii) at least considering that these witnesses have a significant personal interest in the outcome of the arbitration and apparently some manifest interest not to disclose their direct or indirect investment into a Cayman-Island-registered company and (iii) noting another red flag.[427]

523. Finally, Respondents argue that it is Claimant's interest not to disclose that it does not fulfill the personal condition of a "*foreign partner*" for the development of petroleum activities for the arbitration clauses in Article 25.3 of the License Agreements. Respondents point out that during the document production phase, they requested that Claimant disclose its direct and indirect shareholders and beneficiaries, which Claimant refused to do.[428] More generally Claimant did not establish that it is and was a foreign partner within the meaning of the License Agreements and the Petroleum Law.[429]

2. <u>Claimant's position</u>

a) <u>Claimant is a Foreign Juridical Person</u>

524. In response to Respondents' argument that Claimant has not proven that it is a "*Foreign Partner*" as required by the Petroleum Law and the License Agreements, Claimant

[423] Statement of Defence, para. 16, pp. 10-11; Respondents'Post-Hearing Brief, para. 93, p. 29.
[424] Statement of Defence, para. 17, p. 11.
[425] Respondents' Post-Hearing Brief, para. 94, pp. 29-30, referring to Hearing Transcript Day 1, pp. 167:10 *et seq.*, 169:15 *et seq.*; Hearing Transcript Day 2, pp. 20:25 *et seq*.
[426] Respondents' Post-Hearing Brief, para. 94, pp. 29-30.
[427] Respondents'Post-Hearing Brief, para. 94, pp. 29-30, referring to Hearing Transcript Day 2, pp. 22:12 *et seq*.
[428] Respondents' Post-Hearing Brief, para. 95, p. 30.
[429] Respondents' Post-Hearing Brief, para. 96, p. 30.

argues that it is a non-Albanian juridical person and therefore falls within the meaning of "*foreign partner*" in Article 25.3 of the License Agreements.[430]

525. Indeed, according to Claimant, if the term "*foreign partner*" is undefined in the License Agreement, the 1993 Petroleum Law and the 2007 Petroleum Law provide that the MEI may enter into an agreement with a "*Person*", authorizing them to conduct operations in the contract area.[431] A "*Person*" is defined as a "*natural person, partnership, body corporate or other association*" in the 1993 Petroleum Law and as a "*legal person*" in the 2017 Petroleum Law.

526. Claimant adds that it is a "*Foreign Investor*" under the Petroleum Law, which provides for the possibility to settle disputes under international arbitration and for the possibility to contain provisions for the purpose of ensuring the stability of the fiscal regime where a Foreign Investor is a party to a Petroleum Agreement.[432] A "*foreign partner*" under the License Agreements can thus only mean a "*Foreign Investor*" under the Petroleum Law.[433]

527. Claimant further states that "*Foreign Investor*" is not defined in the 1993 and 2017 Petroleum Laws but that Albania's Law for Foreign Investments applicable at the time of grant of the PSAs, provides a definition of "*Foreign Investor*", which includes "*every legal person established in accordance with the law of a foreign country*".[434]

528. On that basis, Claimant argues that (i) it is a foreign juridical person, being a corporation incorporated pursuant to the laws of the Cayman Islands, a status that has never changed,[435] and (ii) it is and has been a party to the License Agreements since the Effective Date as a result of entering into the Instruments of Transfer with Albpetrol.[436]

529. Claimant argues that its shareholders, whether direct or indirect, are not nor have ever been parties to the License Agreements, Petroleum Agreements or Instruments of Transfer,[437] and that nothing in the Petroleum Law, the License Agreements, Petroleum

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[430] Reply, paras. 10-12, p. 2; Claimant's Post-Hearing Brief, paras. 70, 72, p. 13.
[431] Reply, para. 13, p. 2, referring **to CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5(1), p. 4; **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 5(1), respectively: "*The Ministry may subject to paragraph 2 of this Article enter into a Petroleum Agreement with any Person authorizing that Person on the terms and conditions set out therein to explore for, develop and produce Petroleum in the Contract Area*" and "*Subject to Paragraph (2) of this Article, the Ministry may, by virtue of the terms and conditions set forth in this Agreement, enter into a Hydrocarbon Agreement with each Person by authorizing that Person to apply for, develop and produce hydrocarbons in the Contract Area*".
[432] Reply, para. 18, p. 3.
[433] Claimant's Post-Hearing Brief, para. 72, p. 13.
[434] Reply, paras. 17-18, p. 3, referring to **CL-16** – For Foreign Investments, Law No. 7764 dated 02.11.1993; Claimant's Post-Hearing Brief, para. 73, p. 13.
[435] Reply, para. 19, p. 3, referring to **C-163** – Certificate of Good Standing of GBC Oil Company Ltd., dated 28 March 2018; **C-164** – Amended and Restated Memorandum and Articles of Association, adopted 20 July 2007, amended 19 February 2015, amended 28 April 2016; Claimant's Post-Hearing Brief, para. 74, p. 14.
[436] Reply, para. 20, p. 3.
[437] Reply, para. 21, p. 3.

Agreements or Instruments of Transfer require Claimant's shareholders, direct or indirect, to be foreign persons or foreign investors.[438]

530. Claimant contends that under Swiss law, juridical persons – or legal entities – such as corporations, have their own separate identity and existence and must be distinguished in fact and law from their shareholders and other affiliated or closely related persons or entities.[439] Claimant argues that "*therefore, if a corporation is a party to an arbitration agreement or to an ordinary contract, the corporation's direct or indirect shareholders are not a party to the arbitration agreement or the ordinary contract as they are not parties to the arbitration agreement or ordinary contract*".[440]

531. According to Claimant, because they rely on exceptions to the separate entity of juridical persons, Respondents bear the burden of substantiating and proving any grounds for such exception, which they have not done.[441]

532. Claimant thus contends that the "*necessary implication*" of Articles 5(3)(d) and 5(3)(f) of the Petroleum Law is that a License Agreement to which a non-Foreign Investor is a party may not provide for the international arbitration of disputes or fiscal stability.[442] The fact that the License Agreements include the settlement of disputes by way of international arbitration under Article 25.3 and the Fiscal Stabilization Covenant in Article 3.1(c) further indicate that Claimant is a "Foreign Investor" and "foreign partner" entitled to the benefit of Article 25.3.[443]

533. Claimant also argues that the direct or indirect shareholders of a corporation are irrelevant to determine whether an arbitration is international or domestic under Swiss law, as the relevant criterion is whether a corporation has its seat (*i.e.* place of incorporation) abroad at the time when the parties entered into the arbitration agreement.[444] In the case at hand, the relevant point in time for determining whether

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[438] Reply, para. 22, p. 3.

[439] Reply, para. 23, p. 3, referring to **CL-17** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 570: "*As a matter of Swiss law, stock companies, limited liability companies and other legal entities have their own separate identity and existence (CC, Art.53). They must be distinguished, in fact and law, from their shareholders and other affiliated or closely related persons or entities. This distinction applies even if the company only has one shareholder ('one person company' – Ein-Mann-Gesellschaft).*"; Claimant's Post-Hearing Brief, para. 75, p. 14.

[440] Reply, para. 23, p. 3, referring to **CL-17** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 538; Claimant's Post-Hearing Brief, para. 75, p. 14.

[441] Reply, para. 23, p. 3.

[442] Reply, para. 25, p. 4.

[443] Reply, para. 26, p. 4.

[444] Reply, para. 24, p. 4, referring to **CL-18** – Orelli, Commentary on Chapter 12 PILS, Article 176, in: *Arbitration in Switzerland: The Practioner's Guide* (Arroyo ed., 2013), paras. 21, 24: "*The application of Chapter 12 PILS requires that, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. If a corporate entity is involved, the term domicile refers to its seat. The Swiss legislator thus opted in favor of a formal criterion and rejected a substantive criterion relating to the "internationality" of the dispute. The parties' nationality is irrelevant as well.*" and "*With respect to the relevant point in time for the determination of the seat, domicile or habitual residence, Art. 176(1) PILS refers to the time when the arbitration agreement was concluded. The state of affairs in the course of the arbitral proceedings and at the time of the rendering of the arbitral award is therefore irrelevant. Consequently, international arbitration proceedings in the sense of Art. 176(1) PILS at*

Claimant is a "*foreign partner*" was at the time of the award of the License Agreement, *i.e.* the Effective Date, when international arbitration and fiscal stability rights were conveyed to Claimant.[445]

534. In its Post-Hearing Brief, Claimant argues that, in the alternative, if direct shareholders are to be considered in determining whether Claimant was a foreign partner, a majority of its shareholders must be "*foreign investors*" which, pursuant to the Law for Foreign Investments, include citizens of foreign countries and Albanian citizens residing outside of Albania.[446]

535. On the basis of the list of direct shareholders of Claimant and their addresses as of 28 March 2018 (filed at exhibit R-188 by Respondents), Claimant submits a chart in its Post-Hearing Brief indicating the names, addresses and number of shares held by Claimant's shareholders as of the Effective Date, *i.e.* 24 August 2007.[447] On this basis, Claimant argues that, out of the 31,978,010.00 shares outstanding, at most 5,750,000.00, or 17.8%, were held by an Albanian citizen resident in Albania. Accordingly, even if Claimant's corporate veil were pierced, as of the Effective Date Claimant was majority-owned by foreign investors and would thus remain a foreign juridical person.[448]

b) <u>Jurisdiction over Respondents</u>

i. <u>Arguments regarding jurisdiction over all Respondents</u>

536. Claimant's first argument concerning the Tribunal's jurisdiction over Respondents is that Respondents' position that the Tribunal lacks jurisdiction over them because most of the subject-matter of this arbitration allegedly concerns Albpetrol's exercise of rights under the Petroleum Agreement is based on an incorrect assumption with regard to Claimant's claims and is baseless pursuant to Chapter 12 of the SPILA.[449]

537. Indeed, in its Statement of Claim, Claimant argues that according to a leading case of the Swiss Federal Supreme Court, an international arbitral tribunal seated in Switzerland has jurisdiction to examine a preliminary question even if another forum has exclusive jurisdiction over the same question as a main issue.[450] Claimant relies on a decision in

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the time of the conclusion of the arbitration agreement remain exclusively governed by Chapter 12 PILS, even if subsequently, through relocation of one or more of the parties to Switzerland, they have become purely Swiss. Moreover, the moment when the arbitration agreement was originally concluded is also decisive if the party to the arbitration proceedings is a legal successor of the signatory to the arbitration agreement."

[445] Claimant's Post-Hearing Brief, para. 76, p. 14.

[446] Claimant's Post-Hearing Brief, para. 77, p. 14, referring to **CL-16** – For Foreign Investments, Law No. 7764 dated 02.11.1993, Article 1, p. 1: "'*Foreign investor' means: (a) every physical person who is a citizen of a foreign country; or (b) every physical person who is a citizen of the Republic of Albania, but resides outside the country* […]".

[447] Claimant's Post-Hearing Brief, para. 78, pp. 14-15, referring to **R-188** – Copy of the Claimant's Register of members including Incorporation Date.

[448] Claimant's Post-Hearing Brief, para. 79, p. 15.

[449] Statement of Claim, para. 300, pp. 47-48.

[450] Statement of Claim, para. 301, p. 48, referring to **CL-14** – Decision of Swiss Federal Supreme Court, 19 February 2007, BGE 133 III 139, para. 5, p. 142.

which the Swiss Federal Supreme Court ruled that an arbitral tribunal had not exceeded its jurisdiction by assessing as a preliminary question whether a third party – a client in a construction matter – was entitled to a contractual penalty based on the client's contract with a consortium, whose two members were the parties to the arbitration.[451]

538. Claimant contends that in the present case Respondents, including Albpetrol, breached their obligations under the License Agreements and that if the Tribunal needs to examine preliminary questions based on the Petroleum Agreements in order to decide Claimant's claims, it may do so regardless of the arbitration clause in the Petroleum Agreements.[452] According to Claimant, "*it suffices that the Claimant can base its claims on the breach of obligations under the License Agreements. Therefore, this Arbitral Tribunal has jurisdiction over Claimant's claims and over all three Respondents*".[453]

539. Claimant also argues that the License Agreements expressly refer to the Petroleum Agreement for implementing the License Agreements and for definitions relating to the parties' rights and obligations under the License Agreements.[454]

540. Claimant claims that the Tribunal's jurisdiction over "[a]*ll disputes arising in connection with this License Agreement*"[455] therefore "*encompasses the substantiation of the provisions of the License Agreement by virtue of the definitions in the Petroleum Agreement*".[456]

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[451] Statement of Claim, para. 301, p. 48, referring to **CL-15** – Decision of Swiss Federal Supreme Court, 9 November 2010, 4A_428/2010, para. 2.1, pp. 3-4. See also **CL-47** – Decision of Swiss Supreme Court, 7 February 2011, 4A_482/2010, para. 4.3.1.

[452] Statement of Claim, para. 302, p. 48; Claimant's Post-Hearing Brief, para. 101, p. 21.

[453] Statement of Claim, para. 302, p. 48.

[454] Statement of Claim, para. 303, p. 48, referring to **C-2**, **C-3** and **C-4** – License Agreements:

- Recital E: "WHEREAS, *pursuant to Article 4 and Article 12 of the Law No. 7746, dt. 28.07.1993. "*On Petroleum (Exploration and Production)*", and for purposes of implementing this License Agreement, Albpetrol may enter into a Petroleum Agreement with a partner(s) in accordance with this License Agreement, which petroleum agreement is subject to approval from the Council of Ministers of Albania".*
- Recital G: "*Whereas this License Agreement will enter in full force and effect upon the approval by the Council of Ministers of Albania of a Petroleum Agreement which will entered by Albpetrol and its partner*";
- Article 3.4(b): "*As of the Effective Date, and during the terms of this License Agreement, LICENSEE will be entitled to use* […] *free of charge and for the performance of the Petroleum Operations, all other assets, equipment, means and infrastructure under its administration (including roads, electricity power lines and water, oil and gas pipelines) existing on the Effective Date of this License Agreement in the Contract Area or elsewhere as described in Article 12 of the Petroleum Agreement, on an "as is" basis and available for delivery, but (unless otherwise agreed with the supplier) subject to the applicable payments and on a non-discriminatory basis, at reasonable cost for electricity, water, oil and gas used* ".
- Article 6.1 pursuant to which the Petroleum Agreement "*(a) shall be in full accordance with this License Agreement* […] *(b) shall incorporate the exclusive rights to the Contract Area granted in accordance with this License Agreement*" and referring to a list of matters to be defined in the Petroleum Agreement;
- Article 6.2 which refers to the Petroleum Agreement for the definition of the "Project Area" and the allocation "*of the rights, obligations, liabilities and indemnities relating to the Project Area separately from the balance of the Contract Area*" between the License parties.

[455] **C-2**, **C-3** and **C-4** – License Agreements, Article 25.3(a), pp. 63-64.

[456] Statement of Claim, para. 304, p. 49.

541. In addition, according to Claimant, it is necessary that the Tribunal decide on Claimant's claims, for two specific reasons.

542. First, Claimant contends that an arbitral tribunal hearing claims based on the Petroleum Agreements could only decide on such claims with regard to Albpetrol, not the two other Respondents. Claimant points out that while the Petroleum Agreements address disputes solely between the Contractor and Albpetrol, multiparty disputes dealing with AKBN, Albpetrol and the Contractor are specifically dealt with under the arbitration clause in Article 25.3 of the License Agreements. Therefore, only the License Agreements provide for a means to resolve claims with binding effect on all Parties and without the risk of conflicting decisions in one arbitral proceeding.[457]

543. Second, Claimant argues that an arbitral tribunal hearing claims under the Petroleum Agreements, according to Respondents' view, could not hear these claims to the extent that they concern the exercise of rights under the License Agreements. However, neither a hypothetical second tribunal nor this Tribunal would be in a position to render a decision on Claimant's claims because of the lack of clear delimitation between the License Agreements and the Petroleum Agreements, which Claimant describes as follows:

> "*The License Agreements and the Petroleum Agreements deal with the Petroleum Operations and production sharing arrangements of the Oilfields and the rights and obligations of parties in respect thereof. They are inextricably intertwined.*
>
> *The License Agreements are the 'title document" granting the right to produce petroleum in accordance with the Petroleum Law and conferring the fundamental rights and obligations of all the parties to the PSAs.*
>
> *The Petroleum Agreements are ancillary to, arising from and issued pursuant to the License Agreements. They merely give operational effect to the rights and obligations already set out in the License Agreements and the Petroleum Law. The subject-matter falls within the scope of both the License Agreements and the Petroleum Agreements. Accordingly, while Albpetrol purports to have exercised rights only under the Petroleum Agreements, it effectively and primarily infringed the rights of Claimant under the 'title document', that is the License Agreements*".[458]

544. Claimant also argues that it is appropriate that the Tribunal decides on Claimant's claims, as Respondents have disregarded the contractual framework of the PSAs, and in particular the separation between Albpetrol, the other Respondents and other entities of

[457] Statement of Claim, paras. 306-307, p. 49.
[458] Statement of Claim, paras. 308-311, pp. 49-50. See also Claimant's Post-Hearing Brief, para. 102, pp. 21-22.

the Government.[459] Claimant calls "*hypocritical*" the fact that Respondents "*hide*" between an "*artificial separation between the License Agreements and the Petroleum Agreements*", in view of their conduct. The economy of proceedings and consistency of outcomes thus militates in favour of this Tribunal taking jurisdiction over all parties and claims in order to have the disputes resolved within a single forum.[460]

545. Another argument made by Claimant in relation to the Tribunal's jurisdiction over all Respondents is that, when disputing the subjective scope of the arbitration agreements contained in the License Agreements, Respondents confuse the subjective scope with the form requirement of Article 178(1) of the SPILA.[461] Whether a party has signed the main contract or the arbitration agreement would be irrelevant under Article 178(1) of the SPILA, because "*evidenced by a text*" does not require a signature.[462] If it is established that there is an arbitration agreement, the scope of the arbitration agreement is interpreted extensively and the subjective scope of the arbitration agreement (*i.e.* who is bound by an arbitration agreement) is determined by "*the most favo*[u]*rable out of three laws to which Article 178(2) of the PILA refers",* not the form requirement of Article 178(1) of the SPILA, according to the Swiss Supreme Court.[463]

546. Claimant argues that determining what the term "*AKBN*" means – as employed in the arbitration clause – and which parties are bound by the arbitration agreement are questions of substantive validity of the arbitration agreement,[464] which are governed by the most favourable of the three laws to which Article 178(2) SPILA refers. This is Swiss law because the Parties have not selected a law governing the arbitration agreement and the law governing the License Agreements is Swiss law.[465]

547. Claimant argues that when interpreting an arbitration agreement under Swiss law, the arbitral tribunal needs to (i) assess the parties' real mutual intent at the time when they

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[459] Statement of Claim, para. 312, p. 50. Claimant alleges in that respect that (i) Albanian tax authorities transferred reimbursements meant for Claimant to Albpetrol as compensation for alleged claims of Albpetrol against Claimant under the PSAs., (ii) Albpetrol now operates the Cakran and Gorisht Oilfields and acted in concert with other Respondents in their wrongful confiscation.
[460] Statement of Claim, para. 312, p. 50.
[461] Claimant's Post-Hearing Brief, para. 87, p. 17.
[462] Claimant's Post-Hearing Brief, para. 92, p. 18, referring to **CL-41** – Decision of Swiss Supreme Court, 18 February 2016, BGE 142 III 239, para. 3.3.1, p. 248; **CL-42** – Decision of Swiss Supreme Court, 7 August 2001, 4P.124/2001, para. 2c.
[463] Claimant's Post-Hearing Brief, para. 87, p. 17, referring to **CL-40** – Decision of Swiss Supreme Court, 19 August 2008, BGE 134 III 565, para. 3.2, p. 567: "'... *If it examines if it is competent to decide the dispute that is submitted to it, the arbitral tribunal has to resolve, among other issues, the one of the subjective scope of the arbitration agreement. It has to determine which parties are bound by this agreement and to assess, if applicable, if one or several third parties that are not mentioned therein nevertheless fall within its scope of application. This issue of competence* ratione personae, *which pertains to the substance, has to be resolved in light of article 178(2) PILA* [citation of case law]. *The cited provision stipulates three alternative* ties in favorem validitatis, *without any hierarchy between them, that is the law chosen by the parties, the law governing the subject-matter of the dispute (*lex causae*) and Swiss* law [citation of case law]'"
[464] Claimant's Post-Hearing Brief, para. 92, p. 18, referring to **CL-29** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 391; **CL-40** – Decision of Swiss Supreme Court, 19 August 2008, BGE 134 III 565, para. 3.2, p. 567.
[465] Claimant's Post-Hearing Brief, para. 92, pp. 18-19.

entered into the arbitration agreement if their intent is evidenced[466] and, (ii) if this is not possible, the tribunal has to interpret the arbitration agreement objectively according to the principle of trust, *i.e.* establishing "*the meaning that reasonable and loyal parties would have attributed*",[467] as it is not to be presumed that the parties would have intended to agree on an unreasonable solution.[468]

548. Finally, Claimant disagrees with Respondents' position[469] that Article 6.4 of the License Agreements provides that the Petroleum Agreements prevail over the License Agreements. Article 6.4 does not deal with conflicts between the License Agreement and the Petroleum Agreement, but between the Petroleum Agreement and the appendices/exhibits to the Petroleum Agreement.[470]

549. According to Claimant, the Petroleum Law governs conflicts between the License Agreements and it provides that the Petroleum Agreement may not "*contravene*" or "*run contrary*" to "*the relevant license terms*", *i.e.* the License Agreements.[471]

ii. Specific arguments regarding jurisdiction over Albpetrol

550. In response to Respondents' argument that the Tribunal does not have jurisdiction over Albpetrol, Claimant argues that while Claimant and Albpetrol are both the Licensee under the License Agreements, they are not always "*on the same side*" of the License Agreements, as alleged by Respondents.[472] If this were the case, Article 25.3 would refer to the international arbitration of disputes between AKBN and "*Licensee*" instead of distinguishing between AKBN, Albpetrol and the foreign partner.[473] What is more, according to Claimant, Article 25.2 of the License Agreements implies that Claimant's interests and Albpetrol's interests may differ notwithstanding the fact that they are both the Licensee:

> "***25.2 Arbitration between AKBN and Albpetrol alone.***
>
> *All disputes arising in connection with this License Agreement between AKBN and Albpetrol alone shall be finally settled by arbitration taking place in Tirana in accordance with Albanian legislation. Notwithstanding the foregoing, in the event LICENSEE consists of Albpetrol and a foreign partner and such foreign*

[466] Claimant's Post-Hearing Brief, para. 93, p. 19.
[467] Claimant's Post-Hearing Brief, para. 93, p. 19, referring to **CL-43** – Decision of Swiss Supreme Court, 27 February 2014, BGE 140 III 134, para. 3.2, pp. 138-139; **CL-44** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 481.
[468] Claimant's Post-Hearing Brief, para. 93, p. 19, referring to **CL-43** – Decision of Swiss Supreme Court, 27 February 2014, BGE 140 III 134, para. 3.2, pp. 138-139; **CL-44** – Berger & Kellerhals, International and Domestic Arbitration in Switzerland (3d ed. 2015), para. 482.
[469] Rejoinder Brief, paras. 32-34, pp. 14-15.
[470] Claimant's Post-Hearing Brief, para. 104, p. 22.
[471] Claimant's Post-Hearing Brief, para. 103, p. 22, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 12(3)(c); **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 12.2(c).
[472] Reply, para. 29, p. 4.
[473] Reply, para. 30, p. 4.

partner gives notice in writing to AKBN and to Albpetrol that, in its reasonable judgment, a dispute between Albpetrol and AKBN affects such foreign partner's interests under this License Agreement, any such dispute, whether having just arisen or already the subject of pending arbitration under this Section 25.2 shall be resolved in accordance with Section 25.3 […]".[474]

551. In its Post-Hearing Brief, Claimant argues that pursuant to paragraph 3 of the Instruments of Transfer, Albpetrol and AKBN accepted that Claimant became a party to the License Agreements, and argues that it became a party to the License Agreements "*not only as the Licensee but also with predefined rights and obligations that apply to the* 'foreign partner' *only*".[475] According to Claimant, "[s]*ince Albpetrol is not a* 'foreign partner'*, the Claimant's rights under the License Agreements cannot be and are not merely* 'derivative' *as the Respondents incorrectly allege. The License Agreements distinguish between Albpetrol and the foreign partner not only with regard to the substantive rights and obligations. Specifically, the arbitration clause in Article 25.3 of the License Agreements refers to disputes* 'between AKBN, Albpetrol and foreign partner(s)'".[476]

552. Claimant also contends that pursuant to Article 6.2 of the License Agreements, where there are multiple parties as Licensee, each Petroleum Agreement may "*demarcate the rights, obligations, liabilities and indemnities relating to the Project Area and the balance of the Contract Area*"[477] and the Petroleum Agreements do precisely that, being given effect by the Instruments of Transfer, which assigned all of Albpetrol's rights, privileges and obligations under each License Agreement to Claimant subject to the respective Petroleum Agreement.[478] According to Claimant, "*implicit in this is that trilateral disputes may arise between AKBN, Albpetrol and the Claimant regarding,* inter alia*, the respective rights, obligations, liabilities and indemnities relating to the Project Area and Contract Area*", which makes it appropriate for the Tribunal to have jurisdiction over Albpetrol in the context of a multiparty dispute respecting Claimant's rights under the License Agreement.[479]

553. In response to Respondents' argument that the claims against Albpetrol can only arise under the Petroleum Agreements, Claimant contends that the claims against Albpetrol

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[474] Reply, para. 31, pp. 4-5, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 25.2, p. 63.
[475] Claimant's Post-Hearing Brief, para. 89, pp. 17-18.
[476] Claimant's Post-Hearing Brief, para. 89, p. 18.
[477] Reply, para. 32, p. 5, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 6.2, p. 22: "*In the event LICENSEE is comprised of more than one party, such parties may provide in the Petroleum Agreement for an area (the "Project Area") within the Contract Area where Operator will be solely responsible for conducting Petroleum Operations described herein, separately from Petroleum Operations conducted in the balance of the Contract Area. The Petroleum Agreement may provide for the allocation between or among the parties comprising LICENSEE of the rights, obligations, liabilities and indemnities relating to the Project Area separately from the balance of the Contract Area* […]".
[478] Reply, para. 32, p. 5.
[479] Reply, paras. 32-33, p. 5.

arise under both the Petroleum Agreements and the License Agreements and, in particular, that:

- Albpetrol participated in the Wrongful Confiscations, which was a breach of Claimant's rights under the Gorisht and Cakran License Agreements;[480]

- Albpetrol failed to observe its obligations under the Fiscal Stabilization Covenant (which are not a mere "*renegotiation clause*" as argued by Respondents);[481]

- Albpetrol repeatedly refused to complete the handover of the Ballsh Field and eventually purported to assign Claimant's rights to the Ballsh License Agreement to a bailiff, which was a breach of Claimant's rights under the Ballsh License Agreement.[482]

554. Claimant argues that, first, Article 6.2 of the License Agreement apportions the rights, obligations, liabilities and indemnities of the Licensees to the Project Area in accordance with the Petroleum Agreement, which is "*merely an operational document that implements the rights conferred by the License Agreement*".[483] Albpetrol violated the fundamental rights of Claimant to conduct Petroleum Operations in the Gorisht Field and Cakran Field, contrary to both the overarching License Agreement and the subordinate Petroleum Agreement.[484]

555. Claimant also argues that, second, Albpetrol failed to comply with Article 3.1(c) of the License Agreements, which required the parties to "*immediately amend*" the License Agreements in order to eliminate the negative economic effect on Claimant of changes in law.[485]

556. According to Claimant, contrary to Respondents' submissions, Article 3.1(c) neither expresses nor implies any "*renegotiation duty*" but is a "*mandatory direction for the parties to immediately amend the License Agreements*", and the Petroleum Agreement incorporated by reference into the License Agreement requires Albpetrol to "*take all other necessary actions to eliminate the negative economic effect on the Claimant of changes in law*".[486]

557. Finally, in response to Respondents' arguments on this point,[487] Claimant reiterates that it exercised a right to expand the Ballsh Project Area to include the remaining parts of the Contract Area pursuant to Articles 6 and 8 of the License Agreement[488] and that

[480] Reply, para. 34, p. 5, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 6.2, p. 22.
[481] Reply, para. 34, p. 5, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 3.1(c), p. 15.
[482] Reply, para. 34, p. 5, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 6.2, p. 22.
[483] Reply, para. 35, p. 5.
[484] Reply, para. 35, p. 5.
[485] Reply, para. 36, p. 5.
[486] Reply, para. 37, p. 6, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 18.3, p. 28.
[487] Statement of Defence, para. 25, p. 12.
[488] Reply, para. 38, p. 6, referring to Statement of Claim, para. 211, p. 35.

Albpetrol refused to (i) hand over the wells in accordance with the implementing provisions of the Petroleum Agreement, including the Takeover Procedure, within two weeks and to (ii) hand over the facilities within a reasonable period of time.[489]

558. Claimant thus argues that, based on the above, the Tribunal has jurisdiction over Albpetrol and the claims alleged against it under the License Agreements.[490]

iii. Specific arguments regarding jurisdiction over AKBN and the MEI

559. Claimant accuses Respondents of trying to render the arbitration clauses in the License Agreements meaningless by formalistically alleging that (i) the MEI is "*not named in the arbitration agreements* […] *due to the failure to expressly state the Ministry's participation as a party in writing*", and that (ii) AKBN, which is referenced in the arbitration clauses, allegedly signed the License Agreements on behalf of the MEI only but not on behalf of itself and did not enter into the arbitration agreements.[491]

560. Referring to the standards set out in Article 178 SPILA (see above para. 545), Claimant contends that, in the present case, because there is no evidence of the parties' actual mutual intent at the time they entered into the arbitration agreement, the agreement needs to be interpreted objectively according to the principle of trust.[492]

- Jurisdiction over AKBN

561. In response to Respondents' argument that the Tribunal does not have jurisdiction over AKBN, Claimant points out that Article 25.3 of the License Agreements refers specifically to the international arbitration of disputes between *AKBN*, Albpetrol and foreign partner(s), *i.e.* Claimant.[493]

562. According to Claimant, "AKBN" in the arbitration clause means both "*AKBN… on behalf of the Ministry*" and only "*AKBN*".[494]

563. Indeed, according to Claimant, "[d]*espite the fact that AKBN represents the MEI under the License Agreements as its agent, and while the License Agreements may refer to the MEI as being represented by AKBN when individually referring to 'AKBN', the License Agreements nonetheless refer to AKBN and MEI separately throughout*".[495]

564. Claimant contends that (i) the definition of 'License Agreement' at Article 1.41 of the Petroleum Agreements states that the License Agreement is granted by the MEI *and*

[489] Reply, para. 38, p. 6.
[490] Reply, para. 39, p. 6.
[491] Claimant's Post-Hearing Brief, para. 91, p. 18, referring to Rejoinder Brief, para. 45, p. 17, para. 69, p. 25.
[492] Claimant's Post-Hearing Brief, para. 94, p. 19.
[493] Reply, para. 40, p. 6.
[494] Claimant's Post-Hearing Brief, para. 99, p. 21.
[495] Reply, para. 41, p. 6.

AKBN[496] and (ii) that pursuant to the License Agreements, AKBN has a number of rights and obligations, separate from the MEI, including:

a. An obligation to immediately undertake other necessary actions to eliminate the negative economic effect of changes in law on the Licensee;[497]

b. An obligation to ensure that Claimant's right to conduct the Petroleum Operations is not interfered with;[498]

c. A right to be indemnified by the Licensee in respect of claims by third parties for personal damage or property damage resulting from the Petroleum Operations;[499]

d. An obligation to ensure that Claimant obtains all rights, permits, licenses, approvals and other authorizations required to perform the Petroleum Operations;[500]

e. An obligation, upon termination of the Licensee Agreements, to be responsible for certain abandonment obligations;[501] and

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[496] Reply, para. 41, p. 6, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 1.41, p. 6: "'License Agreement' *means the Licence Agreement dated 08/06/2007 granted by the Ministry and the AKBN to Albpetrol governing Petroleum Operations in the Contract Area, and to which Contractor will become a party upon execution and registration of the Instrument of Transfer attached as Annex E*".

[497] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.1(c), p. 15: in case, notably, of infringement of LICENSEE's rights, "*the Parties will immediately amend this License Agreement, or AKBN and the Ministry will immediately undertake other necessary actions to eliminate the negative economic effect on the LICENSEE*".

[498] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.2, pp. 15-16: "[…] *Notwithstanding Section 3.2(a), (b), (c), and (d), any contractor may conduct petroleum operations for development and production of Petroleum outside of the Contract Area in accordance with any agreement reached between a contractor and AKBN. Ministry, AKBN and the contractor shall ensure LICENSEE that those petroleum operations will not interfere and unreasonably prevent the normal development of Petroleum Operations of the LICENSEE in the Contract Area, nor shall LICENSEE unreasonably prevent or interfere with the petroleum operations of such other contractor*".

[499] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.3(a)(iii), p. 16: "*The LICENSEE shall* […] *indemnify the Albanian Government, the Ministry and AKBN, and their employees, officials, officers, directors and respective agents, for all claims by third parties for personal damage or property damage resulting from the performance of the Petroleum Operations, including without limitation, reasonable attorney's fees and costs of defense unless such third party claims are as a direct or indirect result of any fault or breach of legal duty by the Albanian Government, the Ministry or the AKBN.* […]".

[500] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.5(c), p. 18: "*The Ministry and AKBN shall ensure and assist that the LICENSEE is granted, in accordance with Articles 7 and 10 of the Petroleum Law, all the rights, permits, licenses, approvals and other authorizations that it may reasonably require in order to enable the performance of the Petroleum Operations in conformity with this License Agreement, and that any compensation which LICENSEE may be required to pay, pursuant to Article 10.(2) of the Petroleum Law, shall be reasonable and non-discriminatory*".

[501] **C-2**, **C-3** and **C-4** – License Agreements, Articles 9.3(a), p. 34: "[…] *The Ministry and AKBN will be held responsible for all obligations arising following the date of their receipt of such property and will protect, indemnify and hold the LICENSEE harmless against costs and claims based on such obligations*" and 9.3(b): "[…] *However, nothing contained in this License Agreement will oblige the LICENSEE to Abandon the unused equipment or facilities in the Petroleum Operations, and AKBN and the Ministry will protect, indemnify and hold the LICENSEE harmless against costs and claims based on such obligations*".

f. With regards to matters falling within AKBN's authority under Albanian law, in particular the monitoring of the implementation of the Petroleum Agreements and the development plan,[502] rights to request amendments to the Development Plan,[503] approve the Development Plan,[504] approve the extension of the Development and Production Period,[505] and approve new evaluation areas.[506]

565. Claimant considers that by entering into the License Agreement on behalf of the MEI, AKBN accepted the arbitration clause in Article 25.3 that refers simply to "*AKBN*" and that in view of AKBN's obligations under the License Agreements, a reasonable person would have understood that this reference not only referred to AKBN representing the MEI but also AKBN itself.[507]

566. Claimant argues that the interpretation pursuant to which the term "*AKBN*" in the arbitration clause refers to AKBN representing the MEI and AKBN itself also ensures that the foreign partner may resort to arbitration with regard to disputes under the License Agreement regardless of whether the dispute concerns an obligation of the MEI, AKBN or both.[508]

567. In addition, Claimant claims that under its formative legislation, AKBN is responsible to the MEI and delegated authority to negotiate hydrocarbon agreements, and that

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[502] **CL-33** – Legal Opinion of Oltion Toro dated 14 April 2019, p. 3.

[503] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.1(b)(i), pp. 29-30: "*AKBN may, within sixty (60) days following receipt of the proposed Development Plan submitted by LICENSEE pursuant to ARTICLE 7, Section 7.4, request LICENSEE of any amendment it deems necessary to the Development Plan and the reasons therefore. If AKBN fails to inform LICENSEE of any amendment within such sixty (60) days, the proposed Development Plan shall be deemed to be approved. The LICENSEE shall consider the amendments (if any) suggested by AKBN and incorporate those amendments it deems necessary*."

[504] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.3(a), p. 30: "*Subject to ARTICLE 4, Section 4.1 and Sections 8.3(b) and 8.3(c), the Development and Production Period will commence upon approval by AKBN of the Development Plan and will end on the 25th anniversary of the Effective Date.*"

[505] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.3(c), p. 31: "*So long as LICENSEE has not breached any material clause of this License Agreement, upon the request of LICENSEE and approval of AKBN (which approval will not be unreasonably withheld or delayed) the Development and Production Period will be extended for successive periods of five (5) years each, for as long as any portion of the Contract Area continues to produce Petroleum in commercial quantities. Every request for extension should be made to AKBN in writing no later than one hundred and eighty (180) days prior to the termination of the Development and Production Period (as it may have previously been extended). Failure of AKBN to respond to any such request for extension within sixty (60) days following the date of receipt of such request shall be deemed to be approval of the requested extension.*"

[506] **C-2**, **C-3** and **C-4** – License Agreements, Article 8.4(a), p. 31: "*During the implementation of the Development Plan, but no later than five (5) years from the date of the Development Plan approval, LlCENSEE may further propose and design new evaluation areas within the Contract Area but outside of any existing Development and Production Area for a new Evaluation Period. Upon AKBN approval, which approval will not be unreasonably withheld or delayed, such new Evaluation Period will have an initial term of twelve (12) months from commencement, and shall involve a relevant evaluation program (the "New Evaluation Program") involving a minimum work program and capital expenditure commitments and an Evaluation area (the "New Evaluation Area") at LlCENSEE's assessment. The New Evaluation Program shall be appended to Annex B and the New Evaluation Area shall be appended to Annex A. The New Evaluation Area may include the lands within the Contract Area where the new Evaluation and subsequent development and production activities may occur. After completion of each new Evaluation Period, an addendum of the Development Plan must be submitted or the New Evaluation Area relinquished."*

[507] Claimant's Post-Hearing Brief, para. 98, p. 20.

[508] Claimant's Post-Hearing Brief, para. 98, pp. 20-21.

"[p]*ursuant to that authority, AKBN chose to agree that both AKBN and MEI* 'irrevocably waive any right of immunity or any right to object to this arbitration agreement' *at Article 25.3(d) of the License Agreements*".[509]

- Jurisdiction over the MEI

568. Claimant contests Respondents' argument that the Tribunal does not have jurisdiction over the claims brought against the MEI, as it considers that the MEI is subject to Article 25.3 of the License Agreements.

569. Claimant bases its arguments on an objective interpretation of the License Agreements, and asserts that the use of the term "*AKBN*" in the substantive part of the License Agreements enables the Tribunal to interpret the reference to "*AKBN*" in the arbitration clause.[510]

570. First, Claimant contends that although Article 25.3 of the License Agreements refers to the international arbitration of disputes between AKBN, Albpetrol and foreign partner(s), *i.e.* Claimant, the definition of AKBN includes the MEI because it refers to Recital K of the License Agreements which provides that AKBN will act on behalf of the MEI, on the basis of its formative legislation.[511]

571. Second, Claimant argues that the MEI is expressly mentioned as a party to the License Agreements, represented by AKBN, which means that most references to AKBN are references to the MEI[512] and that "AKBN" by default refers to AKBN on behalf of the MEI.[513]

572. Third, Claimant relies on the purpose of the License Agreements, by submitting doctrine suggesting that the objective interpretation encompasses not only the wording but also other relevant aspects, including the purpose of the contractual provision,[514] and that, according to the Supreme Court, the objective interpretation requires attributing an *effet utile* to each contractual clause.[515]

573. Claimant argues that, in the case at hand, the purpose of the License Agreements is the MEI's granting of a license to the foreign partner, *i.e.* Claimant. Claimant points out that the License Agreements contain two different arbitration clauses: (1) "*Arbitration between AKBN and Albpetrol alone*" (Article 25.2) and (2) "*Arbitration between AKBN, Albpetrol and Foreign Partner(s)"* (Article 25.3). Claimant contests Respondents'

[509] Reply, paras. 43-44, p. 7, referring to **CL-2** – The Decree of the Council of Ministers No. 547 dated 09.03.2006.
[510] Claimant's Post-Hearing Brief, para. 95, p. 19.
[511] Reply, para. 47, p. 7; Claimant's Post-Hearing Brief, para. 95, p. 19.
[512] Reply, para. 48, p. 7; Claimant's Post-Hearing Brief, para. 95, p. 19.
[513] Claimant's Post-Hearing Brief, para. 95, p. 19.
[514] Claimant's Post-Hearing Brief, para. 96, pp. 19-20, referring to **CL-45** – Müller, *Art. 18*, in: Berner Kommentar Obligationenrecht (Aebi-Müller & Müller eds., 2018), para. 107.
[515] Claimant's Post-Hearing Brief, para. 96, pp. 19-20, referring to **CL-46** – Decision of Swiss Supreme Court, 17 October 2017, BGE 143 III 589, para. 2.2, p. 595.

arguments that there is no valid arbitration agreement at all for disputes with Claimant under Article 25.3 because (i) the MEI is not expressly mentioned in Article 25.3 and (i) AKBN did not enter into the arbitration agreement on its own behalf but only on behalf of the MEI,[516] because such arguments would leave Article 25.3 without any effective application. The purpose of Article 25.3 is to enable a foreign partner to resort to arbitration for disputes under the License Agreements. Claimant points out that AKBN entered into the License Agreement representing the MEI, which grants the license, and argues that if the reference to AKBN in Article 25.3 is interpreted as meaning that AKBN (also) represents the MEI, it enables the foreign partner to bring disputes under the License Agreements with the MEI and Albeptrol to arbitration.[517] This interpretation attributes an *effet utile* to Article 25.3 and leads to a valid arbitration agreement.[518]

574. Finally, Claimant contends that the Tribunal has jurisdiction over the MEI and the claims brought against it because pursuant to Article 25.3(d) of the License Agreements, the MEI, along with AKBN, "*irrevocably waive any right of immunity or any right to object to this arbitration agreement*".[519]

575. In any event, according to Claimant, as indicated above, even if the reference to "*AKBN*" in the arbitration clause were a manifest error as Respondents allege,[520] this erroneous reference would be irrelevant and the parties' true intent would be decisive under Swiss law.[521] Since Respondents contend that AKBN only represented the MEI, and did not act on behalf of itself, the reference to "*AKBN*" in the arbitration clauses actually means "*AKBN… on behalf of the Ministry*" as AKBN is defined in Recital K of the License Agreements, and the inexact designation "*AKBN*" is irrelevant and the true meaning "*AKBN… on behalf of the Ministry*" prevails.[522]

C. <u>Decision of the Tribunal on its jurisdiction over the Parties</u>

576. On the basis of the issues raised by the Parties, and in particular as to their consent to the arbitration agreement contained in the License Agreements, the Tribunal will analyse in turn its jurisdiction over Respondents (1.) and over Claimant (2.). The Tribunal emphasizes that it has carefully examined all of the Parties' arguments to reach its decision even if they are not all expressly mentioned below.

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[516] Rejoinder Brief, paras. 144, 148 pp. 42-43.
[517] Claimant's Post-Hearing Brief, para. 96, pp. 19-20; Reply, para. 49, p. 7, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Articles 5(1), 5(3)(f), pp. 4-5; **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Articles 5(1), 5(3)(f).
[518] Claimant's Post-Hearing Brief, para. 96, p. 20.
[519] Reply, para. 50, p. 8.
[520] Rejoinder Brief, para. 150, pp. 43-44.
[521] Claimant's Post-Hearing Brief, para. 100, p. 21, referring to Swiss Code of Obligations, Article 18: "*When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".*
[522] Claimant's Post-Hearing Brief, para. 100, p. 21.

577. As a preliminary matter, the Tribunal notes that there is an arbitration agreement in the License Agreements, which were signed by the contracting parties. Therefore, the only remaining issue is whether the various parties that intervened in one way or another in the License Agreements did consent to the arbitration clause contained in them.

1. Jurisdiction over Respondents

578. Before analysing the Parties' position on jurisdiction over Respondents, the Tribunal notes that Claimant bases all its claims on the License Agreements, whether they are damages sought as compensation for Respondents' alleged breaches of the License Agreements or specific performance sought in respect of the alleged breaches of the Ballsh License Agreement. The Tribunal will thus begin its analysis by considering, first, the question of consent to arbitration based on the arbitration clause contained in the License Agreements, on the basis of which it was seized. For the avoidance of doubt, this does not establish nor presume that each of the claims submitted in this arbitration is effectively covered by the arbitration clause in the License Agreements. This is an issue of jurisdiction over Claimant's claims againt Respondents, which will be analysed below.

579. The Tribunal will successively analyse its jurisdiction over Albpetrol (a.), the MIE (b.) and AKBN (c.).

a) Jurisdiction over Albpetrol

580. As far as Albpetrol is concerned, it is undisputed that it is a party to the License Agreements and to the arbitration agreement contained in Article 25.3.

581. The existence and the content of Albpetrol's obligations towards Claimant under the License Agreements are different issues, which relate to the Tribunal's jurisdiction over the claims brought against Albpetrol, and not to Albpetrol's consent to the arbitration agreement. This issue will be considered in section 5.3 below.

582. Therefore, the Tribunal rules that it has jurisdiction over Albpetrol.

b) Jurisdiction over the MIE

583. The MIE is a party to the License Agreements because AKBN represented the METE in the signature of the License Agreements and that the MIE is the legal successor of the MEI, which is itself the legal successor of the METE, under the License Agreements. The question of consent of the MIE to the License Agreements is thus not an issue. However, as seen above, the Parties draw different conclusions from this fact: Claimant considers that AKBN's representation of the MIE in the conclusion of the License Agreements led to AKBN's representation of the MIE in the arbitration clause, which Respondents contest.

584. It is widely admitted that when an arbitration agreement is contained in the main contract, the principle of separability does not mandate that the Parties express their

consent to both the main contract and the arbitration agreement. On the contrary, where a party unquestionably expresses its consent to the main contract (directly or by representation), that party is assumed to have given its consent to the arbitration agreement contained in it, unless demonstrated otherwise.

585. Given that this consent is assumed, the only remaining requirement is for the arbitration agreement to meet the validity requirements of Article 178(1) SPILA, *i.e.* that it is "*made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*". In the present case, the arbitration agreement is indeed contained in writing in Article 25.3 of the License Agreements.

586. Therefore, in the case at hand, since the MIE had consented (by representation) to the License Agreements, it was not necessary to reiterate the MIE's consent to the arbitration agreement contained in Article 25.3 – *i.e.* by indicating in the arbitration agreement that AKBN was signing the arbitration agreement on behalf of the MIE –, given that the MIE had already consented to the arbitration agreement by entering into the License Agreements.

587. It follows that in the Tribunal's view the reference to AKBN in the arbitration agreement must be understood as a reference to the MIE for all contractual obligations for which AKBN was representing the MIE, except for what is clearly intended to refer to undertakings that are specific to AKBN (discussed below).

588. The Tribunal's conclusion that the MIE is bound by the arbitration clause is confirmed by the fact that the MIE itself, and not only AKBN, "*irrevocably waive*[d] *any right of immunity or any right to object to* [the] *arbitration agreement*". Such statement can only make sense if the MIE had consented to the arbitration agreement in the first place and considered itself bound by it.[523]

589. The lack of necessity of a separate consent to the arbitration agreement entails that the rather lengthy and confusing arguments advanced by Respondents on the invalidity of the arbitration agreement due to lack of consent, and particularly on the distinction between lack of objective and subjective *essentialia negotii*, are ineffective.

590. Thus, the Tribunal rules that it has jurisdiction over the MIE.

c) <u>Jurisdiction over AKBN</u>

591. As far as AKBN is concerned, the question is whether it can be considered as a party in its own right to the License Agreements and the arbitration agreement in Article 25.3 even though the front page of the License Agreements indicates that AKBN represented

[523] **C-2**, **C-3** and **C-4** – License Agreements, Article 25.3(d), p. 64: "*The Ministry and AKBN irrevocably waive any right of immunity or any right to object to this arbitration agreement, any arbitration award, any judgment regarding the enforcement of an arbitration award of the execution of any arbitration award against or in respect of any of its property whatsoever it now has or may inquire in the future in any jurisdicion*".

the MIE. In other words, the question is whether AKBN consented to be bound by the License Agreements and the arbitration agreement in its own right.

592. If, as Claimant argues, it is demonstrated that AKBN has rights and obligations of its own under the License Agreements, the reference to AKBN in the arbitration agreement would not only be understood as AKBN on behalf of the MIE, but also as AKBN in its own name, for its own rights and obligations.

593. The Tribunal notes that it would not be incompatible with the rules governing the status of AKBN if the latter had its own rights and obligations under the License Agreements because, pursuant to Decision No. 547 dated 9 August 2006 (as amended) on the establishment of AKBN, AKBN "*inherits all the rights and obligations set fort by the previous bylaws, contracts, assets and bank accounts of the institutions* [whose merger resulted in AKBN]".[524] Respondents also confirmed that AKBN may enter into contracts in its own name.[525]

594. After analysing the License Agreements, the Tribunal finds that AKBN has several rights and obligations pursuant to the License Agreements that are separate from the MEI's.

595. For instance, the Tribunal finds Articles 3.1(c), 3.2 and 3.5(c) of the License Agreements particularly interesting in that respect because they dissociate AKBN's and the MIE's obligations, respectively to (i) eliminate the negative economic effect of changes on the Licensee,[526] (ii) ensure that other contractors' petroleum operations do not interfere with Claimant's Petroleum Operation[527] and (iii) ensure that the Licensee is granted all authorizations necessary for the performance of the Petroleum Agreements.[528]

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[524] **RL-26** – Decision No. 547 of Council of Ministers of 09.08.2006 (correcting translation of Exhibit CL-2), para. 6.

[525] Respondents' Post-Hearing Brief, para. 8, p. 8, referring to **RL-25** – Arts. 24 *et seq.* of the Albanian Civil Code ("**ACC**"):

- Article 29: "*The legal person has the capacity to acquire rights and assume civil obligations from the moment it is founded and, when the law requires it to be registered, from the moment it is registered*".
- Article 24: "*Legal persons are public legal persons and private legal persons*".
- Article 25: "*Public legal persons are state institutions and enterprises, which are self-financing or financed by the state budget, as well as other public entities recognized by law as a legal person. State institutions and entities that do not follow economic purposes, do not register*".

[526] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.1(c), p. 15: "[…] *the Parties will immediately amend this License Agreement, or* ***AKBN and the Ministry*** *will immediately undertake other necessary actions to eliminate the negative economic effect on the LICENSEE*".

[527] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.2, pp. 15-16: "[…] *Notwithstanding Section 3.2(a), (b), (c), and (d), any contractor may conduct petroleum operations for development and production of Petroleum outside of the Contract Area in accordance with any agreement reached between a contractor and AKBN.* ***Ministry, AKBN*** *and the contractor shall ensure LICENSEE that those petroleum operations will not interfere and unreasonably prevent the normal development of Petroleum Operations of the LICENSEE in the Contract Area, nor shall LICENSEE unreasonably prevent or interfere with the petroleum operations of such other contractor*".

[528] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.5(c), p. 18: "***The Ministry and AKBN*** *shall ensure and assist that the LICENSEE is granted, in accordance with Articles 7 and 10 of the Petroleum Law, all the rights,*

596. Similarly, Article 9.3(a) of the License Agreements provides that both the MIE and AKBN will be held responsible for obligations related to equipment and immovable in the Contract Area at the termination or relinquishment of the Contract Area, and will protect, indemnify and hold the Licensee harmless against costs and claims based on such obligations.[529] If AKBN was simply a signatory of the License Agreements as a representative of the MIE and did not have rights and obligations of its own, it would not make sense for the provisions of the License Agreements to refer to the rights and obligations of the MIE *and* of AKBN in a same sentence.

597. The Tribunal takes note of Respondents' argument that AKBN's alleged obligations have their basis in public law and in the administrative rules governing the Agency's duties, and not in the License Agreements, and that the "*listing of public tasks of AKBN cannot substitute the required will to be bound to an agreement*."[530] However, Respondents do not cite any provisions of any public law or any administrative rules governing AKBN's duties that would support this assertion. Without this explanation, it is unclear to the Tribunal why the License Agreements would describe AKBN's rights and obligations in a similar way to those of the MIE if AKBN's obligations had their basis in public law and administrative rules. Moreover, regardless of whether AKBN has the same rights and obligations under public law such as those mentioned in the License Agreements, some rights and obligations of AKBN are clearly specific to the License Agreements, such as Article 9.3(a) cited above, so that they are clearly not general duties under public law.

598. The Tribunal also notes that Article 25.3(d) of the License Agreements expressly states that both the MIE *and* AKBN waive (*inter alia*) any right of immunity or any right to object to the arbitration agreement.[531]

599. Although this element does not "*make an arbitration clause*", to use Respondents' words,[532] it confirms the Tribunal's analysis that AKBN, which is expressly mentioned in the Article 25.3 arbitration agreement, has specific rights and obligations under the License Agreements and is bound by the arbitration agreement contained therein.

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permits, licenses, approvals and other authorizations that it may reasonably require in order to enable the performance of the Petroleum Operations in conformity with this License Agreement, and that any compensation which LICENSEE may be required to pay, pursuant to Article 10.(2) of the Petroleum Law, shall be reasonable and non-discriminatory".

[529] **C-2**, **C-3** and **C-4** – License Agreements, Articles 9.3(a), p. 34: "[…] *The Ministry and AKBN will be held responsible for all obligations arising following the date of their receipt of such property and will protect, indemnify and hold the LICENSEE harmless against costs and claims based on such obligations*" and 9.3(b): "[…] *However, nothing contained in this License Agreement will oblige the LICENSEE to Abandon the unused equipment or facilities in the Petroleum Operations, and AKBN and the Ministry will protect, indemnify and hold the LICENSEE harmless against costs and claims based on such obligations*".

[530] Rejoinder Brief, para. 141, pp. 41-42.

[531] **C-2**, **C-3** and **C-4** – License Agreements, Article 25.3(d), p. 64: "*The Ministry and AKBN irrevocably waive any right of immunity or any right to object to this arbitration agreement, any arbitration award, any judgment regarding the enforcement of an arbitration award of the execution of any arbitration award against or in respect of any of its property whatsoever it now has or may inquire in the future in any jurisdicion*".

[532] Rejoinder Brief, para. 157, pp. 45-46.

600. Therefore, the Tribunal rules that AKBN consented to be bound by the License Agreements and the arbitration clause therein in its own right and not merely as a representative of the MIE. Therefore, the Tribunal holds that it has jurisdiction over AKBN.

601. The Tribunal specifies that, although it rules that it has jurisdiction over all three Respondents, only the obligations that each Respondent had *vis-à-vis* Claimant can be the subject-matter of a claim.

2. Jurisdiction over Claimant

602. The issue of jurisdiction over Claimant concerns whether Claimant falls within the meaning of "*foreign partner*" under Article 25.3 of the License Agreements, an issue over which the Parties disagree.

603. The term "*foreign partner*" is not defined in the License Agreements, but Articles 5(3)(d) and (f) of the Petroleum Law contain the notion of "*foreign investor*"[533] which is defined in the Law for foreign investments of 2 November 1993 as:

> "*a) every physical person who is a citizen of another country; or*
>
> *b) every physical person who is a citizen of the Republic of Albania, but resides outside the country;*
>
> *c) every legal person established in accordance with the law of a foreign country, who directly or indirectly seeks to carry out or is carrying out an investment in the territory of the Republic of Albania in conformity with its laws, or has carried out an investment in conformity with its laws during the period from 31.07.1990 to the present*".[534]

604. In the absence of a definition of the term "*Foreign Partner*" in the Agreements, the Tribunal agrees with Claimant that the term "*foreign investor*" as defined above can be used by analogy at least as regards to the definition of the adjective "foreign". Given that the Agreements do not include any requirements regarding an "investor" or an "investment" there is no need to investigate this element further.

605. The Petroleum Law provides that a "*foreign investor*" can be a party to a Petroleum Agreement, which is linked to the License Agreements that contain the notion of "*foreign partner*".

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[533] **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 5(3)(d): "*A Petroleum Agreement to which a Foreign Investor is a party may contain provisions for the purpose of ensuring the stability of the fiscal regime* […]"; Article 5(3)(f): "*A Hydrocarbon Agreement may* […] *where a Foreign Investor is a party to a Petroleum Agreement make provision for the settlement of disputes arising out of or connecte with the Agreement by international arbitration*".

[534] **CL-16** – For Foreign Investments, Law No. 7764 dated 02.11.1993, Article 1.

606. It can thus be concluded that, as argued by Claimant,[535] the criterion for a company to be consideed as foreign is that of Article 5(3)(c) of the Petroleum Law cited above, *i.e.* that it is a "*legal person established in accordance with the law of a foreign country*".

607. Given that Claimant is a company incorporated in the Cayman Islands in conformity with the law of that country,[536] it should be considered as foreign for purposes of both the Law for foreign investments and the Petroleum Law, and thus also for the purposes of being a "foreign" partner of Albpetrol under the License Agreements.

608. Respondents dispute that a majority of foreign investors hold direct and indirect control and shareholding of Claimant and argue that the decisive factor to ascertain the nationality of the partner is the "*ultimate control and shareholding in Claimant*", which is held by Albanian nationals.[537] However, Respondents do not provide any evidence in support of the assertion that this is the decisive factor to determine nationality for present purposes. Moreover, the legal exhibits submitted by the Parties do not contain any legislative provisions indicating that the nationality of a foreign partner is determined by the nationality of its direct or indirect shareholders.

609. As indicated in Section 5.1 above, the Tribunal believes that Respondents have not provided sufficient elements to substantiate their position that, in the light of the suspicions of illegality identified by Respondents through red flags, it is necessary to pierce the corporate veil in order to identify the ultimate shareholders and beneficiaries of Claimant. There is no reason to depart from that conclusion in this context.

610. In any event, as far as Claimant's direct shareholders are concerned, the Tribunal notes that exhibit R-188 demonstrates that all outstanding shares were held by persons domiciled out of Albania as of the Effective Date (24 August 2007), except the shares of Mr. Arian Tartari which represented only a small percentage of Claimant's outstanding shares.[538]

611. Therefore, even if the Tribunal were to look at Claimant's direct shareholders to determine whether Claimant is a foreign investor, it would find that, as of the Effective Date, the majority of them were foreign investors, within the definition of Article 1(b) of the Law for foreign investments. On the basis of the analogy explained above, it is the Tribunal's opinion that such foreign investors should be considered as foreign partners.

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[535] Reply, paras. 17-18, p. 3, referring to **CL-16** – For Foreign Investments, Law No. 7764 dated 02.11.1993; Claimant's Post-Hearing Brief, para. 73, p. 13.
[536] **C-163** – Certificate of Good Standing of GBC Oil Company Ltd., dated 28 March 2018; **C-164** – Amended and Restated Memorandum and Articles of Association, adopted 20 July 2007, amended 19 February 2015, amended 28 April 2016.
[537] Statement of Defence, para. 16, pp. 10-11; Respondents' Post-Hearing Brief, para. 93, p. 29.
[538] **R-188** – Copy of the Claimant's Register of members including Incorporation Date; Claimant's Post-Hearing Brief, para. 78, pp. 14-15.

612. In conclusion, in the light of the above, the Tribunal finds that Claimant is a foreign partner under Article 25.3 of the License Agreements. Accordingly, the Tribunal rules that it has jurisdiction over Claimant.

5.3. Jurisdiction over the claims against Respondents

A. Respondents' position

1. The Tribunal has no jurisdiction over the claims brought against Albpetrol

613. Respondents assert that the Tribunal does not have jurisdiction over Albpetrol and argue that the reason why Claimant has raised claims against Albpetrol in the present arbitration was to avoid initiating arbitration against Albpetrol under the Petroleum Agreements under which Albpetrol has counterclaims against Claimant "*in a multi-million USD amount*".[539]

614. Indeed, Respondents contend that disputes under the Petroleum Agreements are exclusively covered by the arbitration agreements contained in Article 19 of the Petroleum Agreements which provides for UNCITRAL arbitration.[540] Respondents also dispute Claimant's interpretation that the License Agreements are "*overarching*"[541] and argue instead that the Petroleum Agreements prevail over the License Agreements, as stated in Article 6.4 of the License Agreements:[542]

> "***6.4 Prevailing Document.***
>
> *Once approved by the Council of Ministers, the Petroleum Agreement, together with its appendices and exhibits in each of the languages in which it is written and is valid, shall be provided to AKBN. In case of a conflict or disagreement with the Petroleum Agreement provisions, the provisions of the Petroleum Agreement will prevail*".

615. Respondents' position is that, although Albpetrol is a party to the License Agreements under which the present arbitration is brought, the claims against Albpetrol cannot arise under the License Agreements which govern claims between the "*Licensor*" (the Ministry) on the one side and the "*Licensees*" (Albpetrol and the Claimant) on the other side (if Claimant effectively joined the License Agreements by way of the "*Instrument of Transfer*" in Annex E of the Petroleum Agreements).[543]

616. According to Respondents, due to the mechanism of transfer, Albpetrol transferred all (but only) its rights, privileges and obligations *vis-à-vis* the MIE as agreed under the

[539] Rejoinder Brief, para. 76, p. 27.
[540] Rejoinder Brief, para. 126, p. 39.
[541] Reply, para. 35, p. 5.
[542] Rejoinder Brief, para. 127, p. 39.
[543] Statement of Defence, para. 20, p. 11.

License Agreements to Claimant, subject to the corresponding Petroleum Agreements.[544] Claimant thus obtained such rights on a "*purely derivative basis*".[545]

617. It is thus Respondents' position that Albpetrol and Claimant are "*on the same side*" of the License Agreements, *i.e.* "*on the receiving end*",[546] and thus cannot have claims against each other under the License Agreements.[547] Claimant obtained from Albpetrol "*'licensing rights' of Albpetrol against the MIE – but no claims from Albpetrol against Albpetrol*",[548] as Albpetrol did not own such rights.[549]

618. In Respondents' opinion, the relationship between Albpetrol and Claimant is solely regulated by the Petroleum Agreements.[550]

619. Respondents argue that this position is also reflected by the contractual history showing that the claims that Claimant now directs against Albpetrol under the License Agreements have always been negotiated under the relevant Petroleum Agreements. Respondents indicate that Claimant's claims regarding "*confiscation*" in reality concern the "*termination of the* [Petroleum Agreements (Article 24)]". Further, there has never been any "*confiscation*", neither by Albpetrol nor by the MIE, as proven by Exhibit C-19.[551]

620. Therefore, according to Respondents, if at all, the following claims raised against Albpetrol can only be rooted in the Petroleum Agreements, so that the Tribunal lacks jurisdiction in this respect:

a) The claim for the allegedly wrongful confiscation of the licenses (yet not confiscated by Albpetrol);

b) The claim for an alleged breach of the renegotiation clause;

c) The claim in connection with the claimed handover of the Ballsh oilfield; and

d) Any other claim "*potentially raised in Claimant's unspecific story*".[552]

a) <u>No jurisdiction against Albpetrol under the License Agreements in view of the "*disputes*" about "*wrongful confiscation*" of the Cakran and Gorisht Oilfields</u>

621. Respondents argue that a party that receives a license (such as Albpetrol) cannot be liable for the alleged revocation of the same license if it shared the license with a

[544] Respondents' Post-Hearing Brief, para. 101, pp. 31-32.
[545] Rejoinder Brief, para. 73, p. 26.
[546] Statement of Defence, para. 21, p. 11.
[547] Respondents' Post-Hearing Brief, para. 101, pp. 31-32.
[548] Respondents' Post-Hearing Brief, para. 101, pp. 31-32.
[549] Rejoinder Brief, para. 75, p. 27.
[550] Respondents' Post-Hearing Brief, para. 101, pp. 31-32.
[551] Respondents' Post-Hearing Brief, para. 101, pp. 31-32.
[552] Statement of Defence, paras. 22, 26 pp. 11-12; Respondents' Post-Hearing Brief, para. 100, p. 31.

contractor like Claimant. To the extent that Claimant opposes the termination of the Petroleum Agreements, such dispute would have to be brought under the Petroleum Agreements.[553]

622. Respondents' arguments with respect to the lack of jurisdiction against Albpetrol on these grounds are the following: (i) Claimant failed to substantiate any claims under the License Agreements,[554] (ii) Claimant's argument based on Article 25.2 of the License Agreement must be rejected[555] and (iii) Claimant's argument based on Article 6.2 of the License Agreements must also be rejected.[556]

623. First, Respondents contend that Claimant has not substantiated how a claim in connection with an allegedly "*wrongful confiscation*" of the Cakran and Gorisht Oilfields may arise under the respective License Agreements.

624. Respondents argue that because it is not Albpetrol's duty under the License Agreements to grant licenses to Claimant, Albpetrol cannot be accused of withdrawing such a License, if it is what Claimant means when it refers to "*confiscation*".[557]

625. Respondents argue that Albpetrol entered into Petroleum Agreements with Claimant, under some of which it issued termination notices (the "**Termination Notices**"),[558] and that if Claimant wished to object to such termination notices, it would have to do so under the Petroleum Agreements' dispute resolution mechanisms.[559]

626. Respondents also contend that, as for Claimant's argument that Albpetrol "*seized the oilfields*", it is "*unsubstantiated and inconclusive*" for the following reasons: "*Albpetrol as a private company does obviously not enjoy executory rights, and the Claimant has entirely failed to argue them. The takeover process went smoothly and without any problems. Contrary to what Claimant alleges, no police was present. The workers were happy that Albpetrol took over, because they had not been paid for months. None of the witnesses has substantiated any executory measures by Albpetrol under the License Agreements, and not even under the Petroleum Agreements. Nothing in all this backs even the arguing of a claim under the License Agreement*".[560]

627. Second, Respondents contest Claimant's argument that Article 25.2 of the License Agreements imply that Claimant's and Albpetrol's interests may differ notwithstanding

[553] Statement of Defence, para. 24, p. 12.
[554] Rejoinder Brief, C-III-2-a), p. 27.
[555] Rejoinder Brief, C-III-2-b), p. 28.
[556] Rejoinder Brief, C-III-2-c), p. 29.
[557] Rejoinder Brief, para. 78, p. 27.
[558] **R-100** – Termination letter from Albpetrol to Claimant regarding the Cakran-Mollaj Oilfield dated 19 September 2016; **R-101** – Termination letter from Albpetrol to Claimant regarding the Gorisht-Kocul Oilfield dated 19 September 2016.
[559] Rejoinder Brief, paras. 79-81, pp. 27-28; Respondents' Post-Hearing Brief, para. 124, p. 37.
[560] Rejoinder Brief, para. 82, p. 28; Respondents' Post-Hearing Brief, para. 126, p. 38.

the fact that they are both the Licensee (for Claimant's argument in this regard, see para. 550 above).[561]

628. In particular, Respondents argue that Claimant's position *vis-à-vis* Albpetrol under the License Agreements is characterized by the Instrument of Transfer and is "*of a purely derivative nature*". Claimant has to resort to the Petroleum Agreements if it wishes to litigate/arbitrate against Albpetrol and Article 25.2 does not change this analysis.[562]

629. Respondents also argue that Article 25.2 of the License Agreements which provides for "*arbitration for disputes between AKBN and Albpetrol alone"* is without legal effect and cannot serve as an "*interpretation guide*" for Claimant's claims, as AKBN has not become a party to the License Agreements and has just acted as an agent for/in representation of the Ministry.[563]

630. Finally, Respondents claim that, even if effective, Article 25.2 would only concern arbitration between AKBN and Albpetrol alone and would thus not govern substantive rights between Albpetrol and another Licensee. The mere fact that Article 25.2 also states that "*a dispute between Albpetrol and AKBN* [may] *affect* […] *such foreign partner's interests*" does not mean that the foreign partner's interests are adverse to Albpetrol in the meaning of a substantive claim against Albpetrol: as the Claimant's rights are derived from Albpetrol, a dispute under the License Agreements between a Licensee and Albpetrol may affect Claimant without Albpetrol's and Claimant's positions being of an antagonistic nature.[564]

631. Third, Respondents contest Claimant's argument that it has claims against Albpetrol under Article 6.2 of the License Agreements (for Claimant's argument in this regard, see above at para. 552)[565] which confirms that, in reality, Claimant does not raise claims against Albpetrol under the License Agreements but under the Petroleum Agreements.[566]

632. Respondents' argument in that respect is that Article 6.2 of the License Agreements does not establish any rights of Claimant towards Albpetrol itself, but merely authorises Albpetrol to agree – or not to agree – on certain arrangements under separate Petroleum Agreements:

- "*As the headline and Art. 6.1 support, Art. 6.2 of the License Agreements grants Albpetrol the authority to provide in a separate Petroleum Agreement for an area within the Contract Area where an operator like the Claimant would be solely responsible for conducting Petroleum Operations The right of the operator,*

[561] Reply, paras. 30-31, p. 4, referring to Article 25.2 "*Arbitration between AKBN and Albpetrol alone*".
[562] Rejoinder Brief, para. 86, p. 29.
[563] Rejoinder Brief, para. 87, p. 29.
[564] Rejoinder Brief, para. 88, p. 29.
[565] Reply, paras. 30-31, p. 4, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 25.2, p. 63, "*Arbitration between AKBN and Albpetrol alone*".
[566] Rejoinder Brief, paras. 90-91, pp. 29-30; Respondents' Post-Hearing Brief, para. 127, p. 38.

however, to operate in this area, would clearly be rooted in such Petroleum Agreement*, and not in the License Agreement*."

- "*Art. 6.2 has the legal character of an* authorisation of Albpetrol *(from the Licensor), and not a right that Albpetrol may transfer to an operator by way of the Instrument of Transfer, and that could then be asserted against Albpetrol: An authorization is not a cause of action – irrespective of the fact that a transfer of the authorization of Albpetrol under Art. 6 of the License Agreements by way of the Instruments of Transfer cannot be directed against Albpetrol*".[567]

b) <u>There is no jurisdiction against Albpetrol under the License Agreements in view of the "*disputes*" about a renegotiation of the License Agreements</u>

633. Respondents argue that Albpetrol has "*undisputedly fully and duly performed any kind of renegotiation duty it may have had*", by supporting and even signing the proposed draft Amending Agreements and the draft Settlement Agreement in the spring of 2015 and thereafter. The amendments which Claimant opposed after the drafts were rejected by the Ministry of Finance would mostly have affected the Petroleum Agreements, and not the License Agreements.[568]

634. Respondents contend that Article 3.1(c) of the License Agreements is not the only "*negotiation rule*" in the contractual relationship of the parties and that Article 18.3 of the Petroleum Agreements "*states even more specifically*" than the License Agreements:

> "*if, as a result of any change in the laws, rules and regulations of Albania, any right or benefit granted […] to Contractor under this Agreement or the License Agreement is infringed in some way, […] the Parties will immediately amend this Agreement and License Agreement, and Albpetrol, AKBN and the Ministry will immediately undertake other necessary actions to eliminate the negative economic effect on the Contractor*".[569]

635. First, for the same reasons as the ones stated above concerning the mechanism of the Instrument of Transfer for the Gorisht and Cakran oilfields (see above at para. 628), Respondents argue that Claimant's position *vis-à-vis* Albpetrol under the License Agreements is of a purely derivative nature and does not allow for damage claims.[570] If Claimant is of the opinion that Albpetrol breached any negotiation duty in their specific contractual relationship, Claimant may have to invoke its rights under Article 18.3 of the Petroleum Agreements, but cannot rely on the License Agreements.[571]

636. Second, Respondents argue that Claimant has not invoked Article 3.1 of the License Agreements to amend the License Agreements. Nothing in the wording of Article 3.1

[567] Rejoinder Brief, paras. 91-92, pp. 30-31.
[568] Statement of Defence, para. 23, p. 12.
[569] Rejoinder Brief, para. 94, p. 31, referring to **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 18.3.
[570] Rejoinder Brief, paras. 95-97, pp. 31-32.
[571] Rejoinder Brief, para. 97, p. 32.

of the License Agreements suggests that these contractual provisions are "Fiscal Stabilisation Covenants" and Claimant has failed to show which monetary benefits of a Licensee Articles 3.1(c) aim to stabilise.[572] Respondents also argue that Claimant has failed to show the amendment of which provisions of the License Agreements it has requested, and thus cannot base its request for arbitration on the dispute resolution mechanisms contained in the License Agreements.[573]

637. Third, Respondents contend that Claimant admits that "*the relevant renegotiation duty argued is that under the Petroleum Agreements*", for which Article 19.1 of the Petroleum Agreements contain a dispute resolution mechanism. Indeed, the exhibits submitted by Claimant support the argument that Claimant requested a change of the Petroleum Agreement to remedy the effect of the Royalty Tax, an option that is only foreseen in Article 18.3 of the Petroleum Agreements but not in Article 3.1(c) of the License Agreements.[574] The elements put forward by Respondents are the following:

638. Respondents contend that according to minutes of the 21 November 2011 meeting of the Advisory Committee established between Albpetrol and Claimant, the two parties agreed to establish a working group "*to discuss options of Royalty Tax neutralization*" and to submit a recommendation to AKBN and the Ministry, including amendments to the Petroleum Agreements and License Agreements.[575] Respondent conclude from this document that from the outset, the parties' first thought was to amend the Petroleum Agreements.[576]

639. Respondents further submit that, thereafter, Claimant only requested to amend the Petroleum Agreements, such as by letter of 4 January 2012 in which Claimant complained about Albpetrol's alleged lack of "*rational justifying its position vis-à-vis the Petroleum Agreements*".[577]

640. Respondents also submit that by letter of 9 April 2012, Claimant suggested to neutralise the impact of the Royalty Tax "*using the variable parameters of the Petroleum*

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[572] Rejoinder Brief, para. 98, p. 32.
[573] Rejoinder Brief, para. 99, p. 32.
[574] Rejoinder Brief, para. 100, pp. 32-33.
[575] Rejoinder Brief, para. 101, p. 33, referring to **C-22** – Resolutions of the Eighth Advisory Committee Meeting dated 18 November 2011, updated 5 January 2012.
[576] Rejoinder Brief, para. 101, p. 33.
[577] Rejoinder Brief, para. 102, p. 33, referring to **C-23** – Letter No. 5/11 from Stream to Albpetrol dated 5 January 2012, (6): "*In past, Stream submitted alternatives and recommendations to Albpetrol and AKBN for the neutralization of the Mineral Tax; Stream subsequently met with Albpetrol on a number of occasions only to be told that our alternatives/recommendations are not acceptable and that Albpetrol is not willing to fully neutralize this Mineral Tax. At no time, has Albpetrol provided rational justifying its position vis-à-vis the Petroleum Agreements; Albpetrol also has not provided any other alternatives to neutralize the Mineral Tax; as such, it is pointless to meet without first receiving from Albpetrol a counter proposal that fully neutralizes the impact of the Mineral Tax. Accordingly, Stream requests that Albpetrol provide its fully neutralizing counter proposal to Stream, such that both parties can review its merits in mid-January*".

Agreement"[578] and listed specific proposals, none of which referring to the License Agreements:

> "*To 'Consider Royalty Tax 100% as cost recoverable' [under the Petroleum Agreements] […]*
>
> *'Revise the decline rate [of Art. 3.5.1.1 of the Petroleum Agreements] in all fields to 15% […]'*
>
> *'The Petroleum Agreement should be amended to allow Stream to use according to its needs the associated, natural or any other form of gas from the […] oil fields'*
>
> *'Eliminate Article 10.2 of Petroleum Agreement related to annual training costs […]*"

641. Respondents further contend that by letter of 5 July 2012, Claimant "*again made clear that the negotiations were about the Petroleum Agreements*" and referred to the Petroleum Agreements but not to the License Agreements:

> "'*1. […] the process of preparing the amendments of Petroleum Agreements for neutralizing the effect of tax rent. […]*'
>
> *'[…] the right to amend the Petroleum Agreements for neutralizing the effect of tax rent […]'*
>
> *[and the renegotiation clause of] '18.3 of Petroleum Agreements'*".[579]

642. Respondents argue that in the Advisory Committee Meeting of 24 July 2013,[580] Claimant alleges that it discussed the so called "*Amending Agreements*" with Albpetrol and that no other inference can be drawn that these "*Amending Agreements*" aimed at the implementation of changes to the Petroleum Agreements, as suggested by Claimant in its above-mentioned letter of 9 April.[581]

643. Respondents argue that the cover letter dated 24 or 25 July 2013 sent by Claimant to Albpetrol confirms this by stating that "*Albpetrol shall pursue the procedure of approval of the Amending Agreements to the Petroleum Agreements for Royalty*

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[578] Rejoinder Brief, para. 103, p. 33, referring to **C-21** – Letter No. 204/12 from Stream to Albpetrol dated 9 April 2012, p. 2: "*In keeping with the rights and obligations of the Petroleum Agreements and considering the above identified fundamentals, Stream must be economically neutralized to the impact of this new 10% tax / royalty (representing a 18% NPV loss) using the variable parameters of the Petroleum Agreement*".

[579] Rejoinder Brief, para. 104, p. 34, referring to **C-24** – Letter No. 390/12 from Stream to Albpetrol dated 5 July 2012.

[580] **C-49** – Meeting of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013, (3).

[581] Rejoinder Brief, para. 105, p. 34, referring to **C-49** – Meeting of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013.

neutralization", without making a reference to any amendments of the License Agreements.[582]

644. Respondents point out that the "First Amending Agreements between Albpetrol Sh.A and TransAtlantic Albania Ltd. in relation to the Petroleum Agreement" (draft dated 26 May 2015) signed by Claimant and Albpetrol provides for several changes to the Petroleum Agreements but makes no reference to the License Agreements.[583]

645. Respondents further argue that by letter of 26 May 2015, the Ministry referred to the "*draft of the First Amending Agreements to the Petroleum Agreements* [that proposed] *to change the provisions of the Articles 1, 9, 10, 12, 13 and 14 and the Articles 2 and 4 of the Annex B, and the addition of 2 new articles to the Petroleum Agreements*" and commented exclusively on provisions of the Petroleum Agreements.[584]

646. Another one of Respondents' argument is that the draft "Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A, Translatic and Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship" dated July 2005 refers expressly to Article 18.3 of the Petroleum Agreements in Recital e), without referring to the License Agreements:

> "*Whereas, based and pursuant to Article 18.3 of the Petroleum Agreements, on May 26, 2015, by and between Albpetrol and Translatic Albania Ltd., the First Amending Agreements of the Petroleum Agreements were signed in order to eliminate the negative economic impact caused to TransAtlantic Albania Ltd., as the Contractor, as a result of changes to the fiscal legal framework.*"[585]

647. Finally, Respondents contend that Claimant "*admits*" that the Ministry and Albpetrol had supported Claimant's proposal to amend the Petroleum Agreements, but that the proposal was not acceptable, without referring to the License Agreements.[586]

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[582] Rejoinder Brief, para. 106, p. 34, referring to **C-50** – Resolutions of the Tenth Advisory Committee Meeting dated 24 July 2013, unsigned by Albpetrol.
[583] Rejoinder Brief, para. 107, p. 35.
[584] Rejoinder Brief, para. 108, p. 35, referring to **C-52** – Letter No. 4170 from the Ministry of Energy and Industry to Albpetrol and TransAtlantic dated 26 May 2015.
[585] Rejoinder Brief, paras. 109-110, p. 35, referring to **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh. A., TransAtlantlic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015.
[586] Rejoinder Brief, para. 111, pp. 35-36, referring to Statement of Claim, paras. 142 *et seq.*, pp. 25 *et seq.* (para. 142, p. 25, states "*The Amending Agreements were supported by the MEI. However, the Amending Agreements have never been submitted to or approved by the Council of Ministers and accordingly have never been implemented*").

c) <u>There is no jurisdiction against Albpetrol under the Ballsh-License Agreement in view of the "disputes" with regard to the handover of the Ballsh Oilfield</u>

648. Respondents contend that Albpetrol does not have a duty to handover the Ballsh oilfield under the License Agreements, which Claimant in fact never specifically argued, and that Albpetrol does not even have a duty to handover this oilfield under the Petroleum Agreements.[587]

649. First, for the same reasons as the ones stated above concerning the mechanism of the Instrument of Transfer for the Gorisht and Cakran Oilfields (see above at para. 628), Respondents argue that Claimant's position *vis-à-vis* Albpetrol under the License Agreements is of a purely derivative nature and does not allow for damage claims.[588]

650. Second, in response to Claimant's argument that it exercised a right to expand the Ballsh Project Area to include the remaining parts of the Contracts pursuant to Articles 6 and 8 of the License Agreement and that Albpetrol refused to hand over the wells in accordance with the implementing provisions of the Petroleum Agreement, and to hand over the facilities within a reasonable time,[589] Respondents argue that Articles 6 and 8 of the Ballsh-License Agreement "*are not suitable causes of action and 'simply quoting them' does not grant jurisdiction*".[590]

651. Respondents reiterate that Article 6.2 of the License Agreements does not grant any rights to Claimant against Albpetrol and that all of Claimant's rights against Albpetrol exclusively arise under the Petroleum Agreements.[591]

652. Respondents point out that Article 6.2 of the License Agreements authorizes Albpetrol and Claimant to "[…] *provide in the Petroleum Agreement for an area* […] *within the Contract Area where Operator* [like the Claimant] *will be solely responsible for conducting Petroleum Operations.* […]", and they claim that the right of the operator *vis-à-vis* Albpetrol, however, to operate in this area, "*would clearly be rooted in such a Petroleum Agreement*", and not in the License Agreement.[592]

653. Respondents then reiterate their arguments on Article 6.2 of the License Agreements above (see above at para. 632).

654. As for Article 8 of the Ballsh License Agreement, Respondents argue that it obliges the Licensee to carry out the Development and extract Petroleum only in the Contract Area and in accordance with a "Development Plan" to be developed but does not contain original rights of the Licensee.[593] Even if it did, the right so transferred via the Instrument of Transfer could only be directed against the Licensor, and not the Co-

[587] Statement of Defence, para. 25, p. 12.
[588] Rejoinder Brief, para. 116, p. 37.
[589] Reply, para. 38, p. 6, in response to Statement of Defense, para. 25, p. 12.
[590] Rejoinder Brief, para. 117, p. 37.
[591] Rejoinder Brief, paras. 117-122, pp. 37-38.
[592] Rejoinder Brief, paras. 119-120, pp. 37-38.
[593] Rejoinder Brief, para. 123, p. 38.

Licensee, who "*would also enjoy the same right, and not the corresponding obligation*".[594]

655. Respondents argue that, therefore, Albpetrol's alleged refusal to "*hand over the wells in accordance with the implementing provisions of the Petroleum Agreement*" amounts to a breach of the Ballsh-Petroleum Agreement but not of the Ballsh-License Agreement.[595]

2. <u>The Tribunal has no jurisdiction over the claims brought against AKBN</u>

656. Respondents argue that AKBN is neither a party to the License Agreements nor to the arbitration clauses contained in the License Agreements, a question that requires a restrictive interpretation of the purported arbitration agreement.[596]

657. Respondents point out that, (i) according to their cover page, the License Agreements have been concluded "*between the Ministry of Economy, Trade and Energy* ***as represented by*** *The National Agency of Natural Resources and 'Albpetrol' Sh.A., Fier*" (emphasis added), and (ii) the signature page of the License Agreements indicates that they were executed by the Ministry "*as represented*" by AKBN, clearly confirming a relationship of principal (the Ministry) and agent (AKBN).[597] Respondents also note in that respect that (iii) Recital K of the License Agreement expressly states that "*AKBN* […] *will act on behalf of the Ministry and on the Ministry's behalf will give necessary approvals and issue the necessary authorizations for enabling the performance of the Petroleum Operations in the Contract Area*" and (iv) Article 3.6 of the License Agreement reiterates AKBN's agency role by providing that "[o]*n the basis of the Decree of the Council of Ministers, No. 547, dated August 9th 2006, following the Effective Date, AKBN will act on behalf of the Ministry, provide approval or issue the necessary authorizations for enabling the performance of the Petroleum Operations in the Contract Area*".[598]

658. Respondents thus argue that AKBN did not become a party to the License Agreements but acted as a representative of the Ministry in these transactions, expressly avoided to make a declaration of will for AKBN in a way that it would be obliged under the License Agreements[599] and did not express the intention to become a party to any of the agreements.[600]

659. According to Respondents, the fact that the arbitration clauses in Articles 25.2 or 25.3 of the License Agreements in part refer to AKBN is "*the consequence of lack of* actual

[594] Rejoinder Brief, para. 123, p. 38.
[595] Rejoinder Brief, para. 124, pp. 38-39.
[596] Rejoinder Brief, para. 143, p. 42, referring to **RL-5** – Swiss Federal Supreme Court, Judgment of 4 October 2017, 4A_150/2017, para. 3.2.
[597] Statement of Defence, paras. 28-29, p. 13.
[598] Rejoinder Brief, paras. 133-135, pp. 40-41.
[599] Statement of Defence, para. 30, p. 13.
[600] Respondents' Post-Hearing Brief, para. 99, p. 31.

consensus *as it happens if contracts are not negotiated, but 'awarded' in a setting that raises numerous red flags and doubts about the legality of the transactions*".[601]

660. Respondents argue that, in this context, arbitration clauses are not to be interpreted broadly, but very narrowly, because of the assumption that the parties' will, if not irrelevant due to illegality, is distorted and "*not as free and comprehensive as one would assume for a normal commercial transaction*".[602] Respondents further argue that (i) a broad interpretation is not admissible against a clear wording of the documents and the clear articulation of the signatory's will to act "*in representation*" of the Ministry and not "*in representation of AKBN*" and (ii) AKBN has not accepted the arbitration clause "*against itself*" when accepting the License Agreements only "*for the Ministry*".[603]

661. In response to Claimant's argument that, pursuant to the License Agreements, AKBN has a number of rights and obligations separate from the MIE (see above at para. 564),[604] Respondents argue that this does not mean that AKBN has become a party to the License Agreements since AKBN's obligations have their basis in public law and in the administrative rules governing the Agency's duties, and not in the License Agreements.[605] The listing of public tasks of AKBN cannot substitute the required will to be bound by an agreement.[606]

3. <u>The Tribunal has no jurisdiction over the claims brought against the MIE</u>

662. Respondents argue that pursuant to the clear and unambiguous wording of the arbitration clause contained in Article 25.3 of the License Agreements, disputes with the MIE, or Ministry, are not covered because neither the MIE nor AKBN are "*Foreign Partners":*

> "***25.3 Arbitration between AKBN, Albpetrol and Foreign Partner(s).***
>
> *(a) All disputes arising in connection with this License Agreement between AKBN, Albpetrol and foreign partner(s) shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ('ICC')* […]"[607]

663. According to Respondents, the drafters of the arbitration agreement "erred *about the fact who would become a contract partner*" and AKBN, when signing the License Agreements in representation of the Ministry, "*might have overlooked that it would <u>not</u> become a party to the License Agreements".*[608] This error is "*manifest*" because the arbitration clauses included in Articles 25.2 and 25.3 of the License Agreements contain

[601] Statement of Defence, para. 31, p. 13; Rejoinder Brief, para. 138, p. 41.
[602] Statement of Defence, para. 31, p. 13.
[603] Statement of Defence, para. 32, p. 14; Rejoinder Brief, para. 140, p. 41.
[604] Reply, paras. 40 *et seq.*, pp. 6 *et seq.*
[605] Rejoinder Brief, para. 141, pp. 41-42.
[606] Rejoinder Brief, para. 141, pp. 41-42.
[607] Statement of Defence, paras. 33-34, p. 14; Rejoinder Brief, paras. 147-148, pp. 42-43.
[608] Rejoinder Brief, para. 149, p. 43.

eight references to AKBN and none to the MIE whereas the License Agreements clearly provide that it is the MIE, not AKBN, that acts as Licensor and is a party to the License Agreements.[609]

664. Respondents argue that the Tribunal's suggestion made at the Hearing that AKBN might have been "*representing the Ministry*"[610] to be party to the arbitration agreement is "*neither backed by the LAs nor by the requirements of agency under Swiss law", i.e.* (i) a declaration of will with the contractual content pleaded, (ii) disclosure of agency, and (iii) power of representation. AKBN did not make a declaration of will to bind the MIE in the arbitration clauses of Article 25.3, as this provision makes absolutely no reference to the MIE.[611]

665. Respondents also consider that the fact that AKBN is named as a party to the arbitration agreement may be a mistake,[612] and that "*not the least due to the various red flags that remained unexplained by the Claimant, no specific intention of the Parties going beyond the contract wording could be established by the Claimant, and no* effet utile- *or teleological considerations allow to assume jurisdiction over any of the claims brought against the MIE, as also further set out* supra *in this submission*".[613]

666. In response to Claimant's argument that AKBN's rights and obligations separate from those of the MEI were quoted in the License Agreements,[614] Respondents argue that such references were meant to "*bring the organizational execution of the License Agreements in line with the governmental tasks and duties of AKBN. It would have been highly unusual and odd, however, to restate the public/governmental tasks and duties of AKBN as contractual arrangements* […]".[615]

667. Respondents contest Claimant's argument[616] that because the MIE is a party to the License Agreements, represented by AKBN, most references to AKBN are references to the MIE: "*AKBN as Albania's governmental agency for natural resources has public tasks and duties to perform in the course of petroleum operations, and the references in the License Agreements point exactly at such public tasks and duties. In addition, in view of the very distinct dispute resolution regimes in connection with the License- and Petroleum Agreements, and in view of the distinctive use of 'AKBN' and the 'Ministry' in the process of contract conclusion, Claimant cannot simply say that* 'the agent is the principal, or the principal is the agent, as it deems fit'".[617]

[609] Rejoinder Brief, para. 150, p. 43.
[610] Respondents' Post-Hearing Brief, para. 98, p. 31.
[611] Respondents' Post-Hearing Brief, para. 98, p. 31.
[612] Rejoinder Brief, para. 152, p. 44.
[613] Respondents' Post-Hearing Brief, para. 97, pp. 30-31.
[614] Reply, paras. 42 *et seq.*, pp. 6 *et seq.*; see above para. 564.
[615] Rejoinder Brief, para. 149, p. 43.
[616] Reply, para. 48, p. 7.
[617] Rejoinder Brief, para. 155, p. 45.

668. Respondents also consider that the fact that clause 25.3(d) contains immunity waivers of both AKBN and the Ministry "*does not make an arbitration clause*". Respondents' reasoning is that clauses 25.3(d) are as flawed as the arbitration clauses in Article 25.3(a) as they "*seem to assume*" that AKBN becomes a party to the License Agreements and that the Ministry becomes a party to the arbitration agreements.[618]

669. In conclusion, Respondents argue that the "*necessary* 'restrictive interpretation'" of the arbitration clauses is that the MIE has not been effectively subjected to the arbitration agreement (if they were effective)[619] and that the form requirement of Article 178(1) SPILA prohibits to assume jurisdiction over claims against the Ministry.[620]

670. Respondents' position is thus that in the present case, the Tribunal has no jurisdiction and only the Albanian courts are competent to hear disputes under the License Agreements against the Ministry.[621]

4. <u>A teleological interpretation of the causes of action raised by Claimant does not yield to the result that there is indeed a cause of action under the License Agreements</u>

671. First, according to Respondents, when assessing the question of whether a contractual stipulation is effective or not, one must account for the fact that two contracts exist for each project/oilfield, a License Agreement and a Petroleum Agreement. This means that, according to a teleological interpretation, the Parties did not intend to create rights twice for a specific project/oilfield. Respondents contend that because Claimant does not have a valid cause of action under the License Agreements for its three categories of claims, which may be rooted in the Petroleum Agreements, the Tribunal cannot take an isolated view on the License Agreements when engaging in a teleological interpretation, but also has to consider whether the "*contractual purpose*" (*favor negotii*) can be achieved with the Petroleum Agreements as well.[622]

672. Respondents argue that the Parties "*seem to have blindly copied provisions from one type of contract to the other, and it goes without saying that the Claimant cannot request 'fiscal stabilization twice, although the PAs and the LAs contain the same type of renegotiation clause*". The Tribunal thus needs to take both types of contract into account, together with the Parties' previous conduct and the purpose of the differing types of Agreements, in order to reach the conclusion that the purpose of the Petroleum Agreements is to deal with the financial aspects of the relationship, and that only the Petroleum Agreements – and not the License Agreements – are suitable for "*fiscal*

[618] Rejoinder Brief, para. 157, pp. 45-46.
[619] Rejoinder Brief, para. 151, p. 44 referring to **RL-5** – Swiss Federal Supreme Court, Judgment of 4 October 2017, 4A_150/2017, para. 3.2.
[620] Respondents' Post-Hearing Brief, para. 97, pp. 30-31.
[621] Statement of Defence, para. 36, p. 14.
[622] Respondents' Post-Hearing Brief, para. 55, p. 19.

stabilization", "*profit making from Petroleum Operations*" and "*hand-over of Ballsh*".[623]

673. Second, Respondents also assert that *favor negotii* does not support the claims raised by Claimant. In particular, as regards the stabilization clause, it contravenes Article 5(3)(d) of the Petroleum Law[624] and Article 3.1(b) of the License Agreements as Albpetrol was not a Foreign Investor when the License Agreements were agreed, and that the License Agreements are not "Petroleum Agreements". Conflicts with mandatory provisions of Albanian Law cannot be repaired by "*favor negotii*".[625]

674. Respondents argue that the obligation to "*amend this License Agreement*" contained in Article 3.1 of the License Agreements is a negotiation obligation with no specific stipulated result and that the obligation to "*undertake other necessary actions to eliminate the negative effect*" on Licensee is broad and unspecific. Most importantly, the provision does not contain a contractual guarantee, let alone a straightforward, unconditioned payment claim, and the other relevant wording is "*only comparable to a best efforts-endeavor*", *i.e.* an obligation to conduct negotiations in good faith. Respondents thus claim that interpreting a guaranty or a payment claim into the negotiation clause would not be in *favor negotii* but, to the contrary, "*openly thwart the much ore faceted intentions of the Parties*".[626]

675. Respondents also contend that the conduct of the Parties has to be accounted for to explore the true intent of the Parties before a teleological interpretation can take place. Over the years the Parties never discussed a guaranty or payment claim, and did not even renegotiate the License Agreements at all. Renegotiation took place under the Petroleum Agreements, as "*only the PAs contain the financial terms for the Claimant that can be 'destabilized'. The 'granting of rights' under the LAs, which is free of remuneration under the LAs, was not 'destabilized' by the Royalty Tax*".[627]

676. Third, Respondents argue that, in the alternative, "*stabilization*" would require accounting for Claimant's debts towards the MIE, *i.e.* taking into account this post-contractual conduct. According to Respondents, "[t]*his is not a set-off, or a counter-claim, but the requirement to consider certain legal pre-requisites for the assessment whether there is – in balance – a 'destabilisation'*".[628]

[623] Respondents' Post-Hearing Brief, para. 56, pp. 19-20.
[624] **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5(3)(d), p. 4.
[625] Respondents' Post-Hearing Brief, para. 57, p. 20.
[626] Respondents' Post-Hearing Brief, para. 59, p. 20.
[627] Respondents' Post-Hearing Brief, para. 60, pp. 20-21.
[628] Respondents' Post-Hearing Brief, para. 61, p. 21.

B. Claimant's position

1. Jurisdiction over Claimant's claims

677. Claimant argues that to the extent that the Tribunal needs to assess as a preliminary matter issues that fall within the scope of the Petroleum Agreements, in order to render a decision based on the License Agreements, the Tribunal has jurisdiction over these preliminary issues under Swiss law.[629] This is the case even though a preliminary issue falls within the scope of another specific arbitration agreement.[630]

678. Claimant contends that contrary to Respondents' allegation,[631] the Petroleum Agreements do not prevail over the License Agreements and, in any event, the Petroleum Agreements and the arbitration clauses contained therein have no bearing on the jurisdiction of this Tribunal based on the License Agreements.[632] The License Agreements are the title document to conduct petroleum operations pursuant to a license of the MEI as provided for under the Petroleum Law, as amended,[633] and the License Agreements envisage more than one party as Licensee[634] and authorize Albpetrol to assign its rights by an instrument of transfer.[635] Claimant adds that: "[t]*he License Agreements stipulate that the Licensee is authorized* 'in compliance with the Petroleum Law, the Albpetrol Agreement, and this License Agreement […] to conduct Petroleum Operations for the Project in the Contract Area only on the basis of a Petroleum Agreement, which:'[636] 'shall be in full accordance with this License Agreement'.[637] *The License Agreements stipulate the right to provide in the Petroleum Agreements for a Project Area within the Contract Area where Operator is solely responsible for Petroleum Operations.*[638] *The License Agreements provide for the right to take the Available Petroleum subject to the Petroleum Agreements.*[639] *The License Agreements stipulate the right to the profit, i.e. Available Petroleum minus the Albpetrol Share, minus Cost Recovery Petroleum.*[640]"

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[629] Claimant's Post-Hearing Brief, para. 101, p. 21, referring to **CL-47** – Decision of Swiss Supreme Court, 7 February 2011, 4A_482/2010, para. 4.3.1; **CL-15** – Decision of Swiss Federal Supreme Court, 9 November 2010, 4A_428/2010, para. 2.1.
[630] Claimant's Post-Hearing Brief, para. 101, p. 21, referring to **CL-47** – Decision of Swiss Supreme Court, 7 February 2011, 4A_482/2010, paras. 4.2, 4.3.1.
[631] Rejoinder Brief, paras. 32-35, pp. 14-15.
[632] Claimant's Post-Hearing Brief, para. 102, pp. 21-22.
[633] Claimant's Post-Hearing Brief, para. 102, pp. 21-22, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5, pp. 4-5; **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 5.
[634] Claimant's Post-Hearing Brief, para. 102, pp. 21-22, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 3.3(c), p. 16.
[635] Claimant's Post-Hearing Brief, para. 102, pp. 21-22, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 22.2(c), p. 59.
[636] "*License Agreements, Article 6.1* ***[Exhibits C-2 to C-4]***".
[637] "*License Agreements, Article 6.1(a)* ***[Exhibits C-2 to C-4]***".
[638] "*License Agreements, Article 6.2* ***[Exhibits C-2 to C-4]***".
[639] "*License Agreements, Article 10.1* ***[Exhibits C-2 to C-4]***".
[640] "*License Agreements, Article 10.3(a)* ***[Exhibits C-2 to C-4]***".

679. Claimant' position is that the Petroleum Law governs any conflict between the License Agreement and the Petroleum Agreement and that the Petroleum Agreement may not be in conflict with or run contrary to "*the relevant license terms*", *i.e.* the License Agreement.[641]

680. As indicated above (see para. 548), Claimant contests Respondents' argument that Article 6.4 of the License Agreements deals with conflicts between the License Agreement and the Petroleum Agreement, and argues that, in any event, there is no conflict between the License Agreements and the Petroleum Agreements as to jurisdiction, as Claimant's claims are based on and arise under the License Agreements.[642]

2. Jurisdiction over claims for damages for seizure of the three Oilfields

681. According to Claimant, the illegal seizure of the Cakran and Gorisht Oilfields and the "*sale*" of Claimant's rights to the Ballsh Field breach Claimant's exclusive rights under Article 3.2 of the License Agreements, including the right to conduct Petroleum Operations in the Contract Area and the right to take profit from extracted petroleum.[643] Assessing the scope of Claimant's Project Area, *i.e.* the balance of the Contract Area minus the Albpetrol Operations Zone,[644] "*is but a preliminary issue to quantify* […] *Claimant's loss caused by this breach under the License Agreements*", and the Tribunal has jurisdiction over preliminary issues even if such issues fall within the scope of another specific arbitration clause.[645] It follows that it is irrelevant whether or not such preliminary issues fall within the scope of the arbitration clause in the Petroleum Agreement.

682. Claimant argues that its loss caused by this breach is based on its financial entitlements under the License Agreements, in particular (i) Claimant's right to recover all Petroleum Costs out of Available Petroleum after deducting the ASP, *i.e.* Claimant's entitlement to Cost Recovery Petroleum and (ii) Claimant's entitlement to Profit Petroleum, *i.e.* Available Petroleum in excess of Petroleum Costs minus ASP. According to Claimant, the allocation of Available Petroleum between Albpetrol (*i.e.* ASP) and Claimant is but a preliminary issue over which the Tribunal has jurisdiction.[646]

683. Claimant asserts that, whether all of Respondents are liable to Claimant's claim is a substantive decision and not a matter of jurisdiction. In any event, all three Respondents are liable under the License Agreements to Claimant's claims, so that the Tribunal has

[641] Claimant's Post-Hearing Brief, para. 103, p. 22, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 12(3)(c); **RL-1** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 12.2(c).
[642] Claimant's Post-Hearing Brief, paras. 104-105, p. 22.
[643] Claimant's Post-Hearing Brief, para. 107, pp. 22-23.
[644] **C-2**, **C-3** and **C-4** – License Agreements, Article 6.2, p. 22; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.5, Annex F.
[645] Claimant's Post-Hearing Brief, para. 107, pp. 22-23, referring to **CL-47** – Decision of Swiss Supreme Court, 7 February 2011, 4A_482/2010, paras. 4.2, 4.3.1.
[646] Claimant's Post-Hearing Brief, para. 108, p. 23

jurisdiction over Claimant's damages claims relating to the illegal seizure of the three oilfields.[647]

3. Jurisdiction over claims for damages for failure to hand over the Ballsh Oilfield

684. Claimant argues that before the Ballsh Oilfield was auctioned to a third party, in this arbitration, Claimant initially sought an order to hand over the balance of the Ballsh Oilfield and damages for the late handover, or in the alternative damages in lieu of the handover.[648] Claimant's claims arise from (i) the breach of Claimant's exclusive rights under Article 3.2 of the Ballsh License Agreement, including the right to conduct Petroleum Operations in the Contract Area and to take profit from extracted petroleum, (ii) Claimant's right under Article 3.4 of the Ballsh License Agreement to exclusively use the facilities and equipment in the Contract Area for the performance of the Petroleum Agreements, and all other assets, equipment, means and infrastructure including pipelines and (iii) Claimant's right to take over any existing wells, assets and leases in the Contract Area by submitting a Development Plant for some or all of that Contract Area.[649] Claimant contends that the MEI's and AKBN's obligation to ensure and assist that all approvals for the performance of the Petroleum Operations is stipulated in Article 3.5(c) of the Ballsh License Agreement.[650]

685. Claimant contends that the assessment of the scope of Claimant's Project Area within the Contract Area is a preliminary issue over which the Tribunal has jurisdiction, and that the same applies to the issue of whether the takeover procedure has been complied with.[651]

686. According to Claimant, its loss caused by this breach is also based on its financial entitlements under the License Agreements, and the allocation of Available Petroleum between Albpetrol and Claimant is but a preliminary issue over which the Tribunal has jurisdiction.[652]

4. Jurisdiction over claims for breach of the Fiscal Stabilization Covenant

687. Claimant argues that its damages claim for breach of the fiscal stabilization covenant is based on Article 3.1(c) of the License Agreements and that the Tribunal has jurisdiction over this claim.[653]

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[647] Claimant's Post-Hearing Brief, paras. 109-110, p. 23
[648] Claimant's Post-Hearing Brief, para. 111, p. 23
[649] Claimant's Post-Hearing Brief, para. 111, p. 23, referring to **C-4** – License Agreement for the Development and Production of Petroleum in the Ballsh-Hekal Oilfield, dated 4 July, 2007 between The Ministry of Economy, Trade and Energy as represented by The National Agency of Natural Resources and Albpetrol Sh. A. (Certified English translation), Articles 7.4(a), 8.1(a), pp. 27-29.
[650] Claimant's Post-Hearing Brief, para. 111, p. 23.
[651] Claimant's Post-Hearing Brief, para. 112, p. 23, referring to **C-7** – Petroleum Agreement for the Development and Production of Petroleum in Ballsh-Hekal Field, dated 8 August 2007 between Albpetrol Sh.A. and Stream Oil & Gas Limited, Article 3.5, pp. 12-13, Annex F.
[652] Claimant's Post-Hearing Brief, para. 113, p. 24.
[653] Claimant's Post-Hearing Brief, para. 114, p. 24.

C. Decision of the Tribunal on jurisdiction over the claims against Respondents

688. It is uncontested by the Parties that the Tribunal's jurisdiction lies in the License Agreements, and not the Petroleum Agreements, which contain an arbitration clause providing for UNCITRAL arbitration for disputes arising under the Petroleum Agreements.[654]

689. Respondents contend that a number of Claimant's claims are inadmissible because they do not fall within the scope of the License Agreements but of the Petroleum Agreements.[655] The Tribunal considers that it is more appropriate to address this argument in the analysis of each claim given that it has jurisdiction over all Parties.

690. However, the Tribunal will decide now on the Parties' disagreement as to whether the Tribunal has jurisdiction to examine questions and facts relating to the Petroleum Agreements in order to rule on alleged breaches of the License Agreements, due to the fact that, according to Respondents, the relationship between Albpetrol and Claimant is regulated by the Petroleum Agreements and not the License Agreements.[656]

691. The Tribunal reminds the Parties that it is common practice for an arbitral tribunal seated in Switzerland to preliminarily examine an issue that it does not have jurisdiction over, either because it is a non-arbitrable issue[657] or a because it falls under the jurisdiction of another arbitral tribunal.[658]

692. In the case at hand, the Tribunal finds that although it does not have jurisdiction to rule on claims arising out of the Petroleum Agreements, it might be necessary to analyse questions and facts relating to the Petroleum Agreements to decide issues under the License Agreements in light of the fact that the License Agreements – which constitute the basis of its jurisdiction – and the Petroleum Agreements are part of a single economic operation that involves the same Parties.

693. Moreover, as pointed out by Claimant, the License Agreements expressly underline the intertwinement of the two sets of agreements, notably by indicating that (i) the Petroleum Agreements will be entered into for the purpose of implementing the License

[654] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 19, pp. 28-30.
[655] See above paras. 613 *et seq.*
[656] Respondents' Post-Hearing Brief, para. 101, pp. 31-32.
[657] **CL-14** – Decision of Swiss Federal Supreme Court, 19 February 2007, BGE 133 III 139, para. 5, p. 142.
[658] **CL-15** – Decision of Swiss Federal Supreme Court, 9 November 2010, 4A_428/2010, para. 2.1, pp. 3-4; **CL-47** – Decision of Swiss Supreme Court, 7 February 2011, 4A_482/2010, para. 4.3.1.

Agreements[659] and that (ii) the License Agreements will enter in full force and effect upon approval of the Petroleum Agreements by the Council of Ministers of Albania.[660]

694. Therefore, the Tribunal considers that, when necessary, it can examine questions and facts relating to the Petroleum Agreement in order to rule on alleged breaches of the License Agreements.

6. DECISION OF THE TRIBUNAL ON CLAIMANT'S CLAIMS ON THE MERITS

695. As a preliminary consideration, given that the Tribunal found that the red flags alleged by Respondents are not indicators of illegality of the award of the License Agreements and Petroleum Agreements, it is not necessary for the Tribunal to analyse the legal consequences of illegality on the merits.

6.1. Claimant's allegation that Respondents failed to implement the required fiscal stabilization measures

A. Claimant's position

696. Claimant argues that Respondents did not comply with their legal and contractual obligations to neutralize the negative economic effects on Claimant of the Royalty Tax, promulgated on 28 July 2008, and of the ECC Tax Changes in 2013 and 2014, in breach of Article 3.1(c) of the License Agreements.

697. Indeed, Claimant contends that (i) the Royalty Tax paid between 2009 and 2017 equals USD 12,735,732,[661] (ii) the total Undue Tax Paid to the Government is USD 15,502,732[662] and (iii) by its own calculations, the Government has acknowledged payment by Claimant of Royalty Tax in the period from 2009 to 2014 totaling USD 11,503,008.97.[663]

698. According to Claimant, the Royalty Tax and the ECC Tax Changes were changes in Albanian law that imposed greater obligations or responsibilities on Claimant, or that otherwise negatively influenced the economic benefits that were to accrue to Claimant under the PSAs. Respondents were therefore legally obliged to immediately amend the

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[659] **C-2**, **C-3** and **C-4** – License Agreements, Recital E: "WHEREAS, *pursuant to Article 4 and Article 12 of the Law No. 7746, dt. 28.07.1993.* "On Petroleum (Exploration and Production)*", and for purposes of implementing this License Agreement, Albpetrol may enter into a Petroleum Agreement with a partner(s) in accordance with this License Agreement, which petroleum agreement is subject to approval from the Council of Ministers of Albania".*

[660] **C-2**, **C-3** and **C-4** – License Agreements, Recital G: "*Whereas this License Agreement will enter in full force and effect upon the approval by the Council of Ministers of Albania of a Petroleum Agreement which will entered by Albpetrol and its partner*".

[661] Statement of Claim, para. 263, p. 43, referring to Deloitte Lost Profits Report, Schedule 33.

[662] Statement of Claim, para. 264, p. 43.

[663] Statement of Claim, para. 264, p. 43, para. 150, p. 26, referring to **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016; **C-57** – Letter No. 165/16 from TransAtlantic to Ministry of Finance dated 20 May 2016.

License Agreements and the Petroleum Agreements or to undertake such other necessary actions to eliminate the negative economic effects of these tax changes on Claimant.[664]

699. Claimant points out that the Petroleum Law provides that "*a Petroleum Agreement to which a Foreign Investor is a party may contain provisions for the purpose of ensuring the stability of the fiscal regime*" agreed to with the Government[665] which aims at enabling the Government to provide foreign investors the contractual certainty required that the economic benefits bargained for will not be "*eroded or negated by subsequent Government policies or regimes*".[666]

1. Meaning of Article 3.1(c) of the License Agreements

700. Article 3.1 of the License Agreements reads as follows:

> "***3.1 Application of Law and Stability of Terms.***
>
> *(a) The provisions of this License Agreement shall have full legal effect in accordance with ARTICLE 27.*
>
> *(b) Subject to Section 3.1(c) below, to the extent that any provision of Albanian Law conflicts or is inconsistent with a provision of this License Agreement, the provision of the Albanian Law shall prevail.*
>
> *(c) Notwithstanding Section 3.1(b) above, if, as a result thereof, any right or benefit granted (or which is intended to be granted) to LICENSEE under this License Agreement is infringed in some way, a greater obligation or responsibility shall be imposed onto LICENSEE or, in whatever other way the economic benefits accruing to LICENSEE from this License Agreement are negatively influenced by Section 3.1(b), and such an event is not provided for herein, the Parties will immediately amend this License Agreement, or AKBN and the Ministry will immediately undertake other necessary actions to eliminate the negative economic effect on the LICENSEE*".[667]

701. According to Claimant, the "*Fiscal Stabilization Covenant*" contained in Article 3.1(c) of the License Agreements requires that, if any economic benefit accruing to Claimant is negatively influenced by a change in Albanian law, or if some greater obligation or responsibility is imposed on Claimant, the MEI, AKBN, Albpetrol and Claimant will *immediately* amend the License Agreement, or AKBN and the MEI will *immediately*

[664] Statement of Claim, para. 259, p. 42.
[665] Statement of Claim, para. 256, p. 41, referring to **CL-1** – *Petroleum Law (Exploration and Production)*, Law No. 7746 of 28.7.1993, Article 5(3)(d), p. 4.
[666] Statement of Claim, para. 256, p. 41.
[667] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.1, p. 15.

undertake such other necessary actions to negate the negative economic effect on Claimant.[668]

702. Claimant also invokes[669] the "*Fiscal Stabilization Covenant*" at Article 18.3 of the Petroleum Agreements[670] which requires that "[i]*f, as a result of any change in the laws, rules and regulations of Albania, any right or benefit granted (or which is intended to be granted) to Contractor under this Agreement or the License Agreement is infringed in some way, a greater obligation or responsibility shall be imposed onto Contractor or, in whatever other way the economic benefits accruing to Contractor from this Agreement or the License Agreement are negatively influenced by any change in the laws, rules and regulations of Albania, and such an event is not provided for herein, the Parties will immediately amend this Agreement and License Agreement, and Albpetrol, AKBN and the Ministry will immediately undertake other necessary actions to eliminate the negative economic effect on the Contractor*".

703. Claimant contends that, contrary to what Respondents argue, the "*Fiscal Stabilization Covenant*" is more than a "*renegotiation clause*", as it is an "*absolute obligation of the Respondents to* 'immediately amend' *the License Agreements to neutralize any negative economic effect on the Claimant and for AKBN and the MEI to immediately undertake any other necessary actions to neutralize same*".[671] Even admitting Respondents' suggestion that the Petroleum Agreements are intrinsically interlinked with the License Agreements,[672] Albpetrol is obliged under the Petroleum Agreements to immediately undertake any other necessary actions to neutralize any negative economic effect on Claimant.[673]

2. <u>Claimant's statement of facts regarding Respondents' "*failure*" to neutralize the effects of the Royalty Tax and ECC Tax Changes</u>

704. According to Claimant, Respondents failed to neutralize the negative effects of the Royalty Tax and the ECC Tax Changes despite Claimant's "*early and repeated requests*" and years of negotiations with and assurances from Respondents.[674]

705. In particular, Claimant argues that it began requesting changes to the PSAs to neutralize the effects of the Royalty Tax as early as September 2008.[675]

706. Claimant argues that, on 17 November 2011, Claimant and Albpetrol agreed to establish a working group to discuss options in respect of neutralizing the effects of the Royalty Tax with a view to submitting a proposal to AKBN and the MEI to amend the PSAs by

[668] Statement of Claim, para. 257, p. 42.
[669] Statement of Claim, para. 258, p. 42.
[670] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 18.3, p. 28.
[671] Reply, para. 154, p. 27.
[672] Statement of Defence, para. 481, p. 122.
[673] Reply, para. 154, p. 27.
[674] Statement of Claim, para. 260, p. 42.
[675] Statement of Claim, para. 118, p. 21 referring to **C-21** – Letter No. 204/12 from Stream to Albpetrol dated 9 April 2012.

January 2012 and obtain approval of the Council of Ministers by February 2012.[676] According to Claimant, these targets were not met.[677]

707. Claimant argues that, on 5 January 2012, it requested that Albpetrol provide it with alternatives to neutralize the Royalty Tax by mid-January 2012 because at previous meetings Claimant's proposals were rejected outright and Albpetrol was unwilling to neutralize fully the Royalty Tax.[678]

708. Claimant contends that, on 9 April 2012, it submitted a revised proposal and draft amendments to the Petroleum Agreements with regard to neutralizing the Royalty Tax, which went unanswered by Albpetrol and AKBN.[679] Subsequently, on 5 July 2012, Claimant told Albpetrol that four years had elapsed without progress on neutralizing the Royalty Tax and that a draft amendment needed to be prepared and submitted to AKBN and MEI for approval.[680]

709. According to Claimant, at the Advisory Committee Meeting No. 9 on 18 December 2012, the participants again committed to establish a working group of experts to address Royalty Tax neutralization within January 2013, to prepare and submit a jointly acceptable recommendation to the MEI and AKBN with corresponding amendments to the PSAs and to obtain approval of necessary amendments by the Council of Ministers by February 2013.[681] These targets were not met.[682]

710. Claimant contends that, given that the PEP&ASP Liability and obligations of Albpetrol, AKBN and the MEI pursuant to the Fiscal Stabilization Covenant continued to go unresolved, in 2013, Albpetrol and Claimant finally prepared draft amendments to the PSAs that would neutralize the Royalty Tax and reduce the PEP&ASP Liability, which were provided to AKBN and the MEI but were not approved.[683]

711. Claimant further argues that at the Advisory Committee Meeting No. 11 on 24 December 2013, Albpetrol resolved to discuss as soon as possible the procedure for

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[676] Statement of Claim, para. 119, p. 21, referring to **C-22** – Resolutions of the Eighth Advisory Committee Meeting dated 18 November 2011, updated 5 January 2012: "[…] *Within November 2011 Albpetrol and Stream shall establish a group of experts to discuss options of Royalty Tax neutralization, prepare a jointly acceptable recommendation and submit it to AKBN/METE and also provide corresponding amendments to the Petroleum Agreements and License Agreements for approval within January 2012 and seek to have final approval from Council of Ministers within February 2012* […]."

[677] Statement of Claim, para. 119, p. 21.

[678] Statement of Claim, para. 120, p. 21, referring to **C-23** – Letter No. 5/11 from Stream to Albpetrol dated 5 January 2012.

[679] Statement of Claim, para. 121, p. 21, referring to **C-21** – Letter No. 204/12 from Stream to Albpetrol dated 9 April 2012.

[680] Statement of Claim, para. 122, p. 21, referring to **C-24** – Letter No. 390/12 from Stream to Albpetrol dated 5 July 2012.

[681] Statement of Claim, para. 123, p. 21, referring to **C-25** – Resolutions of the Ninth Advisory Committee Meeting dated 20 December 2012, amended 4 January 2013, unsigned by Albpetrol.

[682] Statement of Claim, para. 123, p. 21.

[683] Statement of Claim, para. 134, p. 23, referring to **C-49** – Minutes of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013; **C-50** – Resolutions of the Tenth Advisory Committee Meeting dated 24 July 2013, unsigned by Albpetrol.

January 2012 and obtain approval of the Council of Ministers by February 2012.[676] According to Claimant, these targets were not met.[677]

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709. According to Claimant, at the Advisory Committee Meeting No. 9 on 18 December 2012, the participants again committed to establish a working group of experts to address Royalty Tax neutralization within January 2013, to prepare and submit a jointly acceptable recommendation to the MEI and AKBN with corresponding amendments to the PSAs and to obtain approval of necessary amendments by the Council of Ministers by February 2013.[681] These targets were not met.[682]

710. Claimant contends that, given that the PEP&ASP Liability and obligations of Albpetrol, AKBN and the MEI pursuant to the Fiscal Stabilization Covenant continued to go unresolved, in 2013, Albpetrol and Claimant finally prepared draft amendments to the PSAs that would neutralize the Royalty Tax and reduce the PEP&ASP Liability, which were provided to AKBN and the MEI but were not approved.[683]

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[677] Statement of Claim, para. 119, p. 21.

[678] Statement of Claim, para. 120, p. 21, referring to **C-23** – Letter No. 5/11 from Stream to Albpetrol dated 5 January 2012.

[679] Statement of Claim, para. 121, p. 21, referring to **C-21** – Letter No. 204/12 from Stream to Albpetrol dated 9 April 2012.

[680] Statement of Claim, para. 122, p. 21, referring to **C-24** – Letter No. 390/12 from Stream to Albpetrol dated 5 July 2012.

[681] Statement of Claim, para. 123, p. 21, referring to **C-25** – Resolutions of the Ninth Advisory Committee Meeting dated 20 December 2012, amended 4 January 2013, unsigned by Albpetrol.

[682] Statement of Claim, para. 123, p. 21.

[683] Statement of Claim, para. 134, p. 23, referring to **C-49** – Minutes of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013; **C-50** – Resolutions of the Tenth Advisory Committee Meeting dated 24 July 2013, unsigned by Albpetrol.

approval of amendments to the Petroleum Agreements to neutralize the effect of the Royalty Tax and to follow the amendments approval procedure with the MEI and the Council of Ministers, and Albpetrol and Claimant again resolved to establish a working group to implement this procedure.[684]

712. On 27 February 2015, Claimant, Albpetrol, AKBN and the MEI met to discuss the PEP&ASP Liability and negotiate possible actions to be taken in order to satisfy the Fiscal Stabilization Covenant.[685]

713. Claimant argues that, on 26 May 2015, at the proposal of the MEI, Albpetrol and Claimant signed an amendment in respect of each of the Petroleum Agreements, effective upon approval by the Council of Ministers, which were designed to eliminate the negative economic effects caused to Claimant by the Royalty Tax and ECC Tax Changes by altering the production sharing arrangement set out in the PSAs (hereinafter, the "**Amending Agreements**"). [686] In particular, the Amending Agreements contemplated a collateral agreement to deal with a setting off of the PEP&ASP Liability as against the Royalty Tax paid by Claimant,[687] pursuant to the following mechanisms: (i) an offset mechanism, which addressed the Royalty Taxes paid by the Licensee/Contractor up to the end of 2014 (the "**Offset Mechanism**") and (ii) a deferral of the Profit Tax, which addressed both the Royalty Taxes paid by the Licensee/Contractor from and after 1 January 2015, as well as the other tax changes made by the Government in 2013 and 2014 (the "**Tax Deferral Mechanism**").[688] In its Post-Hearing Brief, Claimant specifies that by way of the Amending Agreements, the parties agreed to neutralize "*future*" Royalty Tax payments and other tax changes.[689]

714. Claimant states that the Amending Agreements contemplate that the Offset Mechanism would be implemented through an agreement to be entered into among the Licensee / Contractor, Albpetrol, the Ministry of Economic Development, Tourism, Trade and Entrepreneurship (the "**Ministry of Economic Development**") and the Ministry of Finance (the "**Settlement Agreement**"), to be effective upon being approved by the Council of Ministers.[690]

715. Claimant indicates that, after discussions with the Ministry of Finance and Albpetrol, the MEI proposed to enter into the Settlement Agreement in order to set off the amounts paid by Claimant pursuant to the Royalty Tax against the cash converted value of the

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[684] Statement of Claim, para. 124, pp. 21-22, referring to **C-26** – Resolutions of the Eleventh Advisory Committee Meeting dated 24 November 2013, revised 20 December 2013; **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013.
[685] Statement of Claim, para. 139, p. 24, referring to **C-52** – Letter No. 4170 from the Ministry of Energy and Industry to Albpetrol and TransAtlantic dated 26 May 2015.
[686] Statement of Claim, para. 15, p. 2, para. 141, pp. 24-25, referring to **C-11**, **C-12** and **C-13** – First Amending Agreements between Albeptrol Sh.A. and TransAtlantic Albania Ltd. in relation to the Petroleum Agreements dated July 20, 2007 for the Development and Production of Petroleum in the Oilfields.
[687] Statement of Claim, para. 141, pp. 24-25.
[688] Statement of Claim, para. 16, pp. 2-3.
[689] Claimant's Post-Hearing Brief, para. 12, pp. 2-3.
[690] Statement of Claim, paras. 17-18, p. 3.

PEP&ASP Liability, and that such Settlement Agreements were drafted by a working group comprised of representatives of Claimant, the AKBN, Albpetrol, and the Ministry of Finance.[691] The Settlement Agreements evidences the value of the PEP&ASP Liability from the Effective Date of the PSAs to 31 December 2014 as being USD 17,593,978.40 and the value of the Royalty Tax paid by Claimant over that same period as being USD 10,169,253.51, leaving a net liability of USD 7,424,724.89 payable by Claimant pursuant to invoices to be issued by Albpetrol.[692]

716. On 31 July 2015, the Minister of Energy and Industry wrote to the Ministers of Finance and Economic Development, noting that the Settlement Agreement was proposed and drafted by the MEI in order to resolve the dispute regarding the Fiscal Stabilization Covenant and the PEP&ASP Liability.[693] According to Claimant, the Minister of Energy and Industry urged the Ministers of Finance and Economic Development to sign the Settlement Agreement and expected the Council of Ministers to approve the Settlement Agreement.[694]

717. Claimant argues that after the Settlement Agreement was executed by Claimant, Albpetrol and the Ministry of Economic Development in the summer of 2015, on 8 September 2015, the Minister of Energy, which supported the Amending Agreements,[695] again requested that the Minister of Finance execute the Settlement Agreement.[696] The Minister of Finance never signed the Settlement Agreement, so that it was never submitted to or approved by the Council of Ministers, and was never implemented.[697]

718. On 3 June 2016, the Ministry of Finance revised the amount of Royalty Tax paid by Claimant between its enactment and 31 December 2014 upward to US 11,503,008.97,[698] which would reduce the net amount payable under the Settlement Agreement to USD 6,090,969.43.[699]

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[691] Statement of Claim, para. 143, p. 25, referring to **C-52** – Letter No. 4170 from the Ministry of Energy and Industry to Albpetrol and TransAtlantlic dated 26 May 2015; **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015.

[692] Statement of Claim, para. 143, p. 25, referring to **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015, Annex 4.

[693] Statement of Claim, para. 144, p. 25, referring to **C-53** – Letter No. 5443 from Minister of Energy and Industry to Minister of Economic Development, Tourism, Trade and Entrepreneurship dated 31 July 2015.

[694] Statement of Claim, para. 144, p. 25.

[695] Statement of Claim, para. 142, p. 25.

[696] Statement of Claim, paras. 145-146, p. 25, referring to **C-54** – Letter No. 5443/5 from the Minister of Energy and Industry to the Minister of Finance dated 8 September 2015.

[697] Statement of Claim, para. 147, p. 25.

[698] Statement of Claim, para. 150, p. 26, referring to **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016; **C-57** Letter No. 165/16 from TransAtlantic to Ministry of Finance dated 20 May 2016.

[699] Statement of Claim, para. 150, p. 26.

719. Claimant argues that, in the fall of 2015, TAT decided to divest the Oilfields and that TransAtlantic advised the MEI and the Minister of Economy that without having received the fiscal relief requested from the Government, the Petroleum Operations could not remain viable. In order to optimize the outcome of the marketing and sale of the assets, TransAtlantic asked the Government to provide written confirmation that the Amending Agreements and Settlement Agreement would be approved.[700]

720. Claimant contends that the MEI replied that they were in the process of preparing the draft decree and agreements with the respective ministries, including for the cancellation through compensation of the mutual obligations, and that at the conclusion of that process they would send the decree to the Council of Ministers for approval.[701] In the meantime, the owners of TransAtlantic continued to seek confirmation from the Government of the status of the Amending and Settlement Agreements, as it was of interest to prospective purchasers.[702]

721. In or about late December 2015, representatives of GBC BVI met with the Minister of Energy and Industry, Damian Gjiknuri, at the office of the Minister. According to Claimant, the latter confirmed that the Government intended to honour its tax neutralization obligations as outlined in the Settlement Agreement despite it not yet receiving approval of the Council of Ministers, and that cooperation from the MEI would continue with GBC BVI as the new owners of TransAtlantic.[703]

722. Similarly, Claimant contends that in or about early January 2016, representatives of GBC BVI met with Dael Dervishi, the head of AKBN, who confirmed that Claimant's outstanding liability under the PSAs was the PEP&ASP Liability as calculated in the Settlement Agreement and that the Government would approve the Settlement Agreement.[704] On 4 February 2016, representatives of GBC BVI and TransAtlantic met with Dael Dervishi, who confirmed that the Government would honour its tax neutralization obligations pursuant to the Fiscal Stability Covenant.[705]

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[700] Statement of Claim, para. 153, p. 26.
[701] Statement of Claim, para. 154, pp. 26-27, referring to **C-59** – Letter No. 7297/1 from the MEI to TransAtlantic dated 11 November 2015.
[702] Statement of Claim, para. 154, pp. 26-27, referring to **C-60** – Letter No. 345/15 from TransAtlantic to the MEI et al. dated 2 December 2015; **C-61** – Emails from Doug Nester, TransAtlantic to Minister Ahmetaj dated 8 and 14 December 2015.
[703] Statement of Claim, para. 155, p. 27, referring to First Witness Statement of Kreshnik Grezda, para. 20, p. 5; First Witness Statement of Mark Crawford, para. 76, pp. 17-18.
[704] Statement of Claim, para. 156, p. 27, referring to First Witness Statement of Kreshnik Grezda, para. 21, p. 5; First Witness Statement of Mark Crawford, para. 77, p. 18.
[705] Statement of Claim, para. 157, p. 27, referring to First Witness Statement of Kreshnik Grezda, para. 22, pp. 5-6.

723. Claimant alleges that, after completing a diligence process, GBC BVI agreed to purchase Claimant and entered into a sales transaction on 29 February 2016 on the following terms:[706]

a. GBC BVI would acquire Claimant's parent company, SOG;

b. GBC BVI would make a future payment of USD 2.3 million to pay down Claimant's loan facility

c. GBC BVI would assume USD 29.2 millions of liabilities of SOG

d. Claimant would assign its gas assets in the Delvina gas field and all associated liabilities to a new subsidiary of TransAtlantic, which removed approximately USD 744,785 from the amounts calculated in the Settlement Agreement as owed by Claimant.[707]

724. Claimant argues that, in response to a letter sent by Claimant regarding a notice of material breach sent by Albpetrol (see details in section 6.2. below), on 26 February 2016, Albpetrol rejected the setoff mechanism established by the Settlement Agreement and demanded that Claimant comply with its cumulative PEP&ASP obligations since the effective date of the PSAs.[708]

725. On 8 March 2016, Albpetrol requested that Claimant agree to amend the Settlement Agreement on instructions it had received from the MEI.[709] According to Claimant, the instructions from the MEI to redraft the Settlement Agreement were based on comments received by the MEI from the Ministry of Finance about six months earlier, on 17 September 2015.[710]

726. Claimant argues that it was previously unaware of the Ministry of Finance's comments and sought clarification[711] and that, as it turned out, the comments of the Ministry of

[706] Statement of Claim, para. 158, p. 27, referring to **C-62** – News Release of TransAtlantic Petroleum Ltd. dated 3 March 2016: http://boereport.com/2016/03/04/transatlantic-petroleum-announces-completion-of-albania-divestiture-year-end-2015-reserves-and-entry-into-a-new-master-services-agreement/.
[707] **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015, Annexes 1.1, 1.2.
[708] Statement of Claim, para. 161, p. 28, referring to **C-64** – Letter No. 813/2 from Albpetrol to TransAtlantic dated 26 February 2016.
[709] Statement of Claim, para. 163, p. 28, referring to **C-65** – Letter No. 1572 from Albeptrol to TransAtlantic dated 8 March 2016.
[710] Statement of Claim, para. 163, p. 28, referring to **C-66** – Letter No. 4415/10 from the Minister of Energy to Albpetrol dated 4 March 2016.
[711] Statement of Claim, para. 164, p. 29, referring to **C-67** – Letter No. 107/16 from TransAtlantic to Albpetrol dated 12 April 2016.

Finance, which is not a party to the PSAs, amounted to a rejection of the proposed mechanism to neutralize the Royalty Tax without significant changes being adopted.[712]

727. On 5 May 2016, the MEI organized a meeting with Claimant and Albpetrol where the MEI detailed further amendments to the Amending Agreements and the Settlement Agreements (the "**May Meeting**"). According to Claimant, such amended terms would provide only a partial fulfillment of the Fiscal Stabilization Covenant and would materially increase Claimant's payment obligation in order to settle the PEP&ASP Liability. The MEI explained that the requested amendments were based on revising the Settlement Agreement so it implemented the Fiscal Stabilization Covenant with regard to the Royalty Tax in a similar manner as had been agreed with another foreign investor oil company, Bankers Petroleum Albania Ltd ("**BPAL**").[713]

728. Claimant states that, in the May Meeting, it explained that it was not prepared to agree to the requested amendments because they would not have provided the full neutralization that Claimant was entitled to, but that would continue discussions in good faith with Respondents in order to resolve the matter.[714]

729. On 28 July 2016, the MEI demanded that Claimant accept the Royalty Tax set off mechanism negotiated with BPAL.[715] On 31 August 2016, Albpetrol advised that it agreed with the MEI's proposal that the BPAL mechanism be adopted and relayed the position that the Ministry of Finance determined that it would not be a party to the neutralization agreement, and requested that negotiations between Claimant, Albpetrol and the MEI proceed.[716]

730. Claimant argues that, on 2 September 2016, it reminded Albpetrol and the AKBN of the discussions between GBC, Albpetrol and AKBN leading up to Continental's acquisition of the Oilfields from the prior owners and the commitments regarding the implementation of the terms of the Settlement Agreement.[717]

731. On 24 October 2016, Claimant informed the Ministry of Finance that in September 2015 comments on the Settlement Agreement had created the situation leading up to the Termination Notices and asked the Minister of Finance to establish a working group

[712] Statement of Claim, para. 165, p. 29, referring to **C-68** – Letter No. 11535/5 from the Minister of Finance to the MEI dated 17 September 2015.
[713] Statement of Claim, para. 167, p. 29, referring to **C-70** – Minutes of Meeting between TransAtlantic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016; First Witness Statement of Mark Crawford, para. 89, pp. 20-21.
[714] Statement of Claim, para. 168, p. 29; Claimant's Post-Hearing Brief, para. 14, p. 3, referring to First Witness Statement of Mark Crawford, paras. 89-90, pp. 20-21.
[715] Statement of Claim, para. 172, p. 30, referring to **C-70** – Minutes of Meeting between TransAtlantic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016.
[716] Statement of Claim, para. 173, p. 30, referring to **C-72** – Letter No. 5486/2 from Albpetrol to TransAtlantic dated 31 August 2016.
[717] Statement of Claim, para. 174, p. 30, referring to **C-73** – Letter No. 267/16 from TransAtlantic to Albpetrol and AKBN dated 2 September 2016.

with the MEI, AKBN, Albpetrol and Claimant in order to discuss the Ministry of Finance's September 2015 comments.[718]

732. Claimant also contends that, on 31 October 2016, it indicated that it was ready to meet to finalize the Settlement Agreement, and to immediately make payment of the USD 6.1 million arising from the terms of the Settlement Agreement.[719]

733. Claimant further argues that on 28 November 2016, Claimant's counsel issued a letter to resolve the situation regarding the PEP&ASP Liability, the obligations of Respondents pursuant to the Fiscal Stabilization Covenant, the Settlement Agreement and the Termination Notices. In particular, the letter noted that Claimant was owed a net amount of USD 228,854 if the Undue Tax Paid were set off against the PEP&ASP Liability.[720]

734. On 6 December 2016, the Minister of Finance suggested that the MEI establish a working group to examine the technical elements of the Settlement Agreement.[721] On 21 December 2016, the MEI acknowledged that it was still discussing the neutralization mechanism of the Settlement Agreement, but also demanded that Claimant immediately pay its PEP&ASP obligations and provide the Guarantee.[722]

735. Claimant argues that, throughout December 2016 and January 2017, Claimant and Albpetrol had discussions regarding the PEP&ASP and how to resolve some of them through cash payment agreements.[723] In the course of those discussions, and on 10 January 2017, Claimant indicated its willingness to enter into agreements for the issuance of invoices so it could pay outstanding obligations to Albpetrol and provide the Guarantee.[724]

736. Claimant argues that in December 2016/early January 2017, the Albanian tax authorities transferred to Albpetrol the amount of USD 2.42 millions of VAT reimbursements meant for Claimant.[725]

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[718] Statement of Claim, para. 178, p. 31, referring to **C-75** – Letter No. 314/16 from TransAtlantic to the Minister of Finance dated 24 October 2016.
[719] Statement of Claim, para. 179, p. 31, referring to **C-76** – Letter No. 327/16 from TransAtlantic to Albpetrol et al. dated 31 October 2016.
[720] Statement of Claim, para. 180, p. 31, referring to **C-77** – Letter from Williams & Mullen to the Prime Minister of Albania, the Minister of Energy and Industry and the Speaker of the Assembly of Albania dated 28 November 2016, exhibits excluded.
[721] Statement of Claim, para. 181, p. 31, referring to **C-78** – Letter No. 14554/1 Prot. from Ministry of Finance to MEI et al. dated 6 December 2016.
[722] Statement of Claim, para. 182, p. 31, referring to **C-79** – Letter No. 7530 from the Minister of Energy to TransAtlantic dated 21 December 2016.
[723] Statement of Claim, para. 183, p. 31, referring to First Witness Statement of Mark Crawford, para. 98, pp. 22-23.
[724] Statement of Claim, para. 184, p. 31, referring to **C-80** – Email from Fatbardh Ademi, TransAtlantic to Endri Puka, Albpetrol, dated 10 January 2017.
[725] Statement of Claim, para. 113, p. 20, referring to First Witness Statement of Mark Crawford, para. 42, p. 10.

737. Claimant also contends that, on 11 January 2017, Albpetrol (i) acknowledged receipt of Claimant's VAT reimbursements that were seized and transferred to Albpetrol by the Albanian tax authorities, which amounted to approximately USD 2.42 millions, (ii) acknowledged that it had received approximately 15,000 tons of crude oil from Claimant in respect of the Ballsh Field and (iii) sought payment in the amount of USD 5,248,413.89 for 2014 PEP&ASP obligations and USD 13,856,932 for the pre-2014 PEP&ASP obligations previously agreed to in the Settlement Agreement. Albpetrol did not acknowledge the amounts paid by Claimant in respect of the Royalty Tax, nor the value of the over deliveries from Ballsh, nor the fact that the liabilities in respect of the Delvina gas field had been transferred, and did not provide the requested information in respect of the Guarantee.[726]

738. Claimant replied on 12 January 2017 indicating that (i) the Delvina amounts, the amounts relating to *force majeure* in respect of the Cakran and Gorisht Oilfields and the Ballsh Oilfield oversupply should be subtracted from the amounts sought by Albpetrol, in accordance with the Settlement Agreement, (ii) no invoice had yet been issued by Albpetrol in relation to the 2014 obligations claimed "*as due and owing by Albpetrol*" and therefore payment by GBC had not been made possible, and (iii) Claimant indicated that it was ready at any time to conclude its obligations under the Settlement Agreements once invoices were provided by Albpetrol.[727]

3. <u>Claimant's claim on the violation of the Fiscal Stabilization Covenant and response to Respondents' arguments</u>

739. In addition to arguing that the Fiscal Stabilization Covenant is more than a renegotiation clause, (see section 1. above), Claimant contests Respondents' argument that the negotiations failed as a result of Claimant's fault or failure to negotiate in good faith,[728] as "*Respondents were contractually obliged to neutralize the negative economic effects of changes in law, no more no less*". It was imposed no counter obligation other than to participate in the immediate amendment if the License Agreements to implement the neutralization of the negative economic effects.[729]

740. Claimant further contends that the fact that the PEP&ASP Liability may exceed the total value of the Undue Tax Paid is "*no answer to the Respondents' failure to abide the Fiscal Stabilization Covenant*", and that the result of Respondents' repeated breaches is to have deprived the Claimant of cash flow that could have been reinvested into the Oilfields.[730]

[726] Statement of Claim, para. 185, pp. 31-32, referring to **C-81** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 11 January 2017.
[727] Statement of Claim, para. 186, p. 32, referring to **C-82** – Letter No. 13/17 from TransAtlantic to Albpetrol et al. dated 12 January 2017.
[728] Statement of Defence, para. 324, p. 89.
[729] Reply, para. 155, p. 27.
[730] Reply, para. 156, p. 27.

741. Claimant submits that whatever the political or economic merits of the Royalty Tax, Respondents had the ability to audit Claimant (and other contractors) in respect of Petroleum Costs and could always avail themselves of dispute resolution mechanisms under the PSAs. However, Article 3.1(c) of the License Agreements exists precisely so that if the Government changes the way it taxes oil and gas producers, international investors are given certainty that the bargain on which they make their investment decision will not be altered by such a change of law.[731]

742. Regarding Respondents' argument that the Stabilization Covenant may be relied upon by Albpetrol,[732] Claimant considers it "*irrational*" and contends that the only possible beneficiary of the Covenant must be a "*Foreign Investor*", such as Claimant. Claimant points out that the Petroleum Law expressly contemplates that an agreement between the MEI and a Foreign Investor may include a Fiscal Stabilization Covenant, whereas the Petroleum Law does not provide that the MEI and Albpetrol (or other domestic actors) may agree to "*contract out of future tax regimes*". It makes sense that domestic actors may not escape domestic taxes unless a law specifically permits them to do so, and Respondents point to no such law.[733]

743. As for the Amending Agreements, Claimant considers that, contrary to what Respondents argue,[734] they improved the negative effects of taxes but did not fully eliminate them, as the Offset Mechanism only netted Royalty Taxes against the PEP&ASP Liability while the Tax Deferral Mechanism only provided relief through additional cost recovery measures.[735] While the Amending Agreements and Settlement Agreement constituted an attempt at negotiating a solution through comity between the parties, Claimant, which had no obligation to negotiate at all, was never obliged to participate in negotiations in the first place or to settle for less than complete neutralization. It was Respondents' obligation to either amend the PSAs or take the necessary actions to eliminate the negative effects on Claimant.[736]

744. Therefore, Claimant argues that Respondents' allegation[737] that Claimant loses its rights in connection with Article 3.1(c) if it walks away from the negotiations is unfounded in fact and in law.[738] The same applies to Respondents' allegation[739] that Claimant was obliged to accept the mechanism accepted by Bankers Petroleum which did not provide for complete neutralization of negative setoff mechanism.[740]

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[731] Reply, para. 157, pp. 27-28.
[732] Statement of Defence, para. 328, p. 89.
[733] Reply, para. 158, p. 28.
[734] Statement of Defence, para. 338, p. 91.
[735] Reply, para. 159, p. 28.
[736] Reply, para. 160, p. 28.
[737] Statement of Defence, para. 355, p. 95.
[738] Reply, para. 161, p. 28.
[739] Statement of Defence, paras. 357-358, p. 95, paras. 478-479, p. 121.
[740] Reply, para. 162, p. 28.

745. Claimant denies that it owes Profit Tax to Respondents[741] and argues that the Delvina gas field assets and liabilities were transferred to a subsidiary of TAT on 29 February 2016.[742]

746. Claimant also denies that it refused to set-off its credit for the Royalty Tax paid against AKBN/the State instead of against Albpetrol in order to remain the debtor of the State,[743] as any unpaid debts vis-à-vis AKBN or the Government could have justified AKBN terminating the applicable License Agreements on 90 days' notice, rather than through a lengthier and more complex process under the Petroleum Agreements.[744]

747. Finally, Claimant argues that Respondents never gave any reason why the Amending Agreements were never submitted to the Council of Ministers for approval or why the Ministry of Finance was a necessary party to netting off mutual obligations in the first place. A simple solution would have been to exclude the Ministry of Finance from the Settlement Agreement and net off the Royalty Tax payments against the PEP&ASP Liability.[745] Claimant thus blames Respondents for introducing unnecessary additional parties into the negotiations with respect to the Settlement Agreement, namely the Ministry of Economic Development and the Ministry of Finance, whereas both the License Agreements[746] and the Petroleum Agreements[747] provide that once the agreement is initially approved by the Council of Ministers, amendments only need to be approved by the parties to the respective agreements.[748] Consequently, the deleterious effects of the Royalty Tax and the ECC Tax Changes were never effectively neutralized by Respondents, in breach of Article 3.1(c) of the License Agreements which require immediate actions to be taken.[749]

4. <u>Claimant's arguments on its right to damages for Respondents' alleged violation of their duty related to fiscal stabilization measures</u>

748. Claimant explains that, under Swiss law, parties to a contract may validly agree on clauses stipulating that the contract will be adapted to changed conditions, and that they do not need to define in detail the condition and the means for adapting the contract but can use general clauses.[750]

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[741] Reply, para. 163, p. 28.
[742] Reply, para. 164, p. 28 referring to Statement of Claim, para. 158, pp. 27-28.
[743] Statement of Defence, para. 367, p. 97, referring to **RWS1** – First Witness Statement of Endri Puka, para. 62, p. 13.
[744] Reply, para. 165, p. 29.
[745] Reply, para. 166, p. 29.
[746] **C-2**, **C-3** and **C-4** – License Agreements, Article 28.4, p. 68: "[…] *This License Agreement may not be amended, altered or modified except by a writing signed by each Party*".
[747] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 26.9, p. 36: "*No variations to this Agreement shall be effective unless made in writing and signed by the Parties*".
[748] Statement of Claim, para. 261 p. 42.
[749] Statement of Claim, para. 262 p. 42.
[750] Claimant's Post-Hearing Brief, para. 220, p. 45, referring to **CL-71** – Müller, *Art. 18*, in: Berner Kommentar Obligationenrecht (Aebi-Müller & Müller eds., 2018), paras. 579, 582.

749. According to Claimant, if the parties cannot agree on the means to adapt the contract, the arbitrator can supplement the contract by taking into consideration the contractual determinations and the initial balance of the value of the parties' respective performances under the contract,[751] and if the contract stipulates a duty to negotiate an amendment and the parties fail to agree on an amendment, the arbitrator needs to assess what the parties hypothetically would have agreed in good faith.[752]

750. Claimant contends that, in the present case, the neutralization needs to be immediate and should be full, *i.e.* that Claimant is not obliged to compromise or agree to submit to changes short of a full elimination of the negative economic effects.[753] A mere obligation to negotiate in good faith that would leave to Respondents' discretion whether they agree to provide the very stability of the original fiscal regime and to eliminate the negative economic effect of changes in Albanian law does not achieve the purpose of the provision and does not correspond to the strict wording of the provision ("*will*"). Therefore, if there is no amendment to the License Agreement, AKBN and the MEI remain obliged to eliminate the negative effect by undertaking other actions, failing which Respondents are in breach of their obligation under Article 3.1(c).[754]

751. Claimant contends that the breach of the obligation to eliminate the negative effect is a breach of contract that entitles Claimant to damages under Article 97(1) SCO. Respondents' primary obligation to eliminate the negative economic effect is converted into a secondary obligation of damages,[755] and the amount of damages corresponds to the difference between Claimant's actual situation with the negative economic effect and the situation Claimant would have been in without the negative economic effect.[756]

B. <u>Respondents' position</u>

752. As a preliminary matter, Respondents argue that Claimant's outstanding debts *vis-à*-vis Respondents have always been higher than the additional tax effects on Claimant. This prevents Claimant from (i) pretending that the payment of the Royalty Tax hindered it to invest or conduct its petroleum operations or (ii) "*hid*[ing] *behind the "Royalty Tax" when it comes to its responsibility for the suspected misappropriation of crude oil (self-justice) and for debts in the two-digit million USD area*".[757]

753. Respondents also explain the background to the implementation of the Royalty Tax in 2008, namely that the Albanian State considered that a mere profit tax did not provide

[751] Claimant's Post-Hearing Brief, para. 220, p. 45, referring to **CL-71** – Müller, *Art. 18*, in: Berner Kommentar Obligationenrecht (Aebi-Müller & Müller eds., 2018), para. 582.
[752] Claimant's Post-Hearing Brief, para. 220, p. 45, referring to **CL-71** – Müller, *Art. 18*, in: Berner Kommentar Obligationenrecht (Aebi-Müller & Müller eds., 2018), para. 583.
[753] Claimant's Post-Hearing Brief, para. 221, p. 45.
[754] Claimant's Post-Hearing Brief, para. 224, p. 46.
[755] Claimant's Post-Hearing Brief, para. 225, p. 46, referring to **CL-69** – Wiegand, Art. 97 in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), para. 47.
[756] Claimant's Post-Hearing Brief, para. 225, p. 46.
[757] Statement of Defence, paras. 322-323, pp. 88-89.

for fair and adequate taxation of the oil operations in Albania, due to the practices of "*suspected fraudulent*" "*national and international partners*" of Albpetrol.[758]

1. Respondents' argument that Claimant has not shown any cause of action

754. Respondents contend that the relevant cause of action can only be Article 18.3 of the Petroleum Agreements.[759]

755. The first argument made by Respondents in their Post-Hearing Brief in support of the fact that Claimant has not shown any cause of action is that Claimant's rights under the Ballsh Petroleum Agreement were seized and sold in public auction, so that Claimant "*lost all of its rights under the Ballsh PA and –LA […]. Claimant does therefore no longer own alleged claims for the 'neutralization' of Royalty Tax paid under the Ballsh LA*".[760]

756. Respondents also argue that Claimant has no claim pursuant to the renegotiation clause in connection with the "*fiscal stabilization"* against AKBN because it is not a party to the License Agreements as it only represented the Ministry[761] and did not breach any obligations insofar as it represented the Ministry[762]. Moreover, Albpetrol is not obliged under Article 3.1(c) of the License Agreements[763] and in any case was actively engaged in the negotiation process.[764] As for the Ministry, it also supported the negotiations with Claimant as will be detailed below.

757. Respondents allege that the negotiation obligation of the Ministry can be claimed by Albpetrol. Claimant only joined Albpetrol in the position of Licensee when concluding the Petroleum Agreement with the "Instruments of Transfer".[765] Respondents infer from the text of Article 3.1(c) that "[i]*t is* […] *for the parties to negotiate and amend the License Agreement to eliminate the negative economic effect on the LICENSEE, i.e. on Albpetrol and on the Claimant*".[766]

758. Respondents argue that no stabilization rights under Article 3.1(c) of the License Agreements were created for Albpetrol, because "*a local Albanian company cannot effectively agree in a private License Agreement on such tax advantages*".[767] Article 5(3)(d) of the Petroleum Law provides that "*a Petroleum Agreement to which a Foreign Investor is a party may contain provisions for the purpose of ensuring the stability of the fiscal regime*", and argue that the conditions for stabilizations were not met.[768]

[758] Statement of Defence, paras. 325-326, p. 89.
[759] Rejoinder Brief, paras. 475-481, pp. 128-130; Respondents' Post-Hearing Brief, para. 184, p. 55.
[760] Respondents' Post-Hearing Brief, para. 185, p. 55.
[761] Respondents' Post-Hearing Brief, para. 186, p. 55.
[762] Statement of Defence, para. 490, p. 123.
[763] Rejoinder Brief, paras. 469-471, pp. 127-128; Respondents' Post-Hearing Brief, para. 204, p. 60.
[764] Statement of Defence, para. 495, p. 124.
[765] Statement of Defence, para. 328, p. 89.
[766] Statement of Defence, para. 330, p. 90.
[767] Respondents' Post-Hearing Brief, para. 188, p. 56.
[768] Respondents' Post-Hearing Brief, paras. 189-190, p. 56.

759. First, according to Respondents, the License Agreements are not Petroleum Agreements in the meaning of Article 5(3)(d) of the Petroleum Law, according to their wording.[769]

760. In addition, Respondents argue that:

> "*The Parties have agreed on 'Production Sharing Agreements' (cf. Art. 2 Petroleum Law 'Definitions' in Exhibit CL-1). A 'Petroleum Agreement' in* <u>*that contractual setting*</u> *'provides for the recovery of the Contract Costs from Petroleum produced in the Contract Area […] and for the division between the State and the Contractor of the balance of petroleum remaining after the recovery of Contract Costs in accordance with a scale or formula specified in the Petroleum Agreement'. These commercial terms are only set out in the Petroleum Agreements concluded between the Parties on 19 July 2007, and not in the License Agreements. This is an important distinguishing factor, as 'neutralization' of a tax burden can only be achieved by a contract amendment if commercial terms can be amended. The LAs have no such commercial terms. Also, the LAs stipulate in their Art. 1 'DEFINITIONS AND INTERPRETATION' for the notion of 'Petroleum Agreement':* 'Petroleum Agreement' means a petroleum agreement as defined in the Petroleum Law and the Albpetrol Agreement, and as described in Recital E and ARTICLE 6, herein.' *The Amending Law No. 7853 of 29 July 1994 to the Petroleum Law clarifies in Art. 1 c) that the Albpetrol Agreement as concluded on 26 July 1993 authorises Albpetrol to enter into 'Petroleum Agreements' (orig.* 'Marreveshje Hidrokarbure*', also* 'Hydrocarbon Agreements*') with natural or legal persons (like the Claimant) and that such a Petroleum Agreement* '[…] which shall not run contrary to the relevant license terms, shall be the Hydrocarbon [=Petroleum] Agreement bound to this Law'. *Consequently, the* <u>*LAs cannot be considered 'Petroleum Agreements'*</u> *in the meaning of Art 5(3)(d) of the Petroleum Law. Already for this reason, there is no authorization for the 'stabilization clause' on which Claimant relies, so that Art. 3.1(c) of the LAs is* <u>*not effective*</u>*".*[770]

761. Second, according to Respondents, Albpetrol is "*obviously not a Foreign Investor*", whereas the Petroleum Law allows the agreement on stabilization clauses to the benefit of a Foreign Investor and not for the local oil company.[771]

762. According to Respondents, the fact that Claimant intended to receive licensing rights under the License Agreements from Albpetrol on a derivative basis under the Petroleum Agreements does not change the result that Albpetrol could not effectively agree on Article 3.1(c) of the License Agreements. To the contrary, Article 18.3 of the Petroleum Agreements already provided for sufficient stabilization for Claimant.[772]

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[769] Respondents' Post-Hearing Brief, para. 191, p. 56.
[770] Respondents' Post-Hearing Brief, paras. 191-194, pp. 56-57.
[771] Respondents' Post-Hearing Brief, para. 195, p. 57.
[772] Respondents' Post-Hearing Brief, para. 196, p. 57.

763. In that regard, Respondents argue that exceptions from a rule such as lawful taxation under Article 5(3)(d) of the Petroleum Law and Article 3.1(c) of the License Agreements are to be interpreted narrowly,[773] and refer to Article 3.1(b) of the License Agreements which provides that "[s]*ubject to Section 3.1(c) below, to the extent that any provision of Albanian law conflicts or is inconsistent with a provision of this License Agreement, the provision of Albanian law shall prevail*".[774]

764. Respondents contend that Article 3.1(c) conflicts with Article 5(3)(d) of the Petroleum Law which does not apply to License Agreements and to Albanian contractors. Respondents add that "[a]*ccording to its wording and systematic setting, Art. 3.1(c) of the LAs only aims at neutrali*[z]*ing taxes or other economic burden introduced* after *the conclusion of the LAs; to that extent, it is exempt from the contractual stipulation in Art. 3.1(b) that provisions of the LA cannot overrule the Albanian law which conflict – or are just 'inconsistent' – with Albanian law. The question whether Art. 3.1(c) conflicts or is inconsistent with Art. 5(3)(d) Petroleum Law, however, is* <u>*outside*</u> *this exemption as the Petroleum Law had been* introduced before *the LAs were concluded. Therefore, as and to the extent Art. 3.1(c) 'conflicts' with Art. 5(3)(d) Petroleum Law and is 'inconsistent' with it (because it must neither be applied to License Agreements nor to Albanian contractors like Albpetrol), the Parties' contractual stipulation of Art. 3.1(b) prevails so that* <u>*Art. 3.1(c) of the LAs could not be effectively agreed*</u> *with Albpetrol*".[775]

765. Respondents claim that the Albanian tax lax and Article 5(3)(d) of the Petroleum Law are mandatory rules of Albanian Law ("*mandatory provision*") and that their violation is sanctioned with "*nullity*" pursuant to Article 92 of the Albanian Civil Code.[776]

766. Respondents' position is that because no valid "*stabilization clause*" in Article 3.1(c) could be agreed from the outset between the MIE and Albpetrol, Claimant could not derive such right from Albpetrol via the Instruments of Transfer, so that, today, Claimant cannot benefit from Article 3.1(c).[777]

767. Respondents also reiterate that Claimant is not to be considered a Foreign Partner in the arbitration clauses of the License Agreements or a Foreign Investor under the Petroleum Law, so that Claimant does not qualify for the benefits granted by Article 3.1 of the License Agreements.[778]

768. Respondents argue that the condition subsequent for the transfer of Claimant's stabilization rights under Article 3.1(c) of the License Agreements would have occurred

[773] Respondents' Post-Hearing Brief, para. 197, p. 58.
[774] Respondents' Post-Hearing Brief, para. 198, p. 58.
[775] Respondents' Post-Hearing Brief, para. 198, p. 58.
[776] Respondents' Post-Hearing Brief, para. 199, pp. 58-59, referring to **RL-25** – Arts. 24 *et seq.* of the Albanian Civil Code, Article 92: "*Invalid legal transactions do not create any legal consequences. As such are those which: (a) Come in conflict with a mandatory provision of law; (b) Are performed to deceive law* […]".
[777] Respondents' Post-Hearing Brief, para. 201, p. 59.
[778] Respondents' Post-Hearing Brief, para. 202, p. 59.

anyway, on 17 January 2017 (120 days after the termination notice of 19 September 2016), *i.e.* the termination of the Petroleum Agreements.[779]

769. Finally, Respondents contend that damages for breach of a renegotiation clause can only be demanded *after* the creditor has requested to negotiate. Claimant never asserted any negotiation rights against the MIE under the License Agreements *before* the termination of the Petroleum Agreements and the lapse of the rights in January 2017. Claimant filed its request for arbitration – and tried to create the conditions of Article 107 SCO for its damage claim – only when the transfer of rights under the Instruments of Transfer had already lapsed, so that Claimant could not show any cause of action against the MIE, either.[780]

2. Respondents' argument that Article 3.1(c) of the License Agreements does not grant payment claims

770. Respondents argue that Article 3.1(c) of the License Agreements does not foresee a damage claim, but a negotiation obligation for the Ministry with the Licensee, defined in the License Agreements as "*Albpetrol and, in conformity with 'Albpetrol Agreement*' *provisions, any* [of] *its permitted transferee, successor or assignee".*[781]

771. In response to the Tribunal's question at the hearing of whether Article 3.1(c) of the License Agreements can be interpreted as a straightforward payment claim,[782] Respondents asserted that "*it cannot: the wording, systematics, purpose, and contractual history of Art. 3.1(c) would have to be stretched beyond recognition to find a payment claim in that provision*".[783]

772. Respondents first contend that nothing in the wording of Article 3.1(c) suggests that it contains a payment claim, in particular as the words "*pay*", "*indemnify*", or "*payment*" are not included, and "[n]*obody would agree on onerous amendments and* 'other necessary actions' *if he/she simply meant a payment claim*".[784]

773. Respondents add that it is quite clear what the Parties have / have not agreed. Article 3.1(c) constitutes a so called "*economic equilibrium-or balancing clause*", the purpose of which is to provide the parties with the possibility to deal with the potential negative economic consequences of changes to the legal and regulatory regime applicable to the subject matter of their contract by providing for the negotiation of necessary amendments.[785]

[779] Respondents' Post-Hearing Brief, para. 203, pp. 59-60.
[780] Respondents' Post-Hearing Brief, para. 203, pp. 59-60.
[781] Statement of Defence, para. 327, p. 89, paras. 472-473, p. 120.
[782] Hearing Transcript Day 1, p. 109:8 *et seq*.
[783] Respondents' Post-Hearing Brief, para. 205, p. 60.
[784] Respondents' Post-Hearing Brief, para. 206, p. 60.
[785] Rejoinder Brief, para. 482, p. 130, referring to **RL-20** – The guide to energy arbitrations – second edition, GAR Chapter: of Taxes and Stabilisation, p. 4: "*Economic equilibrium clauses, also known as balancing or adaptation clauses, do not freeze the legal regime applicable to the contract. Rather, they attempt to deal with*

774. Respondents submit legal doctrine indicating that in drafting economic equilibrium clauses, the parties should consider defining "*the change of circumstances triggering the clause; the effect of the change on the contract; the objective of a procedure for the renegotiation; and the solution in cases of failure of the renegotiation process*".[786] The fact that, in the present case, the Parties failed to do so, "*is to be held against the Claimant, the party basing its claim on such clauses*".[787]

775. Respondents also argue that Partasides/Martinez do not consider that "*renegotiation*" clauses grant straightforward "*payment claims*" and that, at most, there may be a damage claim if the debtor of the renegotiation obligation does not negotiate in good faith, which has not happened under the License Agreements (see below at paras. 785 *et seq.*).[788]

776. As a comparison, Respondents submit an example of a clause granting a payment claim for fiscal stabilization, which may be called "*allocation of burden clauses*":

> "[T]*he GOVERNMENT shall indemnify each CONTRACTOR Entity upon demand against any liability to pay any Taxes assessed or imposed upon such entity which relate to any of the exemptions granted by the GOVERNMENT under this Article 31.1, and under Articles 31.4 to 31.11* [exempting the investor from certain taxes]".[789]

777. According to Respondents, the purpose of Article 3.1(c) was:

> "*exactly to avoid a straightforward payment claim. The Parties obviously wanted to avoid that the MIE has to pay back in cash what the Ministry of Finance levied with the introduction of a new tax. The Parties wanted to protect the contractual equilibrium and wanted to vest the Parties with the flexibility to take into account also a* 'disequilibrium' *the Licensee may have caused. This is why they finally negotiated – under the PAs! – a complex contractual solution which provided for a set-off of the Royalty Tax paid by the Claimant against the 'Claimant's due debts'. Such a purpose could never be achieved if Article 3.1(c) were to be interpreted a granting a payment claim. So even* effet utile *considerations – if admissible,* quod non *– prohibit an interpretation of Article 3.1(c) LA as a payment claim, which would totally distort the Parties' idea to find a negotiated solution that would also take into accounts unfair advantages of the Licensee* ".[790]

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the consequences of change ***by providing for the negotiation of amendments*** *to the contract to reinstate the economic balance of the contract*". (emphasis added); Respondents' Post-Hearing Brief, para. 207, p. 61.

[786] Respondents' Post-Hearing Brief, para. 208, p. 61, referring to **RL-20** – The guide to energy arbitrations – second edition, GAR Chapter: of Taxes and Stabilisation, p. 4.

[787] Respondents' Post-Hearing Brief, para. 209, p. 61.

[788] Respondents' Post-Hearing Brief, para. 209, p. 61.

[789] Respondents' Post-Hearing Brief, para. 210, pp. 61-62, referring to **RL-20** – The guide to energy arbitrations – second edition, GAR Chapter: of Taxes and Stabilisation, p. 4.

[790] Respondents' Post-Hearing Brief, para. 211, p. 62.

778. Respondents also submit that the contractual history and the Parties' conduct shows that they never believed there was (i) a disequilibrium under the License Agreements, because the Parties negotiated amendments under the Petroleum Agreements, or (ii) a straightforward payment claim under the similar stabilization clause under the PAs. This is because the Parties negotiated a set-off mechanism concerning Claimant's debts and a complex amendment mechanism to neutralize the Royalty Tax, never a simple payment claim.[791]

3. Respondents' argument that Article 3.1(c) of the License Agreements contains a negotiation obligation and not an automatic amendment mechanism

779. Respondents object to Claimant's argument[792] that Article 3.1(c) of the License Agreements contains an "*absolute obligation*" to immediately amend the License Agreement.[793] Article 3.1(c) does not contain an automatic amendment mechanism[794] and that Claimant itself admitted the necessity to agree on a contract amendment.[795]

780. First, Respondents submit that one of the main issues of the so-called economic equilibrium or balancing clauses is the legal impossibility to change the contract terms without the consent of the other party.[796] One possible solution would be an automatic adjustment clause, also called Stipulated Economic Balancing, that (i) "*provides for automatic amendment of the contract in a stipulated fashion (e.g., by way of readjustment of* 'profit petroleum split' *in the case of a Production Sharing Contract (PSC)*"[797] and that (ii) are only possible if the parties stipulated a specific pre-agreed and self-executing automatism to trigger the rebalancing of the contract.[798]

781. Respondents contend that, in the present case, neither Article 3.1(c) of the License Agreements nor Article 18.3 of the Petroleum Agreements[799] contain such a pre-agreed and self-executing automatism, but simply provide for an obligation to "*immediately amend*" the Agreement, evidencing that the Parties intended to deal with economic changes by way of renegotiation.[800]

782. Second, Respondents also argue that, while accusing Respondents of a breach of contract by not "*immediately amending*" the Agreements (apparently unilaterally),

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[791] Respondents' Post-Hearing Brief, para. 212, p. 62.
[792] Reply, para. 154, p. 27.
[793] Rejoinder Brief, para. 473, p. 128.
[794] Rejoinder Brief, para. 482, p. 130.
[795] Rejoinder Brief, para. 489, p. 132.
[796] Rejoinder Brief, para. 483, pp. 130-131, referring to **RL-21** – Oxford Institute for Energy Studies, Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implications, p. 16: "*The three main features of a typical stabilization clause are […] ii)* ***the impossibility of changing the contract terms without previous consent of the other party****, usually to be given in writing*". (emphasis added)
[797] Rejoinder Brief, para. 484, p. 131, referring to **RL-22** – A.F.M. Maniruzzaman, The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends, The Journal of World Energy Law & Business, Volume 1, Issue 2, 25 July 2008, pp. 121-157.
[798] Rejoinder Brief, para. 485, p. 131.
[799] Respondents seem to have mistakenly referred to Article 18.3 of the "License Agreements".
[800] Rejoinder Brief, para. 486, p. 131.

Claimant admits the necessity for the parties to renegotiate and agree on an amendment.[801]

783. Respondents contend that, in particular, Claimant successively (i) recognized its own obligation to immediately amend the Agreement, together with Respondents,[802] (ii) confirmed that it is equally bound by an obligation to immediately amend the Agreements, together with Respondents, but suggests that Albpetrol failed to comply with such obligations,[803] (iii) modified its contractual analysis by alleging that only Respondents are bound by an obligation to immediately amend the License Agreements[804] and (iv) seemed to exclude itself from both contract renegotiation and amendment obligations.[805]

784. According to Respondents, in any event, Claimant eventually confirmed that Albpetrol fulfilled its negotiation obligations when they signed the Amending Agreements, thereby leaving no room for a contract breach.[806] Respondents' position is that the fact that the signed Amending Agreements did not come into force is not the fault of Respondents, which "*were prepared and offered different solutions*", contrary to Claimant which "*simply walk*[ed] *away from the renegotiations, and made no reasonable new proposals*".[807]

4. <u>Respondents' argument that Albpetrol was at all time actively engaged in the negotiation process, which the Ministry supported</u>

785. According to Respondents, the Ministry (or AKBN as its representative) and Albpetrol have "*at all times proactively undertaken the necessary actions*" to eliminate any potential economic effects on Claimant following the implementation of taxes and in particular the following.[808]

786. Respondents argue that contrary to what Claimant claims, Albpetrol actively engaged in and even started the discussions concerning the renegotiation process following the tax changes in 2008,[809] whereas Claimant did not follow up on the initial joint meeting of 3 November 2010.[810]

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[801] Rejoinder Brief, para. 489, p. 132.
[802] Rejoinder Brief, para. 490, p. 132, referring to Statement of Claim, para. 87, p. 14.
[803] Rejoinder Brief, para. 491 p. 132, referring to Reply, para. 36, p. 5.
[804] Rejoinder Brief, para. 492 p. 132, referring to Reply, para. 154, p. 27.
[805] Rejoinder Brief, para. 493 pp. 132-133, referring to Reply, para. 160, p. 28.
[806] Rejoinder Brief, para. 494 p. 133, referring to Reply, para. 129(a), p. 21: "*Albpetrol and the Claimant had signed the Amending Agreements, which provided for neutralization mechanism for an Offset Mechanism and Tax Deferral Mechanism in respect of the Royalty Taxes*".
[807] Rejoinder Brief, para. 495 p. 133.
[808] Statement of Defence, para. 331, p. 90.
[809] Statement of Defence, para. 332 p. 90, referring to **R-116** – Letter from Albpetrol to the Claimant dated 8 October 2010.
[810] Statement of Defence, para. 333 p. 90, referring to **R-117** – Letter from Albpetrol to the Claimant dated 17 December 2010.

787. According to Respondents, even though Claimant failed to attend meetings with Albpetrol, Albpetrol followed up to organise meetings to resolve the issue[811] and "*proactively*" contacted the Ministry, AKBN and the Ministry of Finance to find a neutralisation solution after the tax changes.[812]

788. Respondents contend that in the following years, there were some negotiations for a neutralisation solution but Claimant did not show a real interest in finding a solution. It was in Claimant's interest that the Royalty Tax renegotiation issue "*remain*[…] *open*" because Claimant had found a way to "super-compensate *the Royalty Tax by selling crude oil on own account that was due to Albpetrol for PEP&ASP*" and use the Royalty Tax renegotiation issue as a "'fig leaf' *for not paying much higher debts towards the Respondents*".[813]

789. Respondents recall that on 27 May 2015, Albpetrol and Claimant signed the so-called "First Amending Agreements" to the Petroleum Agreements, which eliminated the negative economic effects of the taxes – in particular of the Royalty Tax – for the future, in their entirety.[814] The "First Amending Agreements" required the approval of the Council of Ministers for their effectiveness.[815]

790. Respondents argue that, as pointed out by Claimant,[816] the Ministry (i) supported these "First Amending Agreements" to the Petroleum Agreements and (ii) proactively proposed to enter into a related Settlement Agreement which provided to set off the Royalty Tax already paid by Claimant against the PEP&ASP obligations of Claimant against Albpetrol under the Petroleum Agreements.[817]

791. According to Respondents, it results from the above that, at all times, the Ministry (directly or through AKBN) and Albpetrol actively supported the (draft) First Amending Agreements to the Petroleum Agreements on 27 May 2015 and the related (draft) Settlement Agreement on 1 July 2015, thereby "*fully discharging their negotiation obligation*" contained in Article 3.1(c) of the License Agreements.[818]

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[811] Statement of Defence, para. 334, p. 90, referring to **R-118** – Letter from Albpetrol to the Claimant dated 26 September 2011.
[812] Statement of Defence, para. 335, p. 91, referring to **R-119** – Letter from Albpetrol to the Ministry, AKBN, and the Ministry of Finance dated 13 December 2011.
[813] Statement of Defence, para. 336, p. 91, referring to **RWS-1** – First Witness Statement of Endri Puka.
[814] Statement of Defence, paras. 337-338, p. 91, referring to **R-120** – First Amending Agreement to the Petroleum Agreement dated 27 May 2015 for the Cakran-Mollaj oilfield; **R-121** – First Amending Agreement to the Petroleum Agreement dated 27 May 2015 for the Gorisht-Kocul oilfield; **R-122** – First Amending Agreement to the Petroleum Agreement dated 27 May 2015 for the Ballsh-Hekal oilfield.
[815] Statement of Defence, para. 337, p. 91.
[816] Statement of Claim, paras. 142 *et seq*., pp. 25 *et seq*.
[817] Statement of Defence, paras. 339-340, p. 92, referring to **R-123** – Agreement for Settlement of the mutual obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), The Ministry of Finance and The Ministry of Economic Development, Tourism, Trade and Entrepreneurship of July 2015. See also paras. 475-476, pp. 120-121.
[818] Statement of Defence, para. 341, p. 92; Respondents' Post-Hearing Brief, para. 215, p. 63.

5. Respondents' argument that Claimant failed to participate in further negotiations after the Ministry of Finance refused to sign the proposed Settlement Agreement

792. According to Respondents, the Ministry of Finance refused to sign the proposed Settlement Agreement,[819] on the ground that it would be against Albanian law to refund to Claimant a tax already paid and thereby to "*retrospectively exempt*" Claimant from this tax obligation, unlike all other oil operators.[820] The Ministry (directly or through AKBN) and Albpetrol had no power to overrule this decision, leaving it to the Parties to find an alternative solution to the issue of neutralising the Royalty Tax paid by Claimant.[821]

793. Respondents first argue that because the renegotiation clause in Article 3.1(c) of the License Agreements could not be interpreted as an obligation of a third party, Claimant had no right to insist on an agreement which required payments of the Ministry of Finance, which was neither a party to the License Agreements nor to the Petroleum Agreements.[822] Moreover, the refusal of such a third party cannot be deemed a breach of contract on the part of the Ministry.[823]

794. According to Respondents, after Albpetrol (i) learned about the Ministry of Finance's comments on 4 March 2016,[824] (ii) informed Claimant about them and (iii) invited Claimant to amend the Settlement Agreement accordingly,[825] Claimant did not react to the invitation but "*again used the open Royalty Tax issue as a justification for not paying its debts towards the Respondents*".[826] Albpetrol thus reminded Claimant to finalise the Settlement Agreement by letters of 24 March and 20 April 2016.[827]

[819] Statement of Defence, paras. 342-346, pp. 92-93, referring to **R-124** – Letter from Ministry of Finance to Ministry of Energy and Industry dated 17 September 2015. Respondents contend that the proposed Settlement Agreement, unlike the First Amendments Agreements, was a four-parties agreement between Claimant, Albpetrol, the Ministry of Economic Development, Tourism, Trade and Entrepreneurship, and the Ministry of Finance, on the ground of the following: (i) the Ministry of Economic Development, Tourism, Trade and Entrepreneurship was to become a party because it was the shareholder of Albpetrol at that time, and outstanding dividend payments of Albpetrol to its shareholder were to be settled via the proposed Settlement Agreement, and (ii) the Ministry of Finance was to become a party because according to the terms of the proposed Settlement Agreement, the Ministry of Finance was supposed to refund already paid Royalty Tax to Claimant.
[820] Statement of Defence, para. 345, p. 93.
[821] Statement of Defence, para. 347, p. 93, para. 369, p. 97.
[822] Statement of Defence, para. 348, p. 93.
[823] Statement of Defence, para. 477, p. 121.
[824] Statement of Defence, para. 349, pp. 93-94, referring to **R-125** – Letter from Ministry of Energy and Industry to Albpetrol dated 4 March 2016.
[825] Statement of Defence, para. 350, p. 94, referring to **R-126** – Letter from Albpetrol to the Claimant dated 8 March 2016.
[826] Statement of Defence, para. 351, p. 94, referring to **R-127** – Letter from Claimant of 16 March 2016.
[827] Statement of Defence, para. 352, p. 94, referring to **R-128** – Letter from Albpetrol to the Claimant dated 24 March 2016; **R-129** – Letter from Albpetrol to the Claimant dated 20 April 2016.

795. Respondents contend that it was upon the initiative of the Ministry that the Parties met on 5 May 2016 to review the First Amending Agreements to the Petroleum Agreement and the Settlement Agreement in order to mitigate the negative tax effects.[828]

796. Respondents disagree with Claimant's argument that the amended terms proposed in the 5 May 2016 meeting "*would provide only a partial fulfillment of the Fiscal Stabilization Covenant*".[829]

797. Respondents contend that such allegation is unsubstantiated, untrue and, in any event, cannot constitute an excuse for Claimant to abandon the negotiations. According to Respondents, "*Claimant loses all rights in connection with the renegotiation obligation under License Agreements if it walks away from the negotiations at this stage*".[830]

798. In Respondents' view, Claimant bears the burden of proof if it claims that one of Respondents' proposal was unacceptable, so much so that Claimant was entitled to abandon the negotiations, which Claimant did not prove.[831]

799. Respondents allege that Claimant's position is unfounded because Respondents' side provided a mechanism that was "*fair and even known to be acceptable for the Claimant and other contractors*", in particular the "Bankers Petroleum" scenario proposed by Albpetrol and the Ministry on 5 May 2016, which Respondents describe as a neutralization agreement with oil contractor Bankers Petroleum Albania Ltd, designed to neutralize the same negative effects of the Royalty Tax as for Claimant.[832]

800. According to Respondents, this mechanism had also been used in the Parties' contractual relations, as they had used it in the First Amending Agreement concerning the <u>future</u> neutralization of the Royalty Tax (from January 2015 to the end of the Agreements). This explains why it became an "*obvious option*" to propose the same mechanism for the Parties' past contractual relation after the Ministry of Finance rejected to be included in the Settlement Agreement.[833]

801. Respondents contend that instead of netting the paid Royalty Tax with Albpetrol's claims for PEP&ASP, Albpetrol (with the support of the Ministry) proposed to net the paid Royalty Tax with the Profit Tax that Claimant should have paid to the State and the payment owed to the State for minimum capital investments during the evaluation period for the Delvina site, in accordance with Article 7.3 of the License Agreement (hereafter, the "**Profit Tax Set-Off Mechanism**"). Claimant had not disputed these two alternative obligations which, in aggregate, exceeded the Royalty Tax paid by Claimant

[828] Statement of Defence, para. 353, p. 94, para. 478, p. 121, referring to **R-65** – Signed Minutes of Meeting of 5 May 2016.
[829] Statement of Defence, para. 354, p. 94, referring to Statement of Claim, para. 167, p. 29.
[830] Statement of Defence, para. 355, p. 95.
[831] Statement of Defence, para. 356, p. 95.
[832] Statement of Defence, paras. 357-358, p. 95, para. 478, p. 121.
[833] Statement of Defence, paras. 359-360, p. 95, para. 479, p. 121.

until 31 December 2014, but did not accept this mechanism, unlike the Bankers Petroleum Company.[834]

802. According to Respondents, as of 5 May 2016, Claimant owed the Albanian government:

(i) USD 7,642,952 for the Profit Tax, on the basis of the "*self-declarations of the Claimant, and the formula contained in the License- and Petroleum Agreements*"[835] as follows:

1	Year	2011	2012	2013	2013
2	Oilfield	Gorisht	Gorisht	Gorisht	Cakran
3	Total Income	13.170.811	15.115.920	16.656.572	40.482.121
4	Total Hydrocrbon Cost	11.424.022	10.795.750	8.105.231	39.737.703
5	Difference	1.746.789	4.320.170	8.551.341	744.418
6	Albpetrol Profit (0.5%)	8.734	21.601	42.757	3.722
7	Difference (5-6)	1.738.055	4.298.569	8.508.584	740.696
8	Profit petroleum Tax 50% (7*50%)	869.027,53	2.149.284,58	4.254.292,15	370.347,96
9	TOTAL (C8+D8+E8+F8)				7.642.952

(ii) USD 4,971,247 for the "*non-fulfilled part of the minimum financial commitment in connection with the evaluation and exploration programs for the Delvina License- and Petroleum Agreement*".[836]

803. Respondent thus contends that the proposal made to Claimant to compensate the Royalty Tax paid between 2007 and 31 December 2014 (10,169,253.51) by way of a set-off with Claimant's obligations towards the Albanian treasury (USD 12,614,199) would have provided for an immediate neutralisation of the Royalty Tax.[837]

804. According to Respondents, Claimant refused to operate this set-off because it "*wished to 'set-off' its credit for the Royalty Tax paid only against its debts vis-à-vis Albpetrol, and not vis-à-vis AKBN/the State (the creditor of the Profit Tax). As any other tricky debtor, the Claimant wanted to get rid of the most inconvenient creditor, which was Albpetrol, the creditor with the termination rights under the Petroleum Agreements. Instead, the Claimant liked to remain the debtor of the State, because the State had not begun a termination procedure*".[838]

805. Respondents argue that Claimant has failed to show why Albpetrol's proposal was unacceptable and did not provide for a fair neutralisation of mutual liabilities. Instead, Claimant "*created the impression*" that they would propose a counter-offer that would

[834] Statement of Defence, para. 361, pp. 95-96, referring to **R-65** – Signed Minutes of Meeting of 5 May 2016 ("*MEI representatives proposed to apply the same mechanism as for the company Bankers Petroleum Albania. Representatives of the company Transatlantic Albania Ltd disagreed to apply this mechanism to mitigate the effects and took time to analyze it".*); **RWS-1** – First Witness Statement of Endri Puka.
[835] Statement of Defence, paras. 362-364, p. 96, referring to **R-21** – Letter from AKBN to the Claimant dated 29 April 2016; **R-22** – Reminder letter from AKBN to the Claimant dated 29 September 2016; **RWS-1** – First Witness Statement of Endri Puka.
[836] Statement of Defence, para. 365, p. 96, para. 480, p. 122, referring to **R-130** – Letter of AKBN to the Claimant dated 9 December 2015; **R-131** – Letter of AKBN to the Claimant dated 12 February 2016.
[837] Statement of Defence, para. 366, pp. 96-97.
[838] Statement of Defence, para. 367, p. 97, referring to **RWS-1** – First Witness Statement of Endri Puka.

not include the Ministry of Finance, but that they never submitted such new offer or more detailed comments on Respondents' offer.[839]

806. Respondents' position is that it was clear that any potential solution could not entail a "*back-payment*" of paid taxes to Claimant as this was against Albanian tax law and that Claimant could not request a party like the Ministry of Finance which is foreign to Claimant's contracts to make a million-USD payment to resolve contractual issues.[840] Thus, even if Respondents' proposal would not have fully neutralised the effects of the Royalty Tax and other taxes, Claimant was not allowed to simply "*walk away*" from the negotiations because Respondents' side's proposal did not "*provide for the desired set off*" with Albpetrol's claims.[841]

807. Respondents also argue that Claimant never made any specific proposal as to *how* to amend the License Agreements, and did not even show that it requested Respondents "at all *to renegotiate the stability of the* [License Agreements]". Claimant always requested equilibrium negotiations with reference to Article 18.3 of the Petroleum Agreements, not with reference to the License Agreements.[842] According to Respondents, "[t]*hese requests are the only sensical ones, because the LAs are not suitable to be amended in light of the Royalty Tax. Only the PAs provide for financial provisions directly affecting the Claimant which can be amended to neutralize the Royalty Tax (e.g. the calculation of PEP/ASP etc.). And an amendment of the PAs is in fact what the Parties intended to agree on when concluding the Amending Agreements to the PAs of 27 May 2015 and the Settlement Agreement of 1 July 2015*".[843]

6. <u>Respondents' arguments on Claimant's right to damages for Respondents' alleged violation of their duty related to fiscal stabilization measures</u>

808. Respondents argue that due to the nature of a negotiation obligation, damages for (hypothetical) lost profit (or expectation interest) cannot be claimed[844] as, unlike a precontract, a negotiation obligation does not comprise the obligation to indeed conclude the targeted new contract or amendment of an existing contract.[845]

809. According to Respondents, even if Article 3.1(c) of the License Agreements could be qualified as a precontract within the meaning of Article 22 SCO, the defects of that amendment would render the precontract ineffective.[846]

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[839] Statement of Defence, para. 368, p. 97, referring to **RWS-1** – First Witness Statement of Endri Puka.
[840] Statement of Defence, para. 369, p. 97, referring to **RWS-1** – First Witness Statement of Endri Puka.
[841] Statement of Defence, para. 483, p. 122.
[842] Respondents' Post-Hearing Brief, para. 214, pp. 62-63, referring to **C-23** – Letter No. 5/11 from Stream to Albpetrol dated 5 January 2012.
[843] Respondents' Post-Hearing Brief, para. 214, pp. 62-63.
[844] Respondents' Post-Hearing Brief, para. 217, p. 64, referring to **RL-40** –Gauch/Schluep/Schmid, Schweizerisches Obligationenrecht, Allgemeiner Teil, 10. Aufl., Zürich 2014, para. 985; **RL-41** – Monn, Die Verhandlungsabrede, Zürich 2010, paras. 1158.
[845] Respondents' Post-Hearing Brief, para. 218, p. 64.
[846] Respondents' Post-Hearing Brief, para. 217, p. 64, referring to **RL-41** – Monn, Die Verhandlungsabrede, Zürich 2010, paras. 1158.

810. Respondents' position is that the "*actions*" that Respondents might have been obliged to perform remained undefined and that, given that uncertainty, the expectation interest (*lucrum cessans*) that Claimant seeks to obtain from Respondents cannot be claimed on the basis of Article 3.1(c) of the License Agreements, as specific performance of that clause is not possible.[847]

811. Respondents argue that the only monetary redress available under Article 3.1(c) would be reliance interest, which encompasses frustrated costs and potential gain if the contract had been concluded with a third party rather than the negotiation partner. This would however not include lost profits from the contract or the amendment that did not come into existence.[848] Moreover, Claimant has not substantiated such claim.

812. Respondents allege that, due to the nature of a negotiation obligation, damages for (hypothetical) lost profit (or expectation interest) cannot be claimed.[849] Unlike a precontract, a negotiation obligation does not comprise the obligation to conclude the targeted new contract or amendment of an existing contract.[850]

C. <u>Decision of the Tribunal</u>

813. The Tribunal will consider and decide in turn the basis for the claim regarding Respondents' alleged failure to implement fiscal stabilization measures (1.), and rule on the merits of Claimant's claim (2.).

1. <u>Basis for the claim regarding failure to implement fiscal stabilization measures</u>

814. As already mentioned above, the Tribunal has jurisdiction under the License Agreements but has the possibility to analyse questions and facts relating to the Petroleum Agreements in order to decide issues under the License Agreements.

815. The Tribunal will thus rule on Claimant's claim regarding Respondents' alleged failure to implement the required fiscal stabilization measures in light of Article 3.1(c) of the License Agreements, but might also refer to Article 18.3 of the Petroleum Agreements in order to interpret and apply Article 3.1(c). The Tribunal notes in this regard that Article 18.3 of the Petroleum Agreements is drafted in the same spirit and has a similar scope and purpose that Article 3.1(c) of the License Agreements.

816. The Tribunal is not convinced by Respondents' arguments that Article 3.1(c) of the License Agreements is ineffective because (i) neutralization of a tax burden can only be achieved by a contract amendment of commercial terms, which are only contained in

[847] Respondents' Post-Hearing Brief, para. 219, pp. 64-65.
[848] Respondents' Post-Hearing Brief, para. 220, p. 65, referring to **RL-41** – Monn, Die Verhandlungsabrede, Zürich 2010, paras. 1243-1246.
[849] Respondents' Post-Hearing Brief, para. 217, p. 64, referring to **RL-40** –Gauch/Schluep/Schmid, Schweizerisches Obligationenrecht, Allgemeiner Teil, 10. Aufl., Zürich 2014, para. 985; **RL-41** – Monn, Die Verhandlungsabrede, Zürich 2010, paras. 1158.
[850] Respondents' Post-Hearing Brief, para. 218, p. 64.

the Petroleum Agreements and not the License Agreements[851] and (ii) Albpetrol is not a "*Foreign Investor*", whereas the Petroleum Law allows the agreement on stabilization clauses to the benefit of a "*Foreign Investor*" and not for the local oil company.[852]

817. With regard to the first argument, Article 3.1(c) specifically states that it applies notwithstanding Article 3.1(b).[853] This suggests that Article 3.1(c) provides for a derogation to the principle of primacy of Albanian law over provisions of the License Agreements. Therefore, even if, as argued by Respondents, in application of the Petroleum Law only the Petroleum Agreements could provide for a tax neutralization because only the Petroleum Agreements contain commercial terms, this principle of Albanian law would not prevail over Article 3.1(c) of the License Agreements.

818. With regard to the second argument, even if the Petroleum Law provides that stabilization clauses can be contained in petroleum agreements to which a "*Foreign Investor*" is a party,[854] the definition of "*Licensee*" in the License Agreements includes not only Albpetrol, but also any of its permitted transferee, successor or assignee,[855] i.e. Claimant, pursuant to the Instrument of Transfer in the Petroleum Agreements. Given that the License Agreements were signed simultaneously with the Petroleum Agreements, which contain a similar provision that is to the benefit of Claimant (Article 18.3), it is clear that Article 3.1(c) of the License Agreements was designed to refer to Claimant since the outset.

819. Therefore, the Tribunal dismisses Respondents' argument that Article 3.1(c) of the License Agreements is ineffective.

2. <u>On the alleged violation by Respondents of their obligations to implement fiscal stabilization measures</u>

a) <u>Identification of the parties to which Article 3.1(c) of the License Agreements is applicable</u>

i. <u>Article 3.1(c) of the License Agreements is applicable to AKBN and the MIE</u>

820. On the issue of the identification of the Respondents which had obligations under Article 3.1(c) of the License Agreements, the Tribunal agrees with Respondents that Claimant does not have a claim against Albpetrol under Article 3.1(c) of the License Agreements.

821. As argued by Respondents, the Instrument of Transfer in Annex E of the Petroleum Agreements provides that Albpetrol "*transfers all its rights, privileges and obligations*

[851] See above para. 760.
[852] See above para. 761.
[853] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.1(b), p. 15: "*Subject to Section 3.1(c) below, to the extent that any provision of Albanian Law conflicts or is inconsistent with a provision of this License Agreement, the provision of the Albanan Law shall prevail*".
[854] **RL-01** – Law No. 7746, dated 28.7.1993 for Hydrocarbons (exploration and production) (amended by Law No. 6-2017, dated 2.2.2017), Article 5(3)(d): "*A Petroleum Agreement to which a Foreign Investor is a party may contain provisions for the purpose of ensuring the stability of the fiscal regime* […]".
[855] **C-2**, **C-3** and **C-4** – License Agreements, Article 1.1, p. 10.

under the License Agreement [to Claimant] subject to said Petroleum Agreement", so that Albpetrol could not have transferred to Claimant its negotiation rights and obligations under Article 3.1(c) of the License Agreements "*against itself*".[856]

822. Therefore, any claim against Albpetrol on the basis of a duty related to fiscal stabilization measures would have to be brought under Article 18.3 of the Petroleum Agreements.

823. As far as the MIE and AKBN are concerned, the Tribunal's jurisdiction over them was established and they are both mentioned in Article 3.1(c) of the License Agreements.

824. To conclude, the Tribunal rules that only AKBN and the MIE are bound by Article 3.1(c) of the License Agreements.

ii. Article 3.1(c) of the License Agreements is applicable to Claimant

825. As indicated above in the section on the validity of Article 3.1(c) of the License Agreements, Claimant is bound by and is a beneficiary of Article 3.1(c) of the License Agreements.

b) Identification of obligations provided for Article 3.1(c) of the License Agreements

826. The Parties disagree on the exact types of obligations contained in Article 3.1(c),[857] Claimant arguing that it is an absolute obligation of Respondents to amend immediately the License Agreements,[858] and Respondents arguing that Article 3.1(c) simply contains an obligation to negotiate.[859]

827. The Tribunal notes that Article 3.1(c) first imposes an obligation on the Parties to "*immediately amend*" the License Agreements in order to eliminate the negative effects of a provision of Albanian law on Claimant. Article 3.1(c) also provides for an alternative in case the Parties do not immediately amend the License Agreements, by indicating "*or, AKBN and the Ministry will immediately undertake other necessary actions* [to eliminate the negative economic effect on Claimant]".

828. As opposed to classical stabilization mechanisms which "*freeze*" the provisions of national law as of the date of the contract,[860] Article 3.1(c) of the License Agreements does not prevent the enactment of legislative changes introduced after the signature of

[856] Rejoinder Brief, paras. 469-471.
[857] **C-2**, **C-3** and **C-4** – License Agreements, Article 3.1(c), p. 15: "*Notwithstanding Section 3.1(b) above, if, as a result thereof, any right or benefit granted (or which is intended to be granted) to LICENSEE under this License Agreement is infringed in some way, a greater obligation or responsibility shall be imposed onto LICENSEE or, in whatever other way the economic benefits accruing to LICENSEE from this License Agreement are negatively influenced by Section 3.1(b), and such an event is not provided for herein, the Parties will immediately amend this License Agreement, or AKBN and the Ministry will immediately undertake other necessary actions to eliminate the negative economic effect on the LICENSEE*".
[858] Reply, para. 154, p. 27.
[859] Rejoinder Brief, paras. 482, p. 130, *et seq*.
[860] **RL-20** – The Guide to Energy Arbitrations – second edition, GAR Chapter: of Taxes and Stabilisation, p. 3.

the License Agreements. Rather, Article 3.1(c) seeks to mitigate the adverse impact of such potential changes on the economic equilibrium of the License Agreements, through negotiations designed to restate the initial economic balance of the License Agreements. It can therefore be considered as an "*economic equilibrium clause*", or "*modern day stabilization clause*".[861]

829. However, Article 3.1(c) also has a stronger, almost "*freezing*" effect due to its mandatory language requiring that AKBN and the Ministry immediately undertake other necessary actions to eliminate the negative economic effect of legislation on Claimant.

830. This language, considered together with the fact that amending the License Agreements would be a complex process, imply that negotiations between the Parties are necessary, so that Article 3.1(c) does not trigger an automatic amendment mechanism. Moreover, this provision does not contain a mere obligation to negotiate since it expressly provides (in mandatory terms) that "*AKBN and the Ministry will immediately undertake other necessary actions* [to eliminate the negative economic effect on Claimant]".

831. The Tribunal is thus of the opinion that, pursuant to Article 3.1(c), AKBN and the MIE have an obligation to hold Claimant harmless for the negative economic effects that Claimant may have suffered.

c) <u>Claimant's right to compensation due to the failure of negotiations between the Parties</u>

832. It is undisputed that the large majority of the effects of tax changes on Claimant were not neutralized.

833. After having carefully reviewed the Parties' submissions and the documentary evidence in the record concerning this issue, the Tribunal has come to the conclusion that no Party can be considered to be at fault for the failure of the negotiations on tax neutralization.

834. The Tribunal notes that the Parties expressed irreconciliable positions in the negotiations - for instance regarding the fact that the PEP&ASP Liability may have exceeded the total value of the taxes paid by Claimant and the consequences of this fact,[862] or as to whether Claimant should have accepted the amendments proposed by Respondents at the May Meeting.[863]

[861] For instance, **RL-20** – The Guide to Energy Arbitrations – second edition, GAR Chapter: of Taxes and Stabilisation, p. 4.

[862] Respondents consider that the tax effects on Claimant should have been set-off against Claimant's outstanding debts *vis-à-vis* Respondents (see above paras. 799 *et seq*.), whereas, in Claimant's opinion, the fact that the PEP&ASP Liability may exceed the total value of the Undue Tax is no answer to Respondents' failure to comply with the "*Fiscal Stabilization Covenant*" (see above para. 740).

[863] Claimant argues that the suggested amendments were unacceptable because they did not provide a full neutralization that it was entitled to (see above para. 728). According to Respondents, this position is unfounded (see above paras. 805 *et seq*.).

835. In addition, as described at length above in the description of the Parties' positions, it is undeniable that Claimant and Respondents took part in negotiations between 2011 and 2017. In particular, they organized several meetings and Advisory Committee Meetings to discuss neutralization options, exchanged letters and draft agreements to the Petroleum Agreements, such as the Amending Agreements dated 27 May 2015[864] and the Settlement Agreement of 1 July 2015 that was supposed to set off the Royalty Tax already paid by Claimant against its PEP&ASP obligations.[865]

836. The following examples show that Respondents did attempt to neutralize the impact of the tax changes on Claimant.

837. First, it appears that the Settlement Agreement was supported by Respondents and that issues arose when the Minister of Finance failed to approve it in September 2015, so that it was never submitted to the Council of Ministers and never implemented.[866]

838. The Tribunal finds that it was not unreasonable for Respondents to solicit the intervention of the Minister of Finance given that the issue at stake was the set-off of tax revenues. Moreover, the Tribunal notes that the Ministry of Finance was part of the working group in charge of drafting the Settlement Agreement and Claimant has not provided evidence that it complained about or ever questioned the Ministry of Finance's participation in this working group.[867]

839. The Tribunal also finds that Respondents cannot be blamed for the Minister of Finance's rejection of the Settlement Agreement, all the more since the Minister of Energy followed up with the Minister of Finance so that it would sign the agreement, which Claimant acknowledges.[868]

840. Second, the Tribunal acknowledges Respondents' efforts to suggest another Royalty Tax setoff mechanism at the May Meeting. There is no reason to suspect that such mechanism was unreasonable or suggested in bad faith by Respondents given that, as

[864] **C-11, C-12** and **C-13** – First Amending Agreements between Albeptrol Sh.A. and TransAtlantic Albania Ltd. in relation to the Petroleum Agreements dated July 20, 2007 for the Development and Production of Petroleum in the Oilfields; **R-120** – First Amending Agreement to the Petroleum Agreement dated 27 May 2015 for the Cakran-Mollaj oilfield; **R-121** – First Amending Agreement to the Petroleum Agreement dated 27 May 2015 for the Gorisht-Kocul oilfield; **R-122** – First Amending Agreement to the Petroleum Agreement dated 27 May 2015 for the Ballsh-Hekal oilfield.

[865] **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015; **R-123** – Agreement for Settlement of the mutual obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), The Ministry of Finance and The Ministry of Economic Development, Tourism, Trade and Entrepreneurship of July 2015. See also paras. 475-476, pp. 120-121.

[866] **R-124** – Letter from Ministry of Finance to Ministry of Energy and Industry dated 17 September 2015.

[867] Statement of Claim, para. 144, p. 25.

[868] Statement of Claim, paras. 145-146, p. 25: "*The Minister of Energy and Industry urged his colleagues to sign the Settlement Agreement and expected the Council of Ministers to approve the Settlement Agreement*"; **C-53** – Letter No. 5443 from Minister of Energy and Industry to Minister of Economic Development, Tourism, Trade and Entrepreneurship dated 31 July 2015 and **C-54** – Letter No. 5443/5 from the Minister of Energy and Industry to the Minister of Finance dated 8 September 2015.

explained by Respondents, [869] it was similar to a mechanism offered to and accepted by another company, Bankers Petroleum Albania Ltd.[870]

841. With regard to Claimant, the Tribunal also finds that it did attempt to negotiate with Respondents to neutralize the effects of the tax changes and cannot be blamed for the failure of the negotiations.

842. Pursuant to Article 3.1(c) of the License Agreements, Claimant had the right to have the full negative economic effect of taxes eliminated. Therefore, the Tribunal finds that Claimant cannot be held responsible for refusing the amendments suggested at the May Meeting after the Ministry of Finance refused to sign the Settlement Agreement if it considered that such amendments did not fully eliminate the negative effects of taxes. The fact that the foreign oil company BPAL accepted a similar proposal does not mean that Claimant was also obliged to accept it, contrary to what Respondents argue.[871]

843. Moreover, it appears that, after refusing to adopt the mechanism suggested by Respondents, Claimant did attempt to continue negotiating with them, for instance by trying to discuss the Ministry of Finance's comments on the Settlement Agreeement[872] or by writing to Respondents on the matter.[873]

844. In conclusion, the Tribunal is of the opinion that it cannot be determined which Party is ultimately responsible for the failure of negotiations.

845. The Parties disagree on the consequences of the failure of the negotiations, with Claimant contending that Article 3.1(c) gives rise to a payment claim, and Respondents arguing that it does not.

846. As indicated above, Article 3.1(c) is not a mere renegotiation clause such as the balancing clauses provided as examples in the exhibits submitted by Respondents.[874] This is because, in addition to the obligation for the Parties to amend the License Agreement, Article 3.1(c) also contains the obligation for AKBN and the Ministry (which are both Respondents in this case) to "*immediately undertake other necessary actions to eliminate the negative economic effect*" of tax changes on Claimant, in case of failure to amend the License Agreements.

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[869] See para. 799 above.
[870] **C-70** – Minutes of Meeting between TransAtlantic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016; First Witness Statement of Mark Crawford, para. 89, pp. 20-21.
[871] Statement of Defence, paras. 357-358, p. 95, para. 478, p. 121.
[872] See above para. 731, Statement of Claim, para. 178, p. 31, referring to **C-75** – Letter No. 314/16 from TransAtlantic to the Minister of Finance dated 24 October 2016.
[873] See above para. 733, Statement of Claim, para. 180, p. 31, referring to **C-77** – Letter from Williams & Mullen to the Prime Minister of Albania, the Minister of Energy and Industry and the Speaker of the Assembly of Albania dated 28 November 2016, exhibits excluded.
[874] **RL-20** – The guide to energy arbitrations – second edition, GAR Chapter: of Taxes and Stabilisation.

847. Therefore, Respondents have the obligation to hold harmless Claimant or, to put it in other words, Claimant has the right to be compensated by AKBN and the MIE for the negative economic effect of the tax changes that it suffered.

848. The terms of Claimant's right to compensation are governed by Swiss law pursuant to Articles 26.1 of the License Agreements which provide: "*all questions with respect to the interpretation or enforcement of, or the rights and obligations of the Parties under, this License Agreement and which are the subject of arbitration in accordance with ARTICLE 25* […] *shall be governed by the laws of Switzerland in the case of a dispute subject to resolution under ARTICLE 25, Section 25.3*", *i.e.* between AKBN, Albpetrol and a Foreign Partner.[875]

849. In the present case, Respondents did not comply with their obligation to compensate Claimant and the License Agreements can no longer be amended pursuant to their Article 3.1(c) because they are no longer in effect.[876] In such a case, under Swiss law, when a claim for specific performance cannot be granted, the original claim for specific performance is "*transformed into a secondary claim* […] *for damages*".[877]

850. In these circumstances, the Tribunal, drawing the consequences of the non-performance by AKBN and the MIE of their obligation to undertake immediately the necessary actions in order to eliminate the negative economic effects of such changes on Claimant, has the power to grant such damages to Claimant. Contrary to what Respondents argue,[878] these damages are not a compensation for lost profit but they represent the excess amount of taxes paid by Claimant that should have been eliminated due to AKBN's and the MIE's obligation under Article 3.1(c) of the License Agreements.

851. Having established that Claimant is entitled to obtain damages on the ground of Article 3.1(c) of the License Agreements, the amount of damages potentially granted to Claimant will be analysed in section 7.1. below.

6.2. <u>Claimant's allegation that Respondents wrongfully confiscated the Cakran and Gorisht Oilfields</u>

A. <u>Claimant's position</u>

852. The Tribunal will in turn lay out Claimant's statement of facts on the alleged wrongful confiscation (1.), Claimant's responses to specific points raised by Respondents on the

[875] **C-2**, **C-3** and **C-4** – License Agreements, Article 26.1.
[876] See the Tribunal's decision on this point at para. 1263 below.
[877] **CL-21** – Schwenzer, Schweizerisches Obligationenrecht Allgemeiner Teil (7th ed. 2016), para. 64.20: "*Also in case of impossibility attributable to the debtor there is* no claim for specific performance since something impossible cannot be requested [citation omitted]. The original claim for specific *performance of the claimant is however transformed into a* secondary claim, *in a claim for* damages, *whereby the contractual relationship is preserved. The damages claim supersedes the original claim [citations omitted]. The following consequences follow from this: […]*".
[878] See para. 808 above.

alleged material breaches (2.), Claimant's arguments on the alleged wrongful termination of the Cakran and Gorisht License Agreements (3.), and its rights to damages in that respect (4.).

1. Claimant's statement of facts regarding the wrongful confiscations by Respondents

853. Claimant points out that under the PSAs, (i) Albpetrol was required to take delivery of its share of production at custody transfer points in respect of each Oilfield (hereinafter the "**Delivery Point**")[879] and (ii) Claimant was required to deliver PEP in-kind to Albpetrol,[880] whereas the ASP was to be lifted in oil and delivered in kind and/or cash to Albpetrol in the Contract Area.[881]

854. According to Claimant, no mechanism exists under the PSAs to deal with a situation where Albpetrol fails or refuses to take PEP, although the Petroleum Agreements contemplate that ASP can be satisfied in kind or in cash. The Accounting Procedure only contemplates the costs of producing and delivering PEP&ASP to Albpetrol as Petroleum Costs, whereas storage costs are not included.[882]

855. Claimant argues that certain liabilities for delivery of PEP&ASP obligations arose in respect of the Cakran Oilfield and the Gorisht Oilfield, "*primarily as a result of Albpetrol breaching its duties under the PSAs to take delivery of its share of production*".[883]

856. In particular, Claimant argues that from 2010 to 2015, it repeatedly wrote to Albpetrol about the need for it to lift its PEP&ASP entitlements so that Claimant's storage facilities would not be at full capacity and so that it could maintain full production at each of the Oilfields.[884] On occasion, Albpetrol claimed that its facilities and equipment were non-functional and needed repairs or that its own storage facilities were full.[885] In

[879] Statement of Claim, para. 125, p. 22, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 1.1, pp. 6 *et seq.*, Article 10.1, p. 36; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 1.26.3, p. 5, Article 9.2, pp. 19-20.
[880] Statement of Claim, para. 126, p. 22, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 3.5.1, 3.5.2, pp. 12-13.
[881] Statement of Claim, para. 126, p. 22, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 9.2, pp. 19-20.
[882] Statement of Claim, para. 128, p. 22.
[883] Statement of Claim, para. 127, p. 22.
[884] Statement of Claim, para. 129, p. 22, referring to, for instance, **C-28** – Letter No. 616/2010 from Stream to Albpetrol dated 21 May 2010; **C-29** – Letter No. 18/11 from Stream to Albpetrol dated 25 January 2011; **C-30** – Letter No. 502/11 from Stream to Albpetrol dated 29 August 2011; **C-31** – Letter No. 659/11 from Stream to Albpetrol and AKBN dated 3 October 2011; **C-32** – Letter No. 734/11 from Stream to Albpetrol dated 9 November 2011; **C-33** – Letter No. 736/11 from Stream to Albpetrol dated 11 November 2011; **C-34** – Letter No. 756/11 from Stream to Albpetrol and AKBN dated 16 November 2011; **C-35** – Letter No. 57/12 from Stream to Albpetrol dated 30 January 2012; **C-36** – Letter No. 78/12 from Stream to Albpetrol dated 13 February 2012; **C-37** – Letter No. 88/12 from Stream to Albpetrol and AKBN dated 15 February 2012; **C-38** – Letter No. 100/12 from Stream to Albpetrol dated 21 February 2012; **C-39** – Letter No. 132/12 from Stream to Albpetrol and AKBN dated 7 March 2012; **C-40** – Letter No. 154/12 from Stream to Albpetrol and AKBN dated 16 March 2012; **C-41** – Letter No. 235/15 from TransAtlantic to Albpetrol dated 1 September 2015.
[885] Statement of Claim, para. 129, p. 22, referring to **C-42** – Letter No. 623/1 from Albpetrol to Stream dated 20 March 2012; **C-43** – Letter No. 214 from Albpetrol to Stream et al. dated 8 January 2013.

some cases, Albpetrol would be asked to confirm its ability to receive deliveries of the PEP&ASP obligations under a processing schedule, but then provided no confirmation that it could lift the oil volumes.[886]

857. Claimant contends that, on 5 January 2012, it advised Albpetrol that its extraction operations had been stalled due to Albpetrol's inability to receive PEP&ASP because its storage tanks were full,[887] and suggested that Claimant and Albpetrol enter into a delivery schedule to avoid incurring additional PEP&ASP obligations.[888]

858. Claimant argues that, apart from periodically interrupting production, the main effect of Albpetrol's failure to lift its share of production was that, due to limited storage capacity, Claimant was forced to sell petroleum in order to be able to continue to produce the Oilfields,[889] with the result that Claimant's in-kind obligation to Albpetrol was increased through no fault of its own.[890]

859. Claimant states that on or about 5 April 2011, it declared a *force majeure* in respect of the Cakran and Gorisht Oilfields between 25 March and the end of May 2011 due to a power outage caused by Albpetrol's failure to pay its obligations to an electrical company.[891]

860. Claimant contends that during the *force majeure*, in accordance with the PSAs, the Contractor was relieved of its obligations to Albpetrol, including any obligation to provide Albpetrol with its share of PEP&ASP.[892] Claimant informed Albpetrol that it would set off its future share of production against the cost of the production lost as a result of *force majeure*.[893]

861. According to Claimant, as the PEP&ASP Liability and obligations of Albpetrol, AKBN and the MEI pursuant to the Fiscal Stabilization Covenant continued to go unresolved, in 2013, Albpetrol and Claimant finally prepared draft amendments to the PSAs that would neutralize the Royalty Tax and reduce the PEP&ASP Liability, which were provided to AKBN and the MEI but were not approved.[894]

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[886] Statement of Claim, para. 129, p. 22, referring to **C-44** – Letter No. 203 from TransAtlantic to Albpetrol dated 6 August 2015.
[887] Statement of Claim, para. 130, p. 23, referring to **C-23** – Letter No. 5/11 from Stream to Albpetrol dated 5 January 2012.
[888] Statement of Claim, para. 130, p. 23.
[889] Statement of Claim, para. 131, p. 23, referring to First Witness Statement of Mark Crawford, para. 63, pp. 14-15.
[890] Statement of Claim, para. 131, p. 23.
[891] Statement of Claim, para. 132, p. 23, referring to **C-45** – Letter No. 86/11 from Stream to Albpetrol dated 5 April 2011; **C-46** – Letter No. 160/11 from Stream to Albpetrol dated 17 May 2011.
[892] Statement of Claim, para. 133, p. 23, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 23, p. 60; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 17, pp. 27-28.
[893] Statement of Claim, para. 133, p. 23, referring to **C-47** – Letter No. 190/11 from Stream to Albpetrol dated 26 May 2011.
[894] Statement of Claim, para. 134, p. 23, referring to **C-49** – Minutes of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013; **C-50** – Resolutions of the Tenth Advisory Committee Meeting dated 24 July 2013, unsigned by Albpetrol.

862. Claimant argues that, on 21 November 2013, Claimant and Albpetrol agreed that it would take too long for Albpetrol to lift its share of petroleum and that a cash payment to settle the PEP&ASP Liability would resolve the issue more quickly, whereas the draft amendments were still before AKBN and the MEI.[895]

863. Claimant explains that on 28 February 2014, Claimant and Albpetrol negotiated an agreement whereby all of Claimant's PEP&ASP Liability to the end of 2013 in respect of the Cakran Oilfield, Gorisht Oilfield and the Delvina gas field were converted into a cash value amount of USD 15,348,169.00 (hereinafter "**the Pre-2014 Liabilities Cash Conversion Agreement**"), excluding the disputed *force majeure* quantities and certain quantities of oil classified as immovable. The Delvina gas field portion of the conversion was USD 429,920.19.[896]

864. Claimant further indicates that on 29 December 2014, since PEP&ASP imbalances were tending to arise as a result of Albpetrol's failure to take delivery of its entitlements, the Council of Ministers passed Decision No. 947 (hereinafter, "**DCM 947**"), which (i) authorized Albpetrol to take in cash the corresponding value of its PEP&ASP under the Petroleum Agreements, (ii) directed Albpetrol to negotiate agreements with contractors in order to settle in-kind obligations in cash and (iii) stated that the MEI and Ministry of Finance would provide detailed regulations to facilitate the cash payment process.[897]

865. Claimant contends that on 27 February 2015, Claimant, Albpetrol, AKBN and the MEI met to discuss the PEP&ASP Liability and negotiate possible actions to be taken in order to satisfy the Fiscal Stabilization Covenant.[898]

866. Claimant asserts that, on 26 May 2015, the Government enacted a procedure ("**Joint Instruction No. 1**") prescribing the method for calculating the in-cash value of PEP&ASP, permitting deductions from the calculated in-cash value to address the costs incurred by contractors handling the PEP&ASP volumes beyond the Delivery Points, invoicing procedures, and procedures for payment of invoices.[899] The process under

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[895] Statement of Claim, para. 135, p. 23, referring to **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013.

[896] Statement of Claim, para. 136, pp. 23-24, referring to **C-51** – Agreement for the Payment of the Crude Oil Obligation for the Non-Delivered Deemed Production (PEP) and Albpetrol Share of Production (ASP) from the Effective Date Until December 31, 2013 for Cakran-Mollaj, Gorisht-Kocul and Delvina Fields dated 28 February 2014, unsigned.

[897] Statement of Claim, paras. 137-138, p. 24, referring to **CL-9** – Council of Ministers Decision No. 947 "*On the authorization of Albpetrol Sh.a. to take in cash the due value of the Deemed Production and Albpetrol Share of Production in compliance with the Petroleum Agreement signed between the parties for the "Development and Production of Hydrocarbons from the existing gas and oil fields*" dated 29.12.2014.

[898] Statement of Claim, para. 139, p. 24, referring to **C-52** – Letter No. 4170 from the Ministry of Energy and Industry to Albpetrol and TransAtlantic dated 26 May 2015.

[899] Statement of Claim, para. 140, p. 24, referring to **CL-10** – *Joint Instruction No. 1* of the MEI and the Ministry of Finance, "*Rules and Procedures of Receiving Monetary Value for the Corresponding Amount of the Production Quantity and the Albpetrol Share*" dated 26.05.2015.

Joint Instruction No. 1 was to result in cash payment agreements negotiated between Albpetrol and contractors.[900]

867. Claimant further argues that, on 2 May 2016, it wrote to Albpetrol noting that it had exceeded its deliveries of monthly PEP&ASP obligations for the Cakran Oilfield in the month of April, but that it was concerned that Albpetrol had begun obstructing its sales of production,[901] to which Albpetrol replied that the MEI had ordered to block sales of petroleum by Claimant until the PEP&ASP Liability was satisfied.[902]

868. Claimant contends that throughout 2016 and up to August 2016, it had accrued no additional PEP&ASP obligations for the three Oilfields combined, as it had over-delivered from the Cakran Oilfield and Ballsh Oilfield respectively in the amounts of 843.7 tons and 1,700.94 tons, while under-delivering from the Gorisht Oilfield by 989.33 tons.[903] Over this period, Claimant actually reduced its obligations by 1,555.31 tons.[904]

869. Claimant contends that (i) pursuant to the Settlement Agreement, Claimant and Albpetrol had agreed to set off Claimant's PEP&ASP Liability from the Effective Date of the PSAs to 31 December 2014 against the Royalty Tax paid by Claimant, for a net amount payable by Claimant to Albpetrol of USD 6,090,969.43, and (ii) from 1 January 2015 to 31 December 2016, Claimant had cumulative PEP&ASP obligations in respect of each of the Oilfields as follows:[905]

2015-2016	PEP+ASP	Delivered	Balance	Oil in Custody[906]	Force Majeure[907]	Pre 2013[908]	Total
Ballsh	2,629.57	9,310.50	6,680.93			3,637.73	10,318.66
Cakran	15,913.68	16,843.83	930.15	1,048.00	3,044.60		5,022.75
Gorisht	32,010.81	22,295.24	-9,715.57	2,402.82	1,567.20		-5,745.55

870. Claimant argues that, on 10 February 2016, almost simultaneously with GBC BVI's acquisition of Claimant, Albpetrol purported to issue to Claimant a notice of material breach of the Petroleum Agreements for the Cakran and the Gorisht Oilfields (the "**First Notice**") which (i) stated that the breach was a result of Claimant's failure to meet its PEP&ASP obligations, without setting out what those were, and (ii) asked Claimant to

[900] Statement of Claim, para. 140, p. 24.
[901] Statement of Claim, para. 148, p. 25, referring to **C-55** – Emails from Fatbardh Ademi, TransAtlantic to Endri Puka, Albpetrol dated 2 May 2016 and 3 May 2016.
[902] Statement of Claim, para. 149, p. 26, referring to **C-55** – Emails from Fatbardh Ademi, TransAtlantic to Endri Puka, Albpetrol dated 2 May 2016 and 3 May 2016.
[903] Statement of Claim, para. 151, p. 26, referring to First Witness Statement of Mark Crawford, para. 65, p. 15.
[904] Statement of Claim, para. 151, p. 26.
[905] Statement of Claim, para. 152, p. 26, referring to Deloitte Lost Profits Report, Schedule 29.
[906] "*See paragraphs 189 - 190, below*".
[907] "*Letter No. 243/15 from TransAtlantic to Albpetrol dated 11 September 2015,* supra ***[Exhibit C-48]***".
[908] "*Settlement Agreement,* supra, *Annex 1.2* ***[Exhibit C-14]***".

commence rectifying the alleged breach but did not explain how this could be accomplished.[909]

871. Claimant argues that, on 12 February 2016, it disputed the assertion that a material breach of its fundamental duties and obligations under the Petroleum Agreements had occurred, stating that despite low and declining oil prices it was still able to provide Albpetrol with over 91% of its PEP&ASP obligations for 2015, and that it noted that the annual delivery deficit of PEP&ASP obligations had shrunk substantially each year since 2013.[910]

872. As indicated above, Claimant states that on 26 February 2016, Albpetrol replied, rejecting the setoff mechanism established by the Settlement Agreement, demanding that Claimant comply with its cumulative PEP&ASP obligations since the effective date of the PSAs and raising various other concerns regarding utility payments for services it provided to the Oilfields, production rates, waste water disposal procedures, ABPs, quarterly Petroleum Cost reports, annual training bonuses and an audit of Petroleum Costs stretching from 2012 to 2013.[911]

873. Claimant then contends that, on 7 March 2016, Albpetrol reissued the notice of material breach of the Petroleum Agreements for the Cakran and the Gorisht Oilfields (the "**Second Notice**" and together with the First Notice, the "**Breach Notices**"), which identified the failure by Claimant to meet its PEP&ASP obligations as the purported reason for breach and requested that Claimant commence rectifying such alleged breach within six months. According to Claimant, "*no guidance was given as to how to substantially rectify the alleged breach. It mentioned none of the secondary concerns raised in Albpetrol's letter of 26 February 2016*".[912]

874. Claimant argues that, on 3 May 2016, it wrote to the MEI regarding the Breach Notices and to raise concerns about Albpetrol's announcement to the media that it had begun the procedure to terminate the Petroleum Agreements for the Cakran and the Gorisht Oilfields.[913]

875. As indicated above, Claimant contends that during the May Meeting with the MEI and Albpetrol, the MEI detailed further amendments to the Amending Agreements and the Settlement Agreements which would materially increase Claimant's payment obligation

[909] Statement of Claim, para. 159, p. 28, referring to **C-15** – Letter from Albpetrol Sh.A. regarding Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated February 10, 2016.
[910] Statement of Claim, para. 160, p. 28, referring to **C-63** – Letter No. 34/16 from TransAtlantic to Albpetrol dated 12 February 2016.
[911] Statement of Claim, para. 161, p. 28, referring to **C-64** – Letter No. 813/2 from Albpetrol to TransAtlantic dated 26 February 2016.
[912] Statement of Claim, para. 162, p. 28, referring to **C-16** – Letter from Albpetrol Sh.A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016.
[913] Statement of Claim, para. 166, p. 29, referring to **C-69** – Letter No. 147/16 from TransAtlantic to Albpetrol dated 3 May 2016.

in order to settle the PEP&ASP Liability.[914] In the May Meeting, Claimant explained that it was not prepared to agree to the requested amendments but would continue discussions in good faith with Respondents in order to resolve the matter.[915]

876. According to Claimant, at the May Meeting, the MEI also demanded that Claimant provide a bank guarantee in favour of Albpetrol in respect of the PEP&ASP Liability (the "**Guarantee**"), which Claimant agreed to but indicated that it required a specific value, the terms and conditions of the Guarantee, and a written assurance from Albpetrol that the Guarantee would "*arrest*" the purported Breach Notices.[916]

877. Claimant states that on or about 30 June 2016, representatives of Claimant had another meeting with Albpetrol and the MEI (the "**June Meeting**"), where (i) the MEI demanded that Claimant provide the Guarantee and (ii) Claimant reiterated that it needed a specific invoiced value, the terms and conditions of the Guarantee, and a written assurance that the Guarantee would arrest the purported Breach Notices. Albpetrol agreed to provide this and acknowledged that the PEP&ASP Liability had been kept to acceptable limits.[917]

878. Claimant argues that on 13 July 2016, despite the commitment to provide Claimant with the requested information concerning the Guarantee, Albpetrol commenced a debt claim against Claimant in the Albanian courts for approximately USD 13 million of the PEP&ASP Liability[918] and that, as a result, Claimant's funds were frozen in its bank accounts.

879. Claimant states that, on 19 September 2016, Albpetrol issued Termination Notices to Claimant in respect of the Cakran and Gorisht Petroleum Agreements, alleging that Claimant had not substantially rectified the material breaches alleged in the Breach Notices and that, as a result, Albpetrol would seek to terminate the two Petroleum Agreements in 120 days. In particular, Albpetrol alleged that as of the end of August 2016, Claimant had not reduced the PEP&ASP Liability in relation to the Cakran Oilfield and that the PEP&ASP Liability in relation to the Gorisht Oilfield had worsened since December 2015.[919]

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[914] Statement of Claim, para. 167, p. 29, referring to **C-70** – Minutes of Meeting between TransAtlantic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016; First Witness Statement of Mark Crawford, para. 89, pp. 20-21.

[915] Statement of Claim, para. 168, p. 29, referring to First Witness Statement of Mark Crawford, para. 90, p. 21.

[916] Statement of Claim, para. 169, p. 29, referring to **C-70** – Minutes of Meeting between TransAtlantic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016; First Witness Statement of Mark Crawford, para. 91, p. 21.

[917] Statement of Claim, para. 170, p. 29, referring to First Witness Statement of Mark Crawford, para. 92, p. 21.

[918] Statement of Claim, para. 171, pp. 29-30, referring to **C-71** – Notification of the National Chamber of Private Court Executioners dated 24 June 2016.

[919] Statement of Claim, para. 175, p. 30, referring to **C-17** – Letter from Albpetrol Sh.A. regarding Notice of Termination of the Petroleum Agreement for Cakran-Mollaj Oilfield dated September 19, 2016 (English

880. According to Claimant, in the period from 1 January 2014 to 31 August 2016, the total PEP&ASP Liability for the Oilfields equaled 14,782.79 tons,[920] but throughout 2016 and up to the end of August 2016, Claimant had accrued no additional PEP&ASP obligations for the three Oilfields combined. Claimant had over-delivered from the Cakran and Ballsh Oilfields in the amounts of 843.7 tons and 1,700.94, while under-delivering from the Gorisht Oilfield by only 989.33 tons, so that over this period of time, Claimant actually reduced its obligations by 1,555.31 tons.[921]

881. Claimant contends that, on 26 September 2016, just days after Albpetrol issued "*what should have been a confidential notice of termination*" to Claimant, Austrian company Jurimex Kommerz Transit Ges.m.b.H. ("**Jurimex**") wrote to Albpetrol expressing interest in entering into petroleum agreements in respect of the Gorisht and Cakran Oilfields, to which Albpetrol replied that while it had issued the Termination Notices, reconciliation with Claimant was still possible.[922]

882. Claimant further argues that on 28 November 2016, Claimant's counsel issued a letter to resolve the situation regarding the PEP&ASP Liability, the obligations of Respondents pursuant to the Fiscal Stabilization Covenant, the Settlement Agreement and the Termination Notices and, in particular, noted that Claimant was actually owed a net amount of USD 228,854 if the Undue Tax Paid were set off against the PEP&ASP Liability.[923]

883. As indicated above, Claimant states that on 6 December 2016, the Minister of Finance suggested that the MEI establish a working group to examine the technical elements of the Settlement Agreement[924] and, on 21 December 2016, the MEI acknowledged that it was still discussing the neutralization mechanism of the Settlement Agreement, but also demanded that Claimant immediately pay its PEP&ASP obligations and provide the Guarantee.[925]

884. Claimant also contends that, on 11 January 2017, Albpetrol (i) acknowledged receipt of Claimant's VAT reimbursements that were seized and transferred to Albpetrol by the Albanian tax authorities, which amounted to approximately USD 2.42 million, (ii) acknowledged that it had received approximately 15,000 tons of crude oil from Claimant

translation); **C-18** – Letter from Albpetrol Sh.A. regarding Notice of Termination of the Petroleum Agreement for Gorisht-Kocul Oilfield dated September 19, 2016 (English translation).

[920] Statement of Claim, para. 176, p. 30, referring to Deloitte Lost Profits Report, Schedule 29; First Witness Statement of Mark Crawford, para. 65, p. 15.

[921] Statement of Claim, para. 176, p. 30, referring to First Witness Statement of Mark Crawford, para. 65, p. 15.

[922] Statement of Claim, para. 177, p. 30, referring to **C-74** – Letter No. 8461 from Albpetrol to the MEI and Jurimex dated 30 December 2016.

[923] Statement of Claim, para. 180, p. 31, referring to **C-77** – Letter from Williams & Mullen to the Prime Minister of Albania, the Minister of Energy and Industry and the Speaker of the Assembly of Albania dated 28 November 2016, exhibits excluded.

[924] Statement of Claim, para. 181, p. 31, referring to **C-78** – Letter No. 14554/1 Prot. from Ministry of Finance to MEI et al. dated 6 December 2016.

[925] Statement of Claim, para. 182, p. 31, referring to **C-79** – Letter No. 7530 from the Minister of Energy to TransAtlantic dated 21 December 2016.

in respect of the Ballsh Field and (iii) sought payment in the amount of USD 5,248,413.89 for 2014 PEP&ASP obligations and USD 13,856,932 for the pre-2014 PEP&ASP obligations previously agreed to in the Settlement Agreement. Albpetrol did not acknowledge the amounts paid by Claimant in respect of the Royalty Tax, nor the value of the over deliveries from Ballsh, nor the fact that the liabilities in respect of the Delvina gas field had been transferred, and did not provide the requested information in respect of the Guarantee.[926]

885. Claimant argues that, on 12 January 2017, it replied to these oversights, indicating that (i) the Delvina amounts, the amounts relating to *force majeure* in respect of the Cakran and Gorisht Oilfields and the Ballsh Oilfield oversupply should be subtracted from the amounts sought by Albpetrol, in accordance with the Settlement Agreement, (ii) no invoice had yet been issued by Albpetrol in relation to the 2014 obligations claimed as due and owing by Albpetrol and therefore payment by GBC had not been made possible, and (iii) Claimant indicated that it was ready at any time to conclude its obligations under the Settlement Agreements once invoices were provided by Albpetrol.[927]

886. Claimant further states that, on 13 January 2017, it told Albpetrol that it had attempted to pick up the invoice for the amount of USD 5,248,413.89 but that the invoice was not available.[928] On 14 January 2017, Claimant noted that Delvina gas field liabilities have been included by Albpetrol in respect of the USD 5,248,413.89 amount, which ought to have been removed since those assets and liabilities were divested on 22 August 2016.[929]

887. Claimant denies that on 15 and/or 16 and 17 January 2017, its director Mr. Ademi lied about the payment of its debts, as argued by Respondents,[930] and states that Mr. Ademi explained to a bailiff retained by Respondents that Claimant had netted off amounts in respect of the Royalty Taxes against the PEP&ASP Liabilities and plead to the bailiff to lift his seizures of Claimant's accounts.[931]

888. According to Claimant, on 17 January 2017, Albpetrol agreed that if the Cash Payment Agreements were executed and followed through, it would halt the terminations of the Cakran and Gorisht Oilfields Petroleum Agreements because any remaining PEP&ASP obligations to be delivered thereafter, in the amount of 15,619.40 tons of petroleum,

[926] Statement of Claim, para. 185, pp. 31-32, referring to **C-81** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 11 January 2017.
[927] Statement of Claim, para. 186, p. 32, referring to **C-82** – Letter No. 13/17 from TransAtlantic to Albpetrol et al. dated 12 January 2017.
[928] Statement of Claim, para. 187, p. 32, referring to **C-83** – Letter No. 14/17 from TransAtlantic to Albpetrol dated 13 January 2017.
[929] Statement of Claim, para. 188, p. 32, referring to **C-84** – Email from Fatbardh Ademi, TransAtlantic to Endri Puka, Albpetrol, dated 14 January 2017.
[930] Statement of Defence, paras. 260-261, p. 75, referring to **R-102** – Letter from Mr. Fatbardh Ademi (the Claimant's director) to Mr. Vako (the court bailiff) dated 16 January 2017; **R-103** – Letter from Mr. Fatbardh Ademi (the Claimant's director) to Mr. Vako (the court bailiff) dated 17 January 2017.
[931] Reply, para. 195, p. 33.

would be comparable to excess amounts of petroleum delivered by Claimant from the Ballsh Oilfield in the approximate amount of 15,00 tons.[932]

889. Claimant claims that after attempting to pick up the invoice again, Claimant noted that the invoice had not been prepared and responded that the remaining in-kind liability should only be 10,207.60 tons of petroleum because a portion was still disputed pursuant to the *force majeure* occurrence from March to May 2011 and some of the oil was immovable.[933]

890. Claimant states that Claimant and Albpetrol executed two Cash Payment Agreements in January 2017 (the "**January 2017 Cash Payment Agreements**"): (i) on 19 January 2017, the Cash Payment Agreement in respect of all Gorisht Oilfield PEP&ASP obligations in 2015 in the amount of USD 875,119.30[934] and (ii) on 20 January 2017, the Cash Payment Agreement in respect of all Cakran Oilfield PEP&ASP obligations in 2014 in the amount of USD 1,392,124.80, specifying that Albpetrol had decided to take its Cakran Oilfield PEP&ASP in kind for 2015.[935]

891. Claimant argues that given that, pursuant to each Cash Payment Agreement, Albpetrol was to invoice Claimant for the cash equivalent value of the undelivered crude oil volumes in the relevant time periods, after which Claimant would pay within a prescribed time, Albpetrol invoiced Claimant in the amount of USD 875,119.30 and USD 1,392,124.80, totaling USD 2,267,244.10.[936] Payments were due on 29 and 30 January 2017 but each Cash Payment Agreement is directed by DCM 947 and Joint Instruction No. 1 to include VAT of 20%, meaning that Claimant is entitled to neutralization totaling USD 377,874 of the USD 2,267,244.10 amount.[937]

892. Claimant contends that it also invoiced Albpetrol in respect of the transportation and related costs incurred in connection with the sale of the PEP&ASP volumes that resulted in the cash conversion liabilities, totaling USD 80,184 for the Cakran Oilfield and USD 60,104.40 for the Gorisht Oilfield.[938] Albpetrol never paid these amounts.[939]

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[932] Statement of Claim, para. 189, p. 32, referring to **C-85** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 17 January 2017.
[933] Statement of Claim, para. 190, p. 32, referring to **C-86** – Email from Fatbardh Ademi, TransAtlantic to Endri Puka, Albpetrol, dated 17 January 2017.
[934] Statement of Claim, para. 191, p. 32, referring to **C-87** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Gorisht-Kocul Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 19 January 2017.
[935] Statement of Claim, para. 192, pp. 32-33, referring to **C-88** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Cakran-Mollaj Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 20 January 2017.
[936] Statement of Claim, paras. 193-194, p. 33, referring to **C-89** – Invoice Nos. 8 and 10 from Albpetrol to TransAtlantic, dated 19 and 20 January 2017.
[937] Statement of Claim, para. 194, p. 33.
[938] Statement of Claim, para. 195, p. 33, referring to **C-90** – Invoice Nos. 6 and 8 from TransAtlantic to Albpetrol, dated 19 and 20 January 2017.
[939] Statement of Claim, para. 195, p. 33.

893. Claimant argues that, on 23 January 2017, it requested that Albpetrol continue to negotiate in order to conclude a Cash Payment for the Gorisht Oilfield in respect of the 2014 obligations, but that no response was received.[940]

894. Claimant argues that despite negotiations amongst Claimant and Respondents between 28 November 2016 and 20 January 2017 to finally settle the PEP&ASP Liability, including Claimant signing two Cash Payment Agreements for the PEP&ASP obligations presented to it by Albpetrol, and despite assurances from Albpetrol that it would not terminate the Petroleum Agreements, on 20 January 2017, Albpetrol sent a letter to the MEI and AKBN saying that it had concluded that Claimant had not rectified or commenced to substantially rectify the material breach.[941]

895. According to Claimant, on 24 January 2017, the MEI issued the Confiscation Order in response,[942] pursuant to which Albpetrol and AKBN, along with Albania State police, carried out the Wrongful Confiscations by seizing the Gorisht Oilfield on 26 January 2017 and the Cakran Oifield on 1 February 2017.[943]

896. Claimant states that, on 26 January 2017, Albpetrol issued a statement to the media announcing that it had seized the Gorisht Oilfield and would shortly thereafter seize the Cakran Oilfield under orders of the MEI, and indicating that the reason for the seizures was that Claimant had outstanding obligations to Albpetrol in the amount of USD 20,000,000, incurred substantially between 2008 and 2013.[944]

897. Claimant argues that on 27 January 2017, its counsel requested that Government officials honour the Fiscal Stabilization Covenant, particularly the Cash Payment Agreements entered into mere days before.[945]

898. Claimant further argues that on 31 January 2017, Albpetrol demanded payment of the invoices in respect of the two Cash Payment Agreements signed by Claimant, the amount of which had already been paid in respect of the redirection of Claimant's VAT reimbursement, according to Claimant.[946]

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[940] Statement of Claim, para. 196, p. 33, referring to **C-91** – Letter No. 27/17 from TransAtlantic to Albpetrol dated 23 January 2017.
[941] Statement of Claim, para. 197, p. 33, referring to **C-19** – Letter from the Ministry of Energy and Industry regarding Confiscation of the Cakran-Mollaj and Gorisht-Kocul Oilfields (English translation).
[942] Statement of Claim, para. 198, p. 33, referring to **C-19** – Letter from the Ministry of Energy and Industry regarding Confiscation of the Cakran-Mollaj and Gorisht-Kocul Oilfields (English translation).
[943] Statement of Claim, para. 199, p. 33, referring to First Witness Statement of Mark Crawford, paras. 111-112, p. 25; First Witness Statement of Kreshnik Grezda, paras. 29-30, p. 7.
[944] Statement of Claim, para. 200, p. 34, referring to **C-92** – Albpetrol Press Statement, "Proceedings for taking back the Gorisht-Kocul and Cakran-Mollaj oilfields" dated 26 January 2017.
[945] Statement of Claim, para. 201, p. 34, referring to **C-93** – Letter from Williams Mullen to the Prime Minister, the Minister of Energy and Industry and the Speaker of the Assembly of Albania dated 27 January 2017, exhibits excluded.
[946] Statement of Claim, para. 202, p. 34, referring to **C-94** – Email from Endri Puka, Albpetrol to Fatbardh Ademi, TransAtlantic dated 31 January 2017.

899. Claimant states that, on 1 February 2017, Claimant wrote to AKBN, indicating that it had entered into various agreements with Albpetrol to settle the PEP&ASP obligations and requested that AKBN ask the MEI to cancel the Confiscation Order,[947] to which AKBN responded that it would not get involved and asked Claimant to resolve the situation in accordance with the Petroleum Agreements.[948]

900. Claimant contends that it has received no further response from Albpetrol, AKBN or the MEI in respect of the Cakran and Gorisht Oilfields, which are currently operated by Albpetrol.[949]

901. Claimant's position is that at no time have the Cakran and Gorisht License Agreements been terminated by any of the Respondents.[950]

2. Claimant's responses to specific points raised by Respondents on Claimant's alleged material breaches

902. First, Claimant objects to Respondents' argument[951] that it owes or has ever owed a Profit Tax, on the ground that while AKBN is entitled to audit the accounting records of Claimant within three years of a fiscal year, liabilities for Profit Tax are assessed by the Albanian Tax Authority and not by AKBN, and no Profit Tax has been assessed by the Albanian Tax Authority.[952]

903. Claimant argues that between 2014 and 2016, the parties were negotiating various ways of setting off mutual obligations and that Claimant never confirmed that it was in material breach of its contractual obligations, whether explicitly, as alleged by Respondents,[953] or otherwise. Instead, Claimant noted in its letter dated 5 January 2016 that the mutual obligations of Claimant and Albpetrol through the first nine months of 2015 were as follows:

- 2,155.4 tons of crude oil owed by Claimant to Albpetrol for the Cakran Oilfield;
- 7,354.98 tons of crude oil owed by Claimant to Albpetrol for the Gorisht Oilfield;
- 3,415.37 tons of crude oil owed by Claimant to Albpetrol for the Ballsh Oilfield.[954]

904. According to Claimant, Respondents omitted inclusion of Albpetrol's obligations to Claimant, which materially reduces Claimant's obligations to Albpetrol.[955]

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[947] Statement of Claim, para. 203, p. 34, referring to **C-95** – Letter No. 44/17 from TransAtlantic to the AKBN dated 1 February 2017.
[948] Statement of Claim, para. 204, p. 34, referring to **C-96** – Letter No. 1344/1 from the AKBN to TransAtlantic dated 2 February 2017.
[949] Statement of Claim, paras. 205-206, p. 34.
[950] Statement of Claim, para. 207, p. 34.
[951] Statement of Defence, para. 129, p. 45.
[952] Reply, para. 122, p. 20, referring to Second Witness Statement of Kreshnik Grezda, para. 14, p. 4.
[953] Statement of Defence, para. 176, pp. 56-57.
[954] Reply, paras. 89-90, pp. 14-15, referring to **R-60** – Letter from Claimant to Albpetrol dated 5 January 2016.
[955] Reply, para. 90, p. 15.

905. Claimant also contends that it also owed Albpetrol 5,604.7 tons of oil in custody, *i.e.* 2,402.8 tons for the Gorisht Oilfield and 3,201.9 tons for the Cakran Oilfield,[956] but that Claimant and Albpetrol agreed that these amounts would only need to be delivered to Albpetrol at the end of the petroleum operations under the Petroleum Agreements.[957] At the Hearing, Mr. Puka seemed to dispute the validity of this agreement to defer delivery of the oil in custody only on the basis that it was an oral agreement.[958]

906. Claimant also states that Albpetrol continued to underlift its share of production in 2015 at a time of increasingly depressed oil prices.[959]

907. Finally, Claimant contends that when it received the 10 February 2016, 26 February 2016 and 7 March 2016 notices of material breach, it had commenced to substantially rectifying the alleged material breaches, in particular by reducing the PEP&ASP Liability to Albpetrol throughout 2016 and up to August 2016.[960]

908. According to Claimant, in fact, on 30 June 2016 Albpetrol acknowledged that the PEP&ASP Liability had been kept to acceptable limits.[961] While Mr. Puka firmly denied saying that the totality of the PEP&ASP Liability was within acceptable limits, he admitted that he may have found more positive words for TAT's management of the PEP&ASP Liability and that he could not remember using the words "*acceptable limits*" with respect to Claimant's debts under TAT's management.[962] According to Claimant, the Tribunal can thus conclude that Mr. Puka understood that the PEP&ASP Liability situation, in isolation of Respondents' neutralization obligation, was improving through 2015 and into 2016.[963]

a) <u>On the PEP&ASP obligations</u>

i. <u>Claimant's argument that some PEP&ASP obligations claimed fail to offset amounts due by Albpetrol to Claimant for over-deliveries from the Ballsh Field</u>

909. Claimant reiterates that it has provided Albpetrol with (i) 100% of the PEP&ASP in respect of the oil produced by Claimant for the Ballsh Oilfield and (ii) over-deliveries

[956] Claimant's Post-Hearing Brief, para. 18, p. 4, referring to **R-60** – Letter from Claimant to Albpetrol dated 5 January 2016.
[957] Claimant's Post-Hearing Brief, para. 18, p. 4, referring to **R-60** – Letter from Claimant to Albpetrol dated 5 January 2016; **C-48** – Letter No. 243/15 from TransAtlantic to Albpetrol dated 11 September 2015.
[958] Claimant's Post-Hearing Brief, para. 18, p. 4, referring to Hearing Transcript Day 2, p. 125:3-21.
[959] Reply, para. 91, p. 15, referring to **C-41** – Letter No. 235/15 from TransAtlantic to Albpetrol dated 1 September 2015.
[960] Reply, para. 92, p. 15, referring to Statement of Claim, para. 176, p. 30.
[961] Reply, para. 93, p. 15, referring to First Witness Statement of Mark Crawford, para. 92, p. 21; Claimant's Post-Hearing Brief, para. 43, p. 8, referring to Second Witness Statement of Mark Crawford, para. 7, p. 3; Hearing Transcript Day 2, pp. 14:19-15:6.
[962] Claimant's Post-Hearing Brief, para. 43, p. 8, referring to **RWS-3** – Third Witness Statement of Endri Puka, paras. 9-10, pp. 2-3.
[963] Claimant's Post-Hearing Brief, para. 43, p. 8.

from the Ballsh Field in an amount of 14,601.92 tons, which were agreed to be set off against Claimant's liability to Albpetrol for Gorisht PEP&ASP obligations.[964]

910. Claimant argues that Albpetrol has not compensated Claimant in that respect and has kept the proceeds of sale of those volumes because of Claimant's other obligations to Albpetrol, according to Mr. Puka.[965]

ii. Claimant's argument that PEP&ASP obligations accrued, in part, as a result of Albpetrol's inability to lift its share of production

911. Claimant argues that the majority of the PEP&ASP Liability arose prior to Mr. Puka taking office in 2013, which leaves the Tribunal with only the paper record to understand what happened prior to October 2013.[966]

912. Claimant states that on 27 January 2012, Claimant and Albpetrol entered into a written agreement indicating that Claimant owed 11,138.56 tons of oil to Albpetrol (the "**January 2012 Agreement**"), which set out a delivery plan with an outside delivery date of 30 June 2012,[967] following which, in March 2012, Claimant indicated that Albpetrol's rate of lifting was creating difficulties for Claimant in maintaining production and caused the parties to miss meeting the delivery plan.[968]

913. According to Claimant, on 20 March 2012, Mr. Puka's predecessor at Albpetrol wrote to Claimant informing it that Albpetrol intended to comply with the January 2012 Agreement by using a delivery pipeline from the Gorisht Oilfield to fill its own tanks, that it was undertaking repairs to the tanks, and that the lifting of oil in Gorisht and Cakran would start soon.[969] During cross-examination, Mr. Puka agreed that lifting for both Cakran and Gorisht in this time period would only start once repair of the tanks was completed,[970] admitted that he doubted that the Gorisht pipeline was ever functional, as it was not functional during his time at Albpetrol,[971] and said that the Cakran pipeline was also not functional during his time at Albpetrol.[972]

914. As for the year 2013, Claimant argues that on 8 January, Albpetrol wrote to Claimant indicating that Claimant owed obligations of 24,302.95 tons of oil and that Albpetrol had sold significant amounts of its inventory of oil to create space for storage of

[964] Reply, para. 117, p. 18, referring to Statement of Claim, para. 176, p. 30, para. 185, pp. 31-32, para. 189, p. 32; Claimant's Post-Hearing Brief, para. 19, p. 4.
[965] Claimant's Post-Hearing Brief, para. 19, p. 4, referring to Hearing Transcript Day 2, pp. 141:2-20, 144:13-16.
[966] Claimant's Post-Hearing Brief, para. 20, p. 4.
[967] Claimant's Post-Hearing Brief, para. 21, p. 4, referring to **R-29** – Agreement between Albpetrol and the Claimant dated 27 January 2012.
[968] Claimant's Post-Hearing Brief, para. 22, p. 4, referring to **C-39** – Letter No. 132/12 from Stream to Albpetrol and AKBN dated 7 March 2012; **C-40** – Letter No. 154/12 from Stream to Albpetrol and AKBN dated 16 March 2012.
[969] Claimant's Post-Hearing Brief, para. 23, pp. 4-5, referring to **C-42** – Letter No. 623/1 from Albpetrol to Stream dated 20 March 2012.
[970] Claimant's Post-Hearing Brief, para. 24, p. 5, referring to Hearing Transcript Day 2, pp. 88:21-89:4.
[971] Claimant's Post-Hearing Brief, para. 24, p. 5, referring to Hearing Transcript Day 2, p. 88:8-17.
[972] Claimant's Post-Hearing Brief, para. 24, p. 5, referring to Hearing Transcript Day 2, p. 87:8-11.

Claimant's PEP&ASP Liability, effectively confirming that it could not lift before for lack of storage space.[973] In mid-2013, Albpetrol and Claimant agreed to establish a joint working group to discuss the PEP&ASP Liability and prepare a document confirming the agreed figures and a way and time for delivery of the net PEP&ASP Liability.[974]

915. Claimant contends that prior to Mr. Puka's letter of 4 November 2013 indicating that Claimant was in material breach of the Petroleum Agreements with respect to all three Oilfields and the Delvina gas field (the "**November 2013 Notice**"), Claimant and Albpetrol had been negotiating draft amendments to the PSAs that would neutralize the Royalty Tax and provide for an offset of the PEP&ASP Liability in July 2013,[975] which were not approved prior to Mr. Puka taking office as Administrator of Albpetrol in October 2013. Within a short time of Mr. Puka taking office, he appears to have issued the November 2013 Notice,[976] although he gave no rationale as to why the Ballsh Petroleum Agreement was in material breach, and represented that Albpetrol had the ability to lift its share of production.[977]

916. According to Claimant, however, Albpetrol failed or refused to lift its share of production in-kind from Delivery Points, either in accordance with delivery schedules or at all, causing a book liability of PEP&ASP obligations to accrue.[978] In one instance, Albpetrol was only able to lift 535 tons of oil over 13 days.[979] Claimant gives another example of Albpetrol being unable to lift production from Transoil Group Sh. A ("Transoil"), the licensee of the Visoka field in Albania,[980] and argues that despite a large PEP&ASP obligation and substantial services obligations owed by Transoil to Albpetrol in respect of a single oil field, Transoil has recently been awarded the Cakran Oilfield, Gorisht Oilfield and Amonicë Oilfield.[981]

917. Claimant argues that, because the PSAs do not provide for storage fees, emergency sales or cash payments to Albpetrol in respect of unlifted production, Albpetrol's interference with Claimant's exclusive rights under the License Agreements to conduct the Petroleum Operations in the Project Area necessitated that Claimant move some of

[973] Claimant's Post-Hearing Brief, para. 25, p. 5, referring to **C-43** – Letter No. 214 from Albpetrol to Stream et al. dated 8 January 2013.
[974] Claimant's Post-Hearing Brief, para. 26, p. 5, referring to **C-49** – Minutes of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013, pp. 4-5.
[975] Reply, para. 77, p. 12; Claimant's Post-Hearing Brief, para. 29, p. 5, referring to **C-49** – Minutes of the Tenth Advisory Committee Meeting held 24 July 2013, dated 25 July 2013; **C-50** – Resolution of the Tenth Advisory Committee Meeting dated 24 July 2013, unsigned by Albpetrol, (5).
[976] Reply, para. 78, p. 12, referring to **R-35** – Letter from Albpetrol to Claimant dated 4 November 2013.
[977] Reply, para. 78, p. 12.
[978] Reply, para. 79, pp. 12-13, referring to Statement of Claim, paras. 125-131, pp. 22-23; First Witness Statement of Mark Crawford, paras. 57-63, pp. 13-15; **C-173** – News Release: Stream Responds to Rumours & Provides Update on 10% Mineral Royalty Tax Neutralization (4 November 2013).
[979] Reply, para. 79, p. 13, referring to **C-174** – Letter No. 612 from Stream to Albpetrol dated 7 November 2013.
[980] Reply, para. 118, pp. 18-19, referring to **C-181** – Balkan Investigative Reporting Network, "Concession of oil fields, Gjiknuri favored the company associated with Gazprom" (6 June 2018).
[981] Reply, para. 119, p. 19, referring to **C-181** – Balkan Investigative Reporting Network, "Concession of oil fields, Gjiknuri favored the company associated with Gazprom" (6 June 2018).

Albpetrol's unlifted production in order to prevent Claimant's storage facilities from reaching capacity and avoid shutting in production.[982]

918. Claimant contends that a consequence of moving Albpetrol's production was that Claimant was often forced to sell the production at discounted rates due to the "*distressed circumstances of selling variable volumes on short notice without a pre-existing contract to whichever shippers were available*".[983]

919. Claimant adds that (i) since it had no agreement with Albpetrol to sell the production on its behalf, it made little sense for Claimant to keep discounted sales proceeds in escrow for Albpetrol because until Joint Instruction No. 1 was promulgated, Albpetrol could not take cash payment from Claimant and (ii) moreover, even if Claimant could have reimbursed Albpetrol with the sale proceeds, Albpetrol would not necessarily have released Claimant from any difference between the sales proceeds and the price at which Albpetrol might have otherwise been able to sell the production (had Albpetrol lifted the production) and could have insisted it needed the physical volumes to perform its own sales obligations or meet internal usage requirements.[984]

920. According to Claimant, any suggestion that it was profiting off of or stealing the distress sales of Albpetrol's share of production is without merit, as there are "*financial and other disincentives*" associated with Claimant selling the unlifted production at low oil prices, including "*diverted labour costs and overhead, business interruption, and minimal profit margins, if any*".[985]

921. Finally, Claimant argues that the "*prevailing international industry standard*" is to cause an underlifting party to take their unlifted production at times that do not disrupt the other party's commercial arrangements and to otherwise penalize them by forfeiting a portion of unlifted volumes.[986]

922. According to Claimant, following the receipt of the November 2013 Notice, Claimant, Albpetrol and AKBN had a meeting on 21 November 2013, during which Claimant and Albpetrol both agreed that it would take too long for Albpetrol to lift its share of petroleum and that a cash payment to settle outstanding PEP&ASP obligations was preferable.[987] This eventually led to the Pre-2014 Liabilities Cash Conversion Agreement between Claimant and Albpetrol, which ascribed cash value of USD 15,384,169 to the PEP&ASP Liability to the end of 2013 in respect of the Cakran, Gorisht and Delvina gas fields.[988] In that regard, Claimant notes that the Delvina gas

[982] Reply, para. 80, p. 13, referring to First Witness Statement of Mark Crawford, para. 63, pp. 14-15.
[983] Reply, para. 81, p. 13, referring to First Witness Statement of Mark Crawford, para. 63, pp. 14-15.
[984] Reply, para. 82, p. 13, referring to Second Witness Statement of Kreshnik Grezda, paras. 18-19, p. 4.
[985] Reply, para. 83, p. 13, referring to Second Witness Statement of Kreshnik Grezda, para. 17, p. 4.
[986] Reply, para. 84, p. 13, referring to Second Witness Statement of Kreshnik Grezda, para. 20, p. 5; **C-175** – AIPN Model Lifting Agreement (2001) Articles 13.05, 13.07, pp. 56-59.
[987] Reply, para. 85, pp. 13-14; Claimant's Post-Hearing Brief, para. 28, p. 5, referring to **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013, pp. 4-5.
[988] Reply, para. 86, p. 14, referring to **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014.

field portion at 28 February 2014 was USD 429,920.19, "*which liability is not attributable to* […] *Claimant as that liability and the related asset was assigned in 2016*".[989]

923. Claimant contends that Respondents have provided no evidence to demonstrate their allegations[990] that the cash value set out in the Pre-2014 Liabilities Cash Conversion Agreement later became USD 17,360,774.37.[991]

924. Claimant also contends that prior to 29 December 2014, when the Council of Ministers passed DCM 947,[992] Albpetrol was not able to take cash in exchange for PEP&ASP under any petroleum agreements, and DCM 947 permitted this practice and directed Albpetrol to negotiate with its contractors in order to settle in-kind obligations in cash.[993] Detailed regulations followed on 26 May 2015 by way of Joint Instruction No. 1, which prescribed the calculation method for the cash value of PEP&ASP and procedures for payment.[994]

iii. Claimant's argument that a portion of PEP&ASP obligations claimed fail to offset Albpetrol's debts to Claimant due to *force majeure*

925. According to Claimant, a large portion of the PEP&ASP obligations is wrongly claimed by Albpetrol, as they fail to offset losses owed by Albpetrol to Claimant resulting from a declaration of *force majeure* between 25 March 2011 and the end of May 2011 due to a power outage caused by Albpetrol's own failure to pay its obligations to an electrical company.[995] The MEI agreed that a *force majeure* had occurred as a result of Albpetrol's actions:

> "*It is a fact that 'Albpetrol' sh.a, due to the lack of liquidity against CEZ, could not settle the obligations paid by 'Stream Oil & Gas' LTD to 'Albpetrol' sh.a and for this reason CEZ interrupts power supplies claiming that it cannot supply electricity to the 'Stream Oil & Gas' LTD until the repayment of the liability by the 'Albpetrol' sh.a. This circumstance is outside the will of 'Stream Oil & Gas'*

[989] Reply, para. 86, p. 14.
[990] Statement of Defence, para. 155, p. 51 (see below paras. 1014, 1046).
[991] Reply, para. 87, p. 14.
[992] **CL-9** – Council of Ministers Decision No. 947 "*On the authorization of Albpetrol Sh.a. to take in cash the due value of the Deemed Production and Albpetrol Share of Production in compliance with the Petroleum Agreement signed between the parties for the "Development and Production of Hydrocarbons from the existing gas and oil fields*" dated 29.12.2014.
[993] Reply, para. 88, p. 14, referring to **CL-9** – Council of Ministers Decision No. 947 "*On the authorization of Albpetrol Sh.a. to take in cash the due value of the Deemed Production and Albpetrol Share of Production in compliance with the Petroleum Agreement signed between the parties for the "Development and Production of Hydrocarbons from the existing gas and oil fields*" dated 29.12.2014.
[994] Reply, para. 88, p. 14, referring to **CL-10** – *Joint Instruction No. 1* of the MEI and the Ministry of Finance, "*Rules and Procedures of Receiving Monetary Value for the Corresponding Amount of the Production Quantity and the Albpetrol Share*" dated 26.05.2015.
[995] Statement of Claim, para. 132, p. 23, referring to **C-45** – Letter No. 86/11 from Stream to Albpetrol dated 5 April 2011; **C-46** – Letter No. 160/11 from Stream to Albpetrol dated 17 May 2011; Reply, para. 120, p. 19.

LTD Company and this company has no subjective possibility to eliminate or minimize this circumstance which is directly related to the producer factor."[996]

926. Claimant contends that during the *force majeure*, in accordance with the PSAs, the Contractor was relieved of its obligations to Albpetrol, including any obligation to provide Albpetrol with its share of PEP&ASP.[997] Claimant informed Albpetrol that it would set off its future share of production against the cost to Stream of the production lost as a result of the *force majeure*.[998]

927. Claimant's position is that the amounts owed by Albpetrol to Claimant in connection with the *force majeure* are significant, totaling 4,611.80 tons of petroleum (the "***Force Majeure* Amounts**") (3,044.60 tons from the Cakran Oilfield and 1,567.20 tons from the Gorisht Oilfield).[999]

b) <u>On other alleged material breaches</u>

i. <u>The alleged VAT issues</u>

928. In response Respondents' allegation that Claimant developed a "*VAT scam*",[1000] Claimant argues that while it is true that a vendor of goods or services must pay VAT in respect of an issued invoice whether or not that invoice is paid, reimbursements by the Albanian Tax Authority are often issued only after a "*lengthy audit and reconciliation process*".[1001] Claimant explains that "[i]*f a company has a positive VAT balance, they may credit that balance against their own VAT liabilities or ask for a cash reimbursement from the Albanian Tax Authority. However, prior to utilization of a VAT credit, an audit must generally be performed which confirms that the VAT credit is reimbursable. Audits and reimbursements generally take months to complete*".[1002]

929. Claimant states that after undergoing the reconciliation process, it received a series of VAT credits from the Albanian Tax Authority in 2016 and 2017.[1003] However, Claimant denies Respondents' allegation that it engaged in a scheme and argues that, in fact, Albpetrol requested that the Albanian Tax Authority divert Claimant's VAT credit and set it off against Albpetrol's own liabilities to the Albanian Tax Authority.[1004]

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[996] Reply, para. 120, p. 19, referring to **C-182** – Letter No. 432 from the MEI to Albpetrol dated 25 January 2012.
[997] Statement of Claim, para. 133, p. 23, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 23, p. 60; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 17, pp. 27-28.
[998] Statement of Claim, para. 133, p. 23, referring to **C-47** – Letter No. 190/11 from Stream to Albpetrol dated 26 May 2011.
[999] Statement of Claim, para. 133, p. 23, referring to **C-48** – Letter No. 243/15 from TransAtlantic to Albpetrol dated 11 September 2015; Reply, para. 121, p. 20; Claimant's Post-Hearing Brief, para. 17, pp. 3-4.
[1000] Statement of Defence, para. 44, p. 17, paras. 195-202, pp. 61-62.
[1001] Reply, para. 94, p. 15, referring to First Witness Statement of Mark Crawford, paras. 39-40, p. 9; Second Witness Statement of Kreshnik Grezda, para. 27, p. 6.
[1002] Reply, para. 94, p. 15, referring to Second Witness Statement of Kreshnik Grezda, para. 28, p. 6.
[1003] Reply, para. 95, p. 15, referring to First Witness Statement of Mark Crawford, para. 41, p. 10.
[1004] Reply, para. 96, p. 15, referring to **C-81** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 11 January 2017.

ii. Claimant's investments in the Oilfields

930. Claimant argues that Respondents misleadingly suggested that Annual Programs and Budgets ("**APBs**") provide for necessary and agreed investment amounts pursuant to the PSAs and the Petroleum Law, whereas none of the Petroleum Agreements, License Agreements and Petroleum Law prescribe a fixed investment level by Claimant after the initial Evaluation Period.[1005]

931. Claimant contends that in fact, (i) Article 8.5 of the Petroleum Agreements recognize that APBs may require changes in light of changing circumstances, permitting Claimant to make changes to the APB provided that it does not change the general objective of the APB and that it obtain approval if it will be accelerating or expanding activities contemplated in the Development Plan and (ii) Article 7.2(d) of the License Agreements recognize that Annual Programs may require modifications deemed necessary by Claimant and that Claimant may make consequential modifications to the Annual Program without AKBN's approval in the event of emergencies to protect health and safety, economic viability, or where there are differences between budgeted and actual revenues, costs and expenses in implementing the Annual Program.[1006]

932. According to Claimant, APBs are "*formative plans, based on a myriad of assumptions*", including oil prices, market and labour issues, work performance, unplanned events and compliance by Respondents with the terms of the PSAs and the Petroleum Law.[1007]

933. Claimant argues that, in any event, over ten years, it has invested approximately $81 million in capital expenditures into the Oilfields, including USD 38.4 million in the Cakran Oilfield and USD 29.3 million in the Gorisht Oilfield.[1008] For instance, Claimant has invested in the Oilfields through, *inter alia*, the installation of modern rod pump and jet pump units, water injection programs, well workovers and facilities modifications and rehabilitation.[1009]

934. Finally, in specific response to Respondents' point that Claimant's investments in 2016 for the Gorisht Oilfield was only USD 63,653.11,[1010] Claimant argues that while Claimant only made capital expenditures of USD 63,653.11 on the Gorisht Oilfield in 2016, Claimant "*significantly overspent*" in comparison to approved budgeted capital expense amounts over the period 2010-2017[1011] and Claimant incurred operating expenses of USD 1,814,730 for Cakran and ISD 2,429,370 for Gorisht in 2016.[1012]

[1005] Reply, paras. 98-99, p. 16.
[1006] Reply, para. 100, p. 16.
[1007] Reply, para. 101, p. 16.
[1008] Reply, para. 102, p. 16, referring to Deloitte Lost Profits Rebuttal Report, Schedule 28.
[1009] Reply, para. 103, p. 16, referring to **C-177** – News Release: Stream Provides Operational Update (27 June 2011); **C-178** – News Release: Stream Provides Operational Update (23 April 2012).
[1010] Statement of Defence, paras. 212-213, p. 65.
[1011] Reply, para. 104, pp. 16-17, referring to First Witness Statement of Mark Crawford, para. 69, p. 16.
[1012] Reply, para. 104, p. 17, referring to **R-75** – Excerpts of the Quarterly Reports 2016 for the Gorisht oilfield; **R-76** – Excerpts of the Quarterly Reports 2016 for the Cakran oilfield; **C-179** – Excerpt of Q4 2016 Quarterly

iii. Claimant's funding and operations

935. In response to Respondents' allegation that Claimant did not have sufficient funding to conduct Petroleum Operations, Claimant argues that its relationships with third parties and how it deals with them are "*outside the bounds of the PSAs and irrelevant to these proceedings",* unless, pursuant to Article 24.1(c) of the License Agreements and Article 24.2.3 of the Petroleum Agreements, Claimant is adjudged bankrupt, which did not occur.[1013]

936. As for Respondents' argument that there was a shut-down of Claimant's activities due to non-payment and that Claimant wrongfully terminated workers,[1014] Claimant sustains that when Continental acquired Claimant, the new management made changes to Claimant's operations, including "*rationalizing positions and replacing certain workers with new staff*". Some field staff responded to these actions by conducting illegal strikes which disrupted the Petroleum Operations in the Cakran and Gorisht Oilfields for a time, but were ultimately resolved.[1015] Claimant also contends that the Termination Notices do not include these issues as a basis for purported termination of the Cakran and Gorisht Petroleum Agreements.[1016]

iv. Environmental and safety obligations

937. Regarding Respondents' allegations of environmental and safety contraventions, Claimant first argues that they were not articulated in any notices of material breach nor in the Termination Notices and are therefore irrelevant to these proceedings.[1017]

938. Claimant also argues that "*they were not material breaches, much less repeated breaches*" of any fundamental duties and obligations under the Petroleum Agreements.[1018]

939. First, Claimant points out that the Petroleum Agreements provide that Claimant is not responsible for any environmental damages incurred prior to the date of approval of a baseline study and that Albpetrol indemnifies and holds Claimant harmless in respect of losses and liabilities suffered or incurred by Claimant pertaining to that environmental damages, except to the extent that Claimant is proved to be solely responsible for the environmental damages.[1019] Any remedial measures required to be undertaken by environmental authorities in respect of works or installations in the Contract Area which

Progress Report for Cakran-Mollaj Oilfield; **C-180** – Excerpt of Q4 2016 Quarterly Progress Report for Gorisht Kocul Oilfield.

[1013] Reply, para. 105, p. 17, para. 194, p. 33.

[1014] Statement of Defence, paras. 218-226, pp. 66-68.

[1015] Reply, para. 106, p. 17, referring to Second Witness Statement of Kreshnik Grezda, para. 13, pp. 3-4.

[1016] Reply, para. 106, p. 17.

[1017] Reply, para. 107, p. 17.

[1018] Reply, para. 108, p. 17.

[1019] Reply, para. 109, p. 17, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 20.4, 20.5, p. 30.

were in place prior to the Effective Date or were transferred to Claimant after the Effective Date are on Albpetrol's account, not Claimant's.[1020]

940. Second, Claimant argues that, in any case, it had a single instance of non-compliance levied against it by the responsible Government entity on 11 November 2016, which "*never formed part of any notice of repeated material breach*" and that this issue was promptly dealt with as repairs to the well at hand were made, preventing future environmental pollution.[1021]

941. Third, Claimant contends that Albpetrol is a corporation, not the Government entity responsible for the environment, and cannot qualitatively speak to the environmental condition of the Oilfields.[1022]

942. Fourth, Claimant argues that while it operated the Project Area of the Ballsh Oilfield, Albpetrol continued to operate the remainder of the Contract Area (which it refused to hand over), which constituted approximately 90% of the Oilfield and included a treating facility that discharged tailings into a lake near the village of Kocul. The records tendered by Respondents do not prove who is responsible for the alleged damages to the villagers of Kocul.[1023]

943. Fifth, Claimant indicates that its field employees are equipped with H2S gas detectors and are instructed to leave the field immediately if their detectors determine gas levels above normal,[1024] and that Respondents submit no evidence that an individual villager actually died as a result of H2S gas attributable to Claimant.[1025]

944. Sixth, Claimant argues that, in any case, since Albpetrol has taken the Oilfields from Claimant, their conditions have "*either been barely maintained or worsened*". Claimant claims that "[p]*resumably Albpetrol is not operating the Oilfields in contravention of the Petroleum Law and License Agreements and therefore these environmental complaints are not valid bases for the Respondents to have taken the Oilfields*".[1026]

v. <u>Electricity payments</u>

945. Regarding Respondents' allegations of Claimant's failure to pay electricity costs, Claimant argues that such allegations were not articulated in any notices of material breach nor in the Termination Notices and are therefore irrelevant to these proceedings.[1027]

[1020] Reply, para. 109, p. 17, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 20.3, p. 30.
[1021] Reply, para. 110, pp. 17-18, referring to Second Witness Statement of Kreshnik Grezda, para. 25, p. 6.
[1022] Reply, para. 111, p. 18.
[1023] Reply, para. 112, p. 18, referring to Second Witness Statement of Kreshnik Grezda, para. 24, pp. 5-6.
[1024] Reply, para. 113, p. 18, referring to Second Witness Statement of Kreshnik Grezda, para. 26, p. 6.
[1025] Reply, para. 113, p. 18.
[1026] Reply, para. 114, p. 18.
[1027] Reply, para. 115, p. 18.

vi. Training bonuses

946. Claimant disputes that its failure to pay annual training bonuses constitutes a material breach, as alleged by Respondents,[1028] and argues that training bonuses were consistently disputed between Claimant and Albpetrol,[1029] and that there were meant to be addressed in the Amending Agreements.[1030]

947. Claimant also indicates that it repeatedly told Albpetrol that it would pay the amount of training bonuses pursuant to the License Agreements directly to independent institutions for training attended by Albpetrol staff, but that Albpetrol wanted the training bonuses applied to expenses for trips or seminars for senior Albpetrol staff unrelated to the Oilfields.[1031] Claimant did not agree to Albpetrol's requests because it believed that this was not in accordance with the intended purpose of the training bonuses: "*for example, Albpetrol never presented training programs or the costs thereof to the Claimant in respect of the Annual Training Bonus, only periodic invoices for travel and accommodation with no explanation of how such invoices related to training*".[1032]

3. Claimant's arguments on Respondents' alleged wrongful termination of the Cakran and Gorisht License Agreements

a) Claimant's argument that it did not receive a notice of material breach under the License Agreements

948. Claimant contends that while it received the Breach Notices and Termination Notices from Albpetrol under the Petroleum Agreements, it never received a notice of material breach or a notice of termination under the License Agreements from AKBN.[1033]

949. According to Claimant, because neither the MEI nor AKBN "*has purported to terminate the License Agreements in accordance with their terms, or at all*", the License Agreements for the Cakran and Gorisht Oilfields are still operative.[1034]

950. Claimant contends that, however, the Government, "*acting in concert with Albpetrol, which now operates the Cakran and Gorisht Oilfields*", has "*physically confiscated*" the Cakran and Gorisht Oilfields despite Claimant holding the grant of license for their exploitation, and has thereby expropriated them. There is no legal basis under the PSAs

[1028] Reply, para. 199, p. 34, referring to **R-64** – Letter from Albpetrol to Claimant dated 7 April 2016.
[1029] Reply, para. 200, p. 34, referring to Second Witness Statement of Kreshnik Grezda, para. 30, p. 7; **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013, pp. 6-7; **C-121** – Minutes of the Thirteenth Meeting of the Advisory Committee held 5 December 2014, p. 7.
[1030] Reply, para. 200, p. 34, referring to **C-11, C-12** and **C-13** – First Amending Agreements between Albeptrol Sh.A. and TransAtlantic Albania Ltd. in relation to the Petroleum Agreements dated July 20, 2007 for the Development and Production of Petroleum in the Oilfields.
[1031] Reply, para. 201, p. 34, referring to Second Witness Statement of Kreshnik Grezda, para. 30, p. 7.
[1032] Reply, para. 201, p. 34, referring to Second Witness Statement of Kreshnik Grezda, para. 31, p. 7; **R-56** – Letter from Albpetrol to Claimant dated 3 November 2015.
[1033] Statement of Claim, para. 265, p. 43.
[1034] Statement of Claim, para. 268, p. 43.

for the MEI Confiscation Order and the confiscation of the Oilfields by the Government is wrongful and constitutes a breach of the License Agreements by Respondents.[1035]

951. Therefore, Claimant's position is that Albpetrol has no right to operate in the Project Areas of either of the Cakran and Gorisht Oilfields, so that Albpetrol is in breach of its obligations under Article 6 of the License Agreement.[1036]

b) Claimant's argument that the purported termination of the Cakran and Gorisht Petroleum Agreements is wrongful as it is invalid

952. According to Claimant, in any event, the purported termination of the Cakran and Gorisht Petroleum Agreements is wrongful as it is invalid, because neither the formal nor the substantive conditions for a termination of the Petroleum Agreements under Article 24.1 are met, *i.e.* a 120 days' notice in the event of, *inter alia*, the following:

> "*if Contractor has repeatedly committed a material breach of its fundamental duties and obligations under this Agreement and has been advised by Albpetrol of Albpetrol's intention to terminate this Agreement. Such notice of termination by Albpetrol shall only be given if Contractor upon receiving notice from Albpetrol that it is in material breach and [sic.] does not rectify or has not commenced to substantially rectify such breach within six (6) months*".[1037]

i. No material breach

953. Claimant contends that the Termination Notices were based only on the notice of material breach sent by Albpetrol to Claimant on 7 March 2016 (the "**March 2016 Breach Notice**").[1038]

954. Claimant argues that although the Termination Notices refer to bailiff activities against Claimant, service debts owed by Claimant to Albpetrol and debts owed to third parties, and an alleged lack of investments in the Oilfields, they "*clearly rely on a single allegation of material breach", i.e.* "*an undefined amount of the PEP&ASP obligations*" owed by Claimant to Albpetrol. Indeed, the unfulfilled PEP&ASP obligation is the only allegation of material breach expressly identified in the March 2016 Breach Notice.[1039]

955. Claimant further claims that the other allegations raised by Respondents in this arbitration concerning Claimant's expertise and financial means, the environmental condition of the Oilfields and the non-payment of training bonuses were neither

[1035] Statement of Claim, para. 269, p. 43.
[1036] Statement of Claim, para. 270, p. 43.
[1037] Statement of Claim, para. 273, p. 44; Reply, para. 124, p. 20; Claimant's Post-Hearing Brief, para. 144, pp. 29-30.
[1038] Claimant's Post-Hearing Brief, para. 150, p. 30, referring to **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016; **C-16** – Letter from Albpetrol Sh.A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016.
[1039] Claimant's Post-Hearing Brief, para. 151, p. 30; Reply, para. 131, p. 21.

material, nor ultimately relied upon by Albpetrol in the Termination Notices or the March 2016 Breach Notice.[1040]

956. Claimant adds that Mr. Puka admitted that the allegations of material breaches not relating to the PEP&ASP obligation lack materiality and were not a basis for termination of the Petroleum Agreements.[1041]

957. Claimant's position is therefore that only the PEP&ASP Liability is relied upon by Albpetrol and can reasonably be described as a repeated and material breach of its fundamental duties and obligations, which it denies in any case.[1042]

958. Claimant argues that, under English law, a "*material breach*" is "*one which in all the circumstances is wholly or partly remediable and is or, if not remedied, is likely to become, serious in the wide sense of having a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms*".[1043] Although Claimant admits that an amount of PEP&ASP was due to Albpetrol at the time of the March 2016 Breach Notice, the full context indicates that this could not constitute a material breach of the Petroleum Agreements:[1044]

- Through its inability to lift PEP&ASP timely or in some cases at all, Albpetrol was partly responsible for the growing PEP&ASP Liability;

- Albpetrol admitted and agreed that the PEP&ASP Liability could not be satisfied by Claimant through deliveries in-kind within six months or even a longer period of time;

- The *Force Majeure* Amounts were disputed and, in Claimant's view, are not part of the PEP&ASP Liability;

- The delivery of the oil in custody amounts were agreed to be deferred until after the end of Petroleum Operations in each Oilfield and therefore are not party of the PEP&ASP Liability;

[1040] Claimant's Post-Hearing Brief, para. 152, p. 30.
[1041] Claimant's Post-Hearing Brief, para. 153, pp. 30-31, referring to **RWS-3** – Third Witness Statement of Endri Puka, para. 30, p. 6: "[Claimant's] *main duty under the product sharing agreements* […] *is* to share the oil with the Respondents in accordance with the contractual arrangements. *This continued – and until today unremedied – fundamental breach of contract led to the termination of the product sharing arrangement*"; Hearing Transcript Day 2, pp. 140:19-141:1, where Mr. Puka indicated that the reason why the Ballsh Petroleum Agreement was not terminated was because "*the debts of the Claimant for PEP&ASP for Ballsh have been delivered and they were oversupplied*".
[1042] Reply, para. 125, p. 20; Claimant's Post-Hearing Brief, para. 154, p. 31.
[1043] Claimant's Post-Hearing Brief, para. 155, p. 31, referring to **CL-57** – *National Power plc v United Gas Company Limited*, [1998] Lexis Citation 2811 (Ch D), p. 42.
[1044] Claimant's Post-Hearing Brief, para. 156, p. 31.

- Claimant was over delivering amounts of PEP&ASP from the Ballsh Field which the parties were de facto treating as offsetting to under-deliveries of PEP&ASP from the Oilfields;

- Through their conduct, Albpetrol and Claimant had recognized that Claimant's Royalty Tax payments needed to be neutralized by, among other things, entering into the Settlement Agreement that recognized an offset of the Royalty Tax paid and Ballsh over deliveries made by Claimant against the cash-converted value of the PEP&ASP Liability;

- The Delvina gas field and all associated liabilities were assigned to a subsidiary of TAT, removing USD 744,785 from the amounts owed by Claimant to Albpetrol;

- In 2015, Claimant made a serious effort to reduce its liabilities to Albpetrol, conscripting essentially all of its production in late 2015 and for all of 2015, Claimant's PEP&ASP obligations for the Oilfields were as follows:[1045]

Crude Oil Quantities Owed to Albpetrol (Tons)		
Gorisht	**Cakran**	**Ballsh**
5,865.18	473.14	(4,429.21)

While the PEP&ASP Liability grew by 1,909.11 tons in 2015, Claimant delivered over 91% of the PEP&ASP obligations while continuing to pay the Royalty Tax without any neutralization. Claimant paid USD 916,096 in Royalty Tax in 2015,[1046] and this amount was not factored into the Settlement Agreement, which only recognized Royalty Tax paid through 2014.[1047]

- In January and February 2016, Claimant delivered 5,074.39 tons of oil to Albpetrol, exceeding its PEP&ASP obligations by 893.64 tons. The breakdown of Claimant's obligations and deliveries is as follows:[1048]

[1045] Claimant's Post-Hearing Brief, para. 156(h), p. 32, referring to First Witness Statement of Mark Crawford, para. 66, p. 15.
[1046] Claimant's Post-Hearing Brief, para. 156(h), p. 32, referring to First Witness Statement of Mark Crawford, para. 33, pp. 7-8.
[1047] Claimant's Post-Hearing Brief, para. 156(h), p. 32, referring to **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015.
[1048] Claimant's Post-Hearing Brief, para. 156(i), p. 32, referring to **C-156** – Chart Summarizing Monthly PEP&ASP Obligations for 2016.

Crude Oil Quantities Owed (Over Delivered) to Albpetrol (Tons)			
Month	**Gorisht**	**Cakran**	**Ballsh**
January 2016	715.11	(134.36)	(402.67)
February 2016	(700.88)	(179.45)	(191.39)

- Claimant provided Albpetrol with a further 402.73 tons of oil from the Cakran Oilfield and 1,194.60 tons of oil from the Gorisht Oilfield between 2 March 2016 and 5 March 2016; and

- Claimant's deliveries of PEP&ASP in 2016 also do not take into account any neutralization of the Royalty Tax paid by Claimant, which amounted to USD 540,169 for the year.[1049]

959. According to Claimant, it is thus impossible to conclude that immediately prior to the issuance of the March 2016 Breach Notice, the outstanding PEP&ASP Liability had any serious effect on the benefits that Albpetrol would otherwise derive from the performance of the Petroleum Agreements.[1050] Albpetrol was continuing to receive the benefits of performance under the Petroleum Agreements, as (i) the PEP&ASP Liability for 2015 itself was minimal or non-existent if part of the Royalty Tax payments in 2015 were neutralized by netting them off against the minimal deficit and (ii) for the first few months of 2016, Claimant had a PEP&ASP delivery surplus while continuing to pay the Royalty Tax.[1051]

960. Claimant further contends that assuming the pre-2015 PEP&ASP Liability could continue to be netted off in a manner similar to that set out in the Settlement Agreement, the cash value of the net obligation payable by Claimant to Albpetrol could have continued to decline by recognizing part of the Royalty Tax payments made in 2015 and 2016. Claimant adds that: (i) in any case, between the signing of the Settlement Agreement and the end of 2016, no invoice for the Settlement Agreement amount or any revised cash payment amount had ever been issued by Albpetrol to Claimant,[1052] (ii) while Albpetrol had sought a bank guarantee from Claimant to satisfy part of the PEP&ASP Liability, and Claimant agreed to provide a guarantee, no final value had ever been provided to Claimant, which left Claimant unable to obtain a guarantee from a financial institution.[1053]

[1049] Claimant's Post-Hearing Brief, para. 156(k), p. 33, referring to First Witness Statement of Mark Crawford, para. 33, pp. 7-8.
[1050] Claimant's Post-Hearing Brief, para. 157, p. 33.
[1051] Claimant's Post-Hearing Brief, para. 158, p. 33.
[1052] Claimant's Post-Hearing Brief, para. 159, p. 33, referring to Hearing Transcript Day 2, pp. 152:18-158:17.
[1053] Claimant's Post-Hearing Brief, para. 159, p. 33, referring to Hearing Transcript Day 2, pp. 46:10-16, 51:6-20.

961. Finally, Claimant argues that Albpetrol "*was not an innocent party*" in the accumulation of the PEP&ASP Liability, in view of its cross-breaches described above.[1054]

ii. Rectification of the breach

962. Alternatively, Claimant claims that to the extent that a material breach existed at the time the Termination Notices were issued, it had rectified or commenced to rectify substantially such breach within the cure period provided.[1055]

963. According to Claimant, Respondents misquote the Petroleum Agreements by stating that Claimant's obligation in response to a notice of material breach was to rectify or substantially rectify the alleged breach(es) whereas, on the contrary, Claimant's obligation was to rectify or to commence substantially rectifying such breach(es).[1056] This is a significant difference, as "*commenced to substantially rectify*" means that rectification is to have begun, not that it is to be complete or near completion.[1057]

964. Claimant also argues that contrary to what Respondents allege, the Parties did not agree that "*substantial*" would mean 70%, as the Petroleum Agreements do not indicate so, and the Pre-2014 Liabilities in Cash Conversion Agreement makes no reference to the termination provisions of the Petroleum Agreements and is not instructive on this point.[1058]

965. According to Claimant, the "*full factual matrix*" evidences that it had started to substantially rectify the PEP&ASP Liability:

a. "*Albpetrol and the Claimant had signed the Amending Agreements, which provided for neutralization mechanism for an Offset Mechanism and Tax Deferral Mechanism in respect of the Royalty Taxes;*

b. *Albpetrol, the Claimant and others had entered into the Settlement Agreement, which provided for the implementation of the Offset Mechanism by way of setting off amounts paid by the Claimant under the Royalty Tax against the cash converted value of the PEP&ASP Liability. As of 3 June 2016, the net amount payable under the Settlement Agreement had fallen to USD $6,090,969.43*[1059]*, before accounting for* force majeure*, volumes of product (moveable and immovable) in custody and Delvina-related obligations;*

[1054] Claimant's Post-Hearing Brief, para. 160, p. 33.
[1055] Claimant's Post-Hearing Brief, para. 161, p. 34.
[1056] Reply, para. 126, p. 20.
[1057] Reply, para. 127, p. 20.
[1058] Reply, para. 128, p. 21.
[1059] "*Statement of Claim, para. 150*".

c. *the Claimant repeatedly offered to provide a bank guarantee, subject to the provision of certain information from Albpetrol (which was never provided);*

d. *the Claimant's cumulative PEP&ASP obligations for 2015 and 2016 indicated a positive delivery balance of 930.15 tons for the Cakran Field and -9,715.57 tons for the Gorisht Field, while the Claimant had over-delivered from the Ballsh Field in the amount of 6,680.93 tons; and*

e. *throughout 2016 and up to August 2016, despite illegal labour strikes, the Claimant had accrued no additional PEP&ASP obligations for the Oilfields, having over-delivered in this period from the Cakran Field and Ballsh Field by 843.7 tons and 1,700.94 tons, respectively, and only having under-delivered from the Gorisht Field by 989.33 tons*".[1060]

966. In its Post-Hearing Brief, Claimant indicates that during the six-month cure period from March 2016 to August 2016, it reduced the PEP&ASP Liability by over delivering 461.66 tons of oil while continuing to pay the Royalty Tax without any neutralization.[1061] Claimant also argues that if deliveries made in September 2016 are considered as well, Claimant would have further reduced its obligations to Albpetrol by an additional 595.97 tons.[1062]

967. Claimant thus contends that the net result of taking into account the above factors is that Claimant's PEP&ASP obligations as at the date of the Wrongful Confiscations would be no more than 8,500 tons, and less than 5,000 tons if the Ballsh pre-2013 oversupply was subtracted from the PEP&ASP Liability.[1063]

968. Claimant further reiterates that the changes to the Amending Agreements and Settlement Agreement proposed by the MEI at the May Meeting in 2016 would change Claimant's payment obligation necessary to settle the PEP&ASP Liability and only provided for partial fulfillment of the Fiscal Stabilization Covenant.[1064] Claimant's representatives agreed that it was in breach ("*but not a material breach*") of its PEP&ASP obligations and wanted to take steps to repair such breach, which led to the MEI and Claimant to discuss using a bank guarantee to satisfy the net liability to Albpetrol. Claimant reiterates that it said at the May Meeting and the June Meeting that it needed a specific value to be invoiced to it in order to provide a guarantee.[1065]

[1060] Reply, para. 129, p. 21.
[1061] Claimant's Post-Hearing Brief, para. 162, p. 34, referring to **C-156** – Chart Summarizing Monthly PEP&ASP Obligations for.
[1062] Claimant's Post-Hearing Brief, para. 162, p. 34, para. 41, p. 8.
[1063] Reply, para. 130, p. 21, referring to Figure 1, p. 36.
[1064] Claimant's Post-Hearing Brief, para. 163, p. 34, referring to Hearing Transcript Day 2, p. 48:7-12; **C-70** – Minutes of Meeting between TransAtlantic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016.
[1065] Claimant's Post-Hearing Brief, para. 163, p. 34, referring to First Witness Statement of Mark Crawford, paras. 91-92, p. 21.

969. According to Claimant, while those discussions were occurring, Albpetrol instructed a bailiff to take measures against Claimant for an amount of USD 13 million,[1066] an amount that was unrelated to the figures that the parties had been discussing that could satisfy the disputed cross-obligations (including the service debts between Albpetrol and Claimant), "*and the action hindered the Claimant in the midst of the cure period*".[1067]

970. Claimant states that ultimately, Claimant did not agree to the partial neutralization measure[1068] and never received a final cash number or invoice from Albpetrol in respect of the guarantee, so that this uncertainty provided Claimant with no determined value with which to obtain a guarantee from a financial institution.[1069]

971. Claimant thus concludes that in the context of the "*multi-faceted situation surrounding the PEP&ASP Liability*", it must objectively be taken to have commenced substantially rectifying any material breach, to the extent that there was one at all.[1070]

972. Another argument made by Claimant is that efforts to resolve the PEP&ASP Liability continued beyond the date of the Termination Notices, as Cash Payment Agreements were entered into between Claimant and Albpetrol on 19 and 20 January 2017 and the invoices were due and payable within days following the Confiscation Order.[1071]

iii. <u>Affirmation of the material breach</u>

973. In the alternative, Claimant argues that if it was in material breach of the Cakran and Gorisht Petroleum Agreements, such breaches were repeatedly affirmed by Albpetrol and could not validly be relied upon to issue the Termination Notices.[1072]

974. Claimant states that the Petroleum Agreements are governed by English law. Further, whether or not Albpetrol affirmed such breaches under those agreements is a preliminary issue of fact and law that may be considered by the Tribunal.[1073]

975. Claimant argues that under English law, a right to terminate a contract for a material breach of an obligation by a counterparty is lost where a party expressly or impliedly affirms the breach by electing to treat the contract as continuing. An affirmation may be implied where a party acts unequivocally such that "*it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that*

[1066] Claimant's Post-Hearing Brief, para. 164, p. 34, referring to **C-71** – Notification of the National Chamber of Private Court Executioners dated 24 June 2016.
[1067] Claimant's Post-Hearing Brief, para. 164, p. 34.
[1068] Claimant's Post-Hearing Brief, para. 165, p. 34, referring to **C-70** – Minutes of Meeting between TransAtlantlic, the MEI and Albpetrol held 5 May 2016, attached to Letter No. 4935 from the MEI to TransAtlantic and Albpetrol dated 28 July 2016; **C-72** – Letter No. 5486/2 from Albpetrol to TransAtlantic dated 31 August 2016; **C-73** – Letter No. 267/16 from TransAtlantic to Albpetrol and AKBN dated 2 September 2016.
[1069] Claimant's Post-Hearing Brief, para. 166, p. 34.
[1070] Claimant's Post-Hearing Brief, para. 167, p. 34.
[1071] Statement of Claim, para. 274, p. 44.
[1072] Claimant's Post-Hearing Brief, para. 168, p. 35.
[1073] Claimant's Post-Hearing Brief, para. 169, p. 35.

he will not exercise his right to treat the contract as repudiated".[1074] Claimant relies on English case law indicating that continued performance of an agreement for a year, without protest or a reservation of rights, is consistent with having elected to abandon a right to terminate a contract.[1075]

976. Claimant's position is that an affirmation does not disentitle a party from damages[1076] and that an affirmation in respect of one breach does not preclude the affirming party from terminating the contract on the ground of further subsequent repudiatory breaches.[1077]

977. Claimant recalls that Albpetrol issued five notices of material breach between 2013 and 2016 in respect of the Cakran and the Gorisht Petoleum Agreements on the basis of the PEP&ASP Liability, including the following:

- The first notice of material breach on 4 November 2013, pertaining to the three Oilfields plus the Delvina gas field;[1078]

- The second notice of material breach on 26 May 2014, pertaining to the PEP&ASP Liability of the Cakran and Gorisht Oilfields and the Delvina gas field;[1079]

- The third notice of material breach on 26 June 2014, pertaining to the PEP&ASP Liability of the Gorisht Oilfield;[1080]

978. According to Claimant, by the time Albpetrol issued its final notices of material breach, on 10 February 2016[1081] and 7 March 2016,[1082] it had failed to assert a termination of the Cakran and Gorisht Petroleum Agreements and, in doing so, it continued to accept performance of the Petroleum Agreements by Claimant while the PEP&ASP Liability's growth slowed and "*in fact began to shrink*", despite no neutralization of the Royalty Tax.[1083] Albpetrol also agreed to the terms of the Settlement Agreement and accepted

[1074] Claimant's Post-Hearing Brief, paras. 170-171, p. 35, referring to **CL-58** – Beale, *Chitty on Contracts* (33d ed., 2018), para. 24-003; **CL-59** – *Stocznia Gdanska SA v Latvian Shipping Co (No 3)*, [2002] EWCA Civ 889, para. 87.
[1075] Claimant's Post-Hearing Brief, para. 172, p. 35, referring to **CL-60** – *Tele2 International Card Company SA v Post Office Ltd*, [2009] EWCA Civ 9, para. 57.
[1076] Claimant's Post-Hearing Brief, para. 173, p. 35, referring to **CL-61** – Beale, *Chitty on Contracts* (33d ed., 2018), para. 24-010.
[1077] Claimant's Post-Hearing Brief, para. 173, p. 35, referring to **CL-62** – Beale, *Chitty on Contracts* (33d ed., 2018), para. 24-004.
[1078] Claimant's Post-Hearing Brief, para. 174, p. 36, referring to **R-35** – Letter from Albpetrol to Claimant dated 4 November 2013.
[1079] Claimant's Post-Hearing Brief, para. 175, p. 36, referring to **R-38** – Letter from Albpetrol to the Claimant dated 26 May 2014.
[1080] Claimant's Post-Hearing Brief, para. 175, p. 36, referring to **R-39** – Letter from Albpetrol to the Claimant dated 26 June 2014.
[1081] **C-15** – Letter from Albpetrol Sh.A. regarding Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated February 10, 2016.
[1082] **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016; **C-16** – Letter from Albpetrol Sh.A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016.
[1083] Claimant's Post-Hearing Brief, para. 176, p. 36.

over-deliveries from the Ballsh Oilfield. According to Claimant, by this conduct, Albpetrol "*unequivocally affirmed any material breaches"* by Claimant in respect of the PEP&ASP Liability through at least July 2015, and elected to continue the Cakran and Gorisht Petroleum Agreements as a result. Albpetrol never reserved its rights as to termination. Claimant argues that, consequently, Albpetrol cannot rely upon any portion of the PEP&ASP Liability accrued up to July 2015 as a material breach for termination of the Petroleum Agreements.[1084]

979. Claimant reiterates that without taking into account any neutralization of the Royalty Tax, it delivered to Albpetrol (i) over 91% of its PEP&ASP obligations in 2015,[1085] and (ii) 5,074.39 tons of oil in January and February 2016, exceeding its PEP&ASP obligations by 893.64 tons.[1086] Claimant concludes that if Albpetrol affirmed any material breaches up to July 2015, it is clear that there could not be a further or subsequent material breach in respect of the PEP&ASP Liability that Albpetrol could have relied upon in its notices of material breach sent on 10 February and 7 March 2016.[1087]

iv. <u>Defective breach notice</u>

980. Claimant also contends that the Termination Notices are ineffective, or invalid at law, because they relied upon an invalid notice of material breach.[1088]

981. Claimant submits English case law indicating that a notice of material breach must be "*sufficiently clear and unambiguous to enable a reasonable recipient (that is to say one having all the background knowledge reasonably available to the recipient at the time of the notice) to understand the contractual basis for the notice and the nature of the breach which is alleged to have occurred, so as to be able to assess the validity of the notice and take such steps as are open to him to remedy the alleged breach*".[1089]

982. Claimant argues that the March 2016 Breach Notice upon which the Termination Notices rely is "*patently ambiguous and insufficiently clear as to have enabled the Claimant to determine the magnitude of the alleged material breach or otherwise understand how it could remedy the alleged material breach*".[1090]

983. First, Claimant argues that the March 2016 Breach Notice did not set out a specific amount of the PEP&ASP Liability to be rectified, as the PEP&ASP Liability was an amount subject to earlier offset and neutralization agreements (the status of the

[1084] Claimant's Post-Hearing Brief, para. 176, p. 36.
[1085] Claimant's Post-Hearing Brief, para. 177, p. 36, referring to **C-63** – Letter No. 34/16 from TransAtlantic to Albpetrol dated 12 February 2016.
[1086] Claimant's Post-Hearing Brief, para. 177, p. 36, referring to **C-156** – Chart Summarizing Monthly PEP&ASP Obligations for 2016.
[1087] Claimant's Post-Hearing Brief, para. 178, p. 36.
[1088] Claimant's Post-Hearing Brief, para. 179, p. 36, para. 191, p. 38.
[1089] Claimant's Post-Hearing Brief, para. 180, p. 37, referring to **CL-63** - *QOGT Inc v International Oil & Gas Technology Ltd*, [2014] EWHC 1628 (Comm), para. 112.
[1090] Claimant's Post-Hearing Brief, para. 181, p. 37.

Settlement Agreement and Pre-2014 Liabilities Cash Conversion Agreement being unclear) and other disputes concerning the Ballsh over deliveries, the *Force Majeure* Amounts and oil in custody volumes.[1091]

984. Claimant contends that Albpetrol's letter dated 26 February 2016 also does not specify an amount of PEP&ASP or cash value that it asks Claimant to provide, but asked Claimant to "*comply to the PEP&ASP obligations as notified through our last letter in that regard, with Nr.9006 Prot., dated 11.12.2015*".[1092] In such letter, Albpetrol had informed Claimant that it owed the following through 30 September 2015:

- 25,655.27 tons for the Gorisht Oilfield; and
- 11,761.13 tons for the Cakran Oilfield.[1093]

985. According to Claimant, a reasonable person cannot assume that a notice issued in March 2016 could rationally refer back to volumes owed up to 30 September 2015 and rely upon it as an assertion of a material breach. Such a notice would not take into account any changes from 1 October 2015 through March 2016, which happened to be in Claimant's favour.[1094]

986. Claimant adds that the March 2016 Breach Notice, if relying upon the 26 February 2016 letter from Albpetrol, "*leave a reasonable person unsure as to whether an accommodation for the Royalty Tax is being made or not. If the Royalty Tax were being considered, there is no certainty as to the PEP&ASP Liability the Claimant must meet. If the Royalty Tax were not being considered, the notice might be entirely invalid for ignoring a potentially material breach of a fundamental cross-obligation*".[1095]

987. Second, Claimant argues that the March 2016 Breach Notice give no clear guidance as to how Claimant could cure the alleged material breach, as it simply asked Claimant to provide an engagement plan to be followed in order to "*rectify such breaches with the above-mentioned timeframe*" and there was no guarantee that Albpetrol might agree with a proposed engagement plan, which reinforces the ambiguity of the March 2016 Breach Notice.[1096]

988. Claimant also argues that by asking Claimant to rectify the breaches within six months, the March 2016 Breach Notice ignores the legal right set out in Article 24.2.1 that

[1091] Claimant's Post-Hearing Brief, para. 182, p. 37.
[1092] Claimant's Post-Hearing Brief, para. 183, p. 37, referring to **C-64** – Letter No. 813/2 from Albpetrol to TransAtlantic dated 26 February 2016.
[1093] Claimant's Post-Hearing Brief, para. 184, p. 37, referring to **R-57** – Letter from Albpetrol to Claimant dated 11 December 2015. According to Claimant, "*these figures appear to include the oil in custody amounts, recognize that Albpetrol owed the Claimant 11,336.44 tons from the Ballsh Field, and refers to outstanding invoices under the Pre-2014 Liabilities Cash Conversion Agreement. However, no reference is made to the Royalty Tax payments made by the Claimant*".
[1094] Claimant's Post-Hearing Brief, para. 185, pp. 37-38, referring to paras. 156(h)-(k), pp. 32-33.
[1095] Claimant's Post-Hearing Brief, para. 186, p. 38.
[1096] Claimant's Post-Hearing Brief, para. 188, p. 38, referring to **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016; **C-16** – Letter from Albpetrol Sh.A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016.

Claimant can obviate a material breach by commencing to substantially rectify the breach. No guidance was given as to how Claimant could substantially rectify or commence to substantially rectify the alleged material breach: "[f]*or instance, the March 2016 Breach Notices could have indicated whether payment in part would suffice to arrest the alleged material breach. However, instead, the only yardstick available is that the Claimant must entirely 'rectify such breaches' within the six-month cure period*".[1097]

989. Finally, Claimant contends that the March 2016 Breach Notice does not indicate whether payment in-kind or cash could be utilized to satisfy the PEP&ASP Liability, specifying that the default under the Petroleum Agreements is for the Claimant to provide PEP in-kind, although it can provide ASP in-kind or in cash.[1098] Claimant adds that "*Albpetrol admitted that a comparable PEP&ASP Liability was incapable of being delivered in-kind within a six-month period. However, by issuing the March 2016 Breach Notices it clearly believed the PEP&ASP Liability was capable of remedy within a six-month period or else it would have indicated no cure was possible*".[1099]

v. Additional arguments

990. In response to Respondents' assertion that Mr. Puka and Mr. Mitchell agreed on a reduction of liability "*by way of handshake agreement*",[1100] Claimant argues that Mr. Mitchell is not and never was Claimant, and that the alleged agreement was not made in writing in accordance with Articles 28.4 of the License Agreements and 26.9 of the Petroleum Agreements, so that it is not binding on the parties and is irrelevant.[1101]

991. Claimant also contends that in early 2015, its former parent company, TAT, offered to pay or guarantee payment of 70% of the outstanding cash value owed by Claimant to Albpetrol, conditional upon the execution of the Amending Agreements and a definitive plan for the Ballsh handover.[1102] However, Albpetrol rejected this offer.[1103]

992. Another argument of Claimant is that no notice of termination was ever issued by Albpetrol in relation to the 7 April 2016 letter and the allegations raised therein.[1104]

993. Finally, Claimant argues that Respondents may not request the performance of the PEP&ASP Liability because the fiscal arrangement under the PSAs, including PEP&ASP, is based on Respondents' obligation to implement Fiscal Stabilization

[1097] Claimant's Post-Hearing Brief, para. 189, p. 38.
[1098] Claimant's Post-Hearing Brief, para. 190, p. 38, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 3.5.1, 3.5.2, pp. 12-13.
[1099] Claimant's Post-Hearing Brief, para. 190, p. 38.
[1100] Statement of Defence, para. 164, p. 53, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1101] Reply, para. 196, p. 33.
[1102] Reply, para. 197, p. 33, referring to **R-45** – Letter from TransAtlantic Petroleum Ltd. to Albpetrol dated 20 January 2015.
[1103] Reply, para. 197, p. 33, referring to **R-46** – Letter from Albpetrol to Claimant dated 26 January 2015.
[1104] Reply, para. 132, p. 22.

Measures and that, since they have been in default of providing Fiscal Stabilization Measures since 2008, they may not request performance of the PEP&ASP Liability.[1105]

c) Claimant's argument that even if the Petroleum Agreements were validly terminated, it would not result in the automatic termination of the License Agreements

994. Claimant argues that if the Termination Notices were validly issued, the termination of the respective Petroleum Agreements did not result in the automatic lapse of the Instruments of Transfer. Indeed, Claimant rejects Respondents' contention that this was the case because the Instruments of Transfer are subject to a condition subsequent that requires the Petroleum Agreements to have not been terminated.[1106]

995. Claimant points out that Albpetrol transferred to Claimant "*all its rights, privileges and obligations under the License Agreement* […] *subject to said Petroleum Agreement*"[1107] and argues that the Instruments of Transfer are not mere assignments of claims, as evidenced by the fact that "*only claims can be assigned, obligations (and some rights other than obligations) as well as entire contractual relationships cannot be assigned under Swiss law*".[1108] The Instruments of Transfer also stipulate that Claimant became a party to the License Agreements, but with predefined rights and obligations that apply to the "foreign partner" only. According to Claimant, since Albpetrol is not a "*foreign partner*", Claimant's rights under the License Agreements cannot be and are not "*derivative*" as Respondents incorrectly allege.[1109]

996. Claimant's position is that the foreign partner (or any party other than Albpetrol comprising the Licensee) has separate rights and obligations under the License Agreements that cannot be and are not derivative,[1110] namely:

(i) The "*foreign partner*", *i.e.* Claimant, *inter alia*, has the right to a Project Area separate from the Albpetrol Operations Zone, so that the Licensee's rights under the License Agreement are limited to the area allocated to the foreign investor in case of Claimant, respectively Albpetrol's rights as Licensee are limited to the balance of Claimant's Project Are, i.e. the Albpetrol Operations Zone;[1111]

[1105] Statement of Claim, para. 275, p. 44.
[1106] Claimant's Post-Hearing Brief, para. 193, p. 39, referring to Rejoinder Brief, para. 462, p. 125.
[1107] Claimant's Post-Hearing Brief, para. 194, p. 39, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Annex E, 1), p. 1.
[1108] Claimant's Post-Hearing Brief, para. 194, p. 39, referring to **CL-64** – Girsberger & Hermann, Art. 164, in: Basler Kommentar OR I (Honsell et al. eds., 6 ed. 2015), paras. 4a, 5.
[1109] Claimant's Post-Hearing Brief, para. 194, p. 39.
[1110] Claimant's Post-Hearing Brief, para. 198, p. 40.
[1111] Claimant's Post-Hearing Brief, para. 195, p. 39, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 6.2, p. 22; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.5, pp. 12-13, Annex F.

(ii) The foreign partner is a separate entity to the arbitration agreement and has separate "*interests under this License Agreement*":[1112] whereas the foreign partner and Albpetrol are jointly and severally liable and responsible for the Licensee's obligations under the License Agreement,[1113] the foreign partner is solely responsible for conducting Petroleum Operations in the balance of the Contract Area, *i.e.* the Albpetrol Operations Zone;[1114]

(iii) With regard to Abandonment Costs and claims and losses related to abandonment activities, the foreign partner and Albpetrol may agree on an allocation of their responsibilities in which case they will be individually and jointly responsible under the License Agreement only to the extent set forth in the Petroleum Agreement.[1115] The foreign partner and Albpetrol each pay separately their tax on Profit in kind.[1116] And the provisions governing the allocation of Available Petroleum (Article 10) and payments (Article 14) apply separately with respect to each party.[1117]

(iv) AKBN had the right to cancel the License Agreement under certain conditions. If the Licensee is comprised of more than one party and the action leading to termination has been committed by only one entity, the License Agreement shall not be terminated if the other entity takes appropriate action to remedy the situation with regard to the License Agreement.[1118]

997. Claimant argues that there is no condition subsequent in the Instruments of Transfer, or no mechanism in the Petroleum Law or the PSAs, that would make Claimant's quality as party (foreign partner) to the License Agreements dependent on whether the Petroleum Agreements have been terminated.[1119] In Claimant's opinion "[t]*he opposite is the case: since Albpetrol and AKBN accepted that the Claimant became a party to the License Agreements (with rights and obligations separate from Albpetrol), Albpetrol may not unilaterally withdraw the Claimant's rights under the License Agreements by (purportedly) terminating the Petroleum Agreements. The Respondents' contrary (baseless) contention would undermine the termination provisions of the License*

[1112] Claimant's Post-Hearing Brief, para. 195, pp. 39-40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Articles 25.2, 25.3, pp. 63-64.
[1113] Claimant's Post-Hearing Brief, para. 195, p. 40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 3.3(c), p. 16.
[1114] Claimant's Post-Hearing Brief, para. 195, p. 40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 6.2, p. 22.
[1115] Claimant's Post-Hearing Brief, para. 196, p. 40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 9.3(d), p. 35.
[1116] Claimant's Post-Hearing Brief, para. 196, p. 40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 14.2(c), p. 44.
[1117] Claimant's Post-Hearing Brief, para. 196, p. 40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 14.2(d), p. 44.
[1118] Claimant's Post-Hearing Brief, para. 197, p. 40, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 24.1, p. 61.
[1119] Claimant's Post-Hearing Brief, para. 199, p. 40; Reply, para. 133, p. 22.

Agreements and effectively enable Albpetrol to decide alone the fate of the foreign investor under the License Agreements".[1120]

998. Claimant also argues that it is incorrect for Respondents to state that the License Agreements "*had already been cancelled*" as an automatic result of the termination of the related Petroleum Agreements, as

(i) there are no cross-default provisions between the agreements, and that an allegation of breach under one agreement is not deemed to constitute a breach under the other agreement, nor is a notice of breach issued under one agreement deemed to constitute a notice of breach under the other agreement. According to Claimant, the termination provisions under the License Agreements and the Petroleum Agreements function differently from one another, as the termination provision under the Petroleum Agreements provides the Contractor with 6 months to rectify an alleged breach, whereas the termination provision under the License Agreements provide the Licensee only 90 days to rectify an alleged breach;[1121]

(ii) the termination of a Petroleum Agreement does not result in the removal of GBC as a Licensee under the corresponding License Agreement;[1122]

(iii) AKBN never provided the required notifications to repair or terminate under the License Agreements; and

(iv) Albpetrol's ongoing operation of the Gorisht and Cakran Oilfields constitutes a breach of Article 6 of the License Agreements.[1123]

999. Finally, Claimant states that even if the purported termination of the Cakran and Gorisht Petroleum Agreements could have any effect on the License Agreements, there is no such effect in the case at hand.

1000. Indeed, Claimant submits that under Swiss law, (i) long-term contracts like license contracts may be terminated for good cause prior to the end of the term,[1124] but that if a party waits on declaring such termination, it is deemed that there is no cause for terminating the contract prior to the ordinary end of its terms,[1125] and (ii) if the termination is not justified, it has no legal effect and the contract remains valid.[1126]

[1120] Claimant's Post-Hearing Brief, para. 199, p. 40.
[1121] Statement of Claim, para. 266, p. 43.
[1122] Statement of Claim, para. 267, p. 43.
[1123] Reply, para. 134, p. 22.
[1124] Claimant's Post-Hearing Brief, para. 200, p. 41, referring to **CL-65** – Decision of Swiss Supreme Court, 6 March 2007, BGE 133 III 360, para. 8.1.
[1125] Claimant's Post-Hearing Brief, para. 200, p. 41, referring to **CL-66** – Decision of Swiss Supreme Court, 2 February 2010, 4A_536/2009, para. 2.4.
[1126] Claimant's Post-Hearing Brief, para. 200, p. 41, referring to **CL-65** – Decision of Swiss Supreme Court, 6 March 2007, BGE 133 III 360, para. 8.1.2.

1001. Claimant argues that, in the case at hand, Respondents, which have based their September 2016 Termination Notices on breach notices issued in February and March 2016 that "*supposedly refer to the Claimant's PEP&ASP Liability accrued primarily in 2014 and earlier*",[1127] have tried to invoke a reason for purportedly terminating the Petroleum Agreements more than a year after the purported breach. This indicates that there is no material breach that would justify an early termination – in turn – of the License Agreements.[1128]

4. Claimant's arguments on its right to damages for Respondents' alleged wrongful termination of the Cakran and Gorisht License Agreements.

1002. Claimant argues that the loss caused by Respondents' breach of Claimant's exclusive rights under Article 3.2 of the License Agreements is based on Claimant's financial entitlements under the License Agreements. In particular, Claimant invokes:

(i). its right to recover all Petroleum Costs out of the Available Petroleum after deducting the ASP, *i.e.* Claimant's entitlement to Cost Recovery Petroleum[1129] and

(ii). its entitlement to Profit Petroleum, *i.e.* Available Petroleum in excess of Petroleum Costs minus ASP.[1130]

1003. Claimant contends that it set an additional time limit for Respondents to perform and, with regard to the Cakran and Gorisht License Agreements, forewent performance and claims damages for non-performance pursuant to Article 107(2) SCO, second alternative.[1131]

1004. According to Claimant, Albpetrol and AKBN carried out the illegal seizure of the Cakran and Gorisht Oilfields upon order of the MEI, so that all Respondents breached Claimant's rights under the Cakran and Gorisht License Agreements and are liable to Claimant's damages claims for this breach.[1132]

B. Respondents' position

1005. Subject to the jurisdictional objections that they submit for each of them (see above section 5.2.B.(1)), Respondents argue that Claimant has no substantive claims against the MIE, AKBN or Albpetrol.

[1127] Claimant's Post-Hearing Brief, para. 200, p. 41, referring to Statement of Claim, paras. 159-162, p. 28.
[1128] Claimant's Post-Hearing Brief, para. 200, p. 41.
[1129] Claimant's Post-Hearing Brief, para. 209, p. 42, referring to **C-2**, **C-3** and **C-4** – License Agreements, Articles 3.3(a)(i), 10.2(a).
[1130] Claimant's Post-Hearing Brief, para. 209, p. 42, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 3.5(c).
[1131] Claimant's Post-Hearing Brief, para. 209, p. 42.
[1132] Claimant's Post-Hearing Brief, para. 210, p. 42.

1006. Concerning AKBN, Respondents argue that AKBN has not breached any contractual obligations when "*taking back*" the Cakran and Gorisht Oilfields, as the Agreements had already been terminated by Albpetrol.[1133] AKBN did not breach any of the License Agreements because it was not a party to them and "*it did not act*".[1134]

1007. Respondents contend that Claimant has not proven a breach of contract by the MIE either, as the MIE "*did not act at all and continued to grant all rights under the LAs*" and, in particular, did not issue any confiscation order or request Claimant to cease operations.[1135]

1008. As far as Albpetrol is concerned, Respondents argue that it did not breach any contractual obligations when "*taking back*" the Cakran and Gorisht Oilfields, as the Agreements had already been terminated so that Albpetrol did not breach any obligations towards Claimant under the License Agreements.[1136]

1009. More precisely, Respondents argue that, contrary to what Claimant alleges, the so-called "*confiscation*" of the Cakran and Gorisht Oilfields does not constitute a breach of contract of the respective License Agreements and, in particular, it is not a breach of Article 6 of the License Agreements. Respondents contend that (i) by the time the alleged "*confiscation*" occurred, the respective License Agreements had already been cancelled as the automatic result of the rightful termination of the related Petroleum Agreements on the basis of a number of material breaches of contract by Claimant and (ii) this was not a "*confiscation*" by State Authorities but a "*taking back*" of the petroleum operations by the party entitled to conduct the petroleum operations, *i.e.* Albpetrol.[1137]

1010. As preliminary point, Respondents argue that Claimant presents a flawed summary of facts and that Claimant's own letter dated 5 January 2016,[1138] which documents Claimant's liabilities until December 2015, is unrebuttable evidence of Claimant's "*continued and intentional breaches*" of its main obligation to deliver PEP&ASP to Albpetrol.[1139]

1. <u>Claimant's alleged first breach: a "*massive failure*" to pay PEP&ASP in "kind" and in "cash"</u>

a) <u>Overview of Claimant's debts until 31 December 2016</u>

1011. In their Statement of Defence, Respondents provide an overview of Claimant's debts until 31 December 2016 for the Gorisht and Cakran Oilfields, in support of their argument that Claimant did not meet its primary contractual obligations under the

[1133] Statement of Defence, para. 468, p. 119.
[1134] Respondents' Post-Hearing Brief, para. 132, p. 39.
[1135] Respondents' Post-Hearing Brief, para. 130, p. 38.
[1136] Statement of Defence, para. 458, p. 117, para. 471, p. 120.
[1137] Statement of Defence, paras. 120-121, p. 41.
[1138] **R-60** – Letter from Claimant to Albpetrol dated 5 January 2016.
[1139] Rejoinder Brief, para. 395, p. 105.

Petroleum Agreements by failing to deliver "*huge quantities*" of oil in-kind that it owed to Albpetrol, in particular the PEP&ASP, and by failing to pay for services and training bonuses contractually owed.[1140]

1012. Respondents also provide as evidence monthly and quarterly reports for the oilfields from 2007 to early 2017, which, according to Respondents, were usually prepared by Claimant and prove the development of Claimant's amounts of debts months-by-months.[1141]

1013. Concerning the year 2013, Respondents claim that when Mr. Puka took over as CEO of Albpetrol in late 2013, Claimant's debts had accrued to 50,278.85 tons of crude oil in aggregate, for a monetary value of USD 24,645,205.96.[1142]

1014. Concerning the year 2014, Respondents argue that "*under the impression*" of Mr. Puka's Material Breach Notices, on 28 February 2014, Claimant accepted the conversion of a big part of the debt in kind into cash (USD 15,384,169 net without VAT) (the "**28 February 2014 Conversion Agreement**" referred to by Claimant as "the Pre-2014 Liabilities Cash Conversion Agreement"). The amount stated in the Agreement was later mutually corrected by the Parties to USD 17,360,774.37 without VAT or 20,832,929.24 with VAT. Respondents contend that Claimant paid USD 6,976,000 to Albpetrol but failed to deliver a great part of its debts in kind (PEP&ASP for 2014) in the amount of USD 7,927,404.70, which equals to 19,102.18 metric tons of crude oil. The rate to convert the new debt of 2014 (crude oil) into USD is based on the price Claimant obtained when selling Albpetrol's oil.[1143]

1015. Concerning the year 2015, Respondents argue that Claimant increased its debt in kind by 6,136.39 tons of crude oil, equalling to a value of USD 1,196,596.05, and did not pay any of its debts.[1144]

1016. Concerning the year 2016, Respondents argue that Claimant increased its debt in kind by 2,684.20 tons of crude oil, equalling to a value of USD 523,419, and that, during this year, Albpetrol was able to reduce Claimant's overall debts only by engaging a bailiff who collected around USD 1.5 million.[1145]

1017. Respondents claim that, after all, the total value of debts towards Albpetrol as of 31 December 2016 amounted to USD 27,778,871.29 and that after three years of attempts to collects Claimant's debts, the new management of Albpetrol "*had to face the inconvenient truth*" that Claimant would not be able to significantly reduce its debts. Respondents also contend that they realised that the "*'stable', but way-too-high*" level

[1140] Statement of Defence, para. 122, p. 41.
[1141] Statement of Defence, para. 131, p. 45, referring to Monthly and quarterly reports of the Claimant for the oilfields including the basic data for the calculation of the Claimant's debts (provided by USB flash drive only).
[1142] Statement of Defence, para. 124, p. 44 (table p. 42 ("*Situation on 31.12.2013*")).
[1143] Statement of Defence, para. 125, p. 44 (table p. 42 ("*Situation on 31.12.2014*")).
[1144] Statement of Defence, para. 126, p. 44 (table p. 43 ("*Situation on 31.12.2015*")).
[1145] Statement of Defence, para. 127, p. 44 (table p. 43 ("*Situation on 31.12.2016*")).

of debts that accrued in the time of the government of the Democratic Party in the years 2013-2016 was "*achieved only at the expense of practically no investments in the oilfields, which lead to untenable environmental conditions and that provided for the 'slow death' of the oilfields, which require constant care and investment. Even throughout this period of increased supervision and pressure from Albpetrol, the Claimant continued to sell Albpetrol's oil*".[1146]

1018. Respondents contend that, in addition, Claimant owes Profit Tax amounting to USD 7,642,952 to the Albanian State, pursuant to a calculation based on the self-declarations of Claimant and the formula contained in the License and Petroleum Agreements as follows:[1147]

1	Year	2011	2012	2013	2013
2	Oilfield	Gorisht	Gorisht	Gorisht	Cakran
3	Total Income	13.170.811	15.115.920	16.656.572	40.482.121
4	Total Hydrocrbon Cost	11.424.022	10.795.750	8.105.231	39.737.703
5	Difference	1.746.789	4.320.170	8.551.341	744.418
6	Albpetrol Profit (0.5%)	8.734	21.601	42.757	3.722
7	Difference (5-6)	1.738.055	4.298.569	8.508.584	740.696
8	Profit petroleum Tax 50% (7*50%)	869.027,53	2.149.284,58	4.254.292,15	370.347,96
9	TOTAL (C8+D8+E8+F8)				7.642.952

1019. Respondents contest Claimant's argument that it does not owe Profit Tax,[1148] as such payment is provided for in Article 14.1 of the License Agreements and Article 14.2 requires a notification of AKBN, not the Albanian Tax Authority, as Claimant alleges. Respondents argue that this notification has been provided by AKBN by letters of 29 April 2016 and 29 September 2016.[1149]

1020. As a conclusion of their overview of Claimant's debts, Respondents argue that Claimant's "*massive*" debts has always been higher than the Royalty Tax that was introduced after the conclusion of the License Agreements, a fact that is undisputed by Claimant as the various set-off agreements between Albpetrol and Claimant referenced by Claimant demonstrated a "*massive debt overrun*" of Claimant after deduction of the Royalty Tax. The implementation of the Royalty Tax could not even be an "*informal justification*" to withhold PEP&ASP until a reasonable renegotiation of the Agreement.[1150]

[1146] Statement of Defence, para. 128, pp. 44-45, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1147] Statement of Defence, para. 129, p. 45, referring to **R-21** – Letter from AKBN to the Claimant dated 29 April 2016; **R-22** – Reminder letter from AKBN to the Claimant dated 29 September 2016; **RWS-1** – First Witness Statement of Endri Puka.
[1148] Reply, para. 122, p. 20.
[1149] Rejoinder Brief, para. 400, p. 107, referring to **R-21** – Letter from AKBN to the Claimant dated 29 April 2016; **R-22** – Reminder letter from AKBN to the Claimant dated 29 September 2016.
[1150] Statement of Defence, para. 133, p. 46.

b) Claimant's alleged constant "*theft*" of oil and money[1151] during the early contractual relationship of Respondents with Claimant (as Stream Oil & Gad Ltd.)

1021. Respondents allege that in the early stages of the contractual relationship, Albpetrol already had to "*admonish*" Claimant to meet its obligations.[1152] Respondents refer notably to an instance in June 2011 where Claimant and Albpetrol met for a bilateral cooperation and reconciliation meeting, they agreed on the amount of oil and debt owed to Albpetrol and Claimant ensured payment until 30 June 2011.[1153]

1022. Respondents contend that, however, Claimant failed to pay when the debts were due, even though an agreement had been found and it provided assurances that it would pay:

> "*1. Stream recognizes the financial lability to Albpetrol for the services that Albpetrol has provided to Stream and the respective amount, after being finally reconciled between the parties, will be paid by Stream, preferably within September 2011;*
>
> *2. Stream recognizes the obligation to deliver to Albpetrol the Pre-Existing Production of Gas for the Delvine gas field. In accordance with the provisions of Hydrocarbon Agreement on this issue, Stream obligation to Albpetrol for the Pre-Existing Production of Gas is to evade this quantity in kind, in the well's mouth and Stream is ready to do so upon notice given by Albpetrol.*
>
> *3. In accordance with the provisions of Hydrocarbon Agreements for the oil fields Cakran-Mollaj and Gorisht-Kocul, Stream has declared application of Force Majeure due to power outage in these oil fields. Based on these provisions, Stream is released from contractual obligations for the delivery of Oil Pre-Existing Production for wells affected by power outage. Moreover, as Albpetrol has declared and officially, Stream will cover the losses caused by the power outage, from Albpetrol's production. Starting in September 2011, Stream will begin to deliver to Albpetrol the difference of Oil Pre-Existing Production*".[1154]

1023. According to Respondents, Claimant did not fulfill its written promises again but discussions continued and led to an agreement on alternative payment delivery so that all debts in kind and cash would be settled by December 2011.[1155] Claimant did not even

[1151] Statement of Defence, para. 134, p. 46.
[1152] Statement of Defence, para. 135, p. 46.
[1153] Statement of Defence, para. 135, p. 46, referring to **R-23** – Letter from Albpetrol to Claimant dated 24 June 2011.
[1154] Statement of Defence, para. 136, pp. 46-47, referring to **R-24** – Letter from Claimant to Albpetrol dated 25 August 2011.
[1155] Statement of Defence, para. 137, p. 47, referring to **R-25** – Letter from Albpetrol to Claimant dated 12 September 2011; **R-26** – Letter from Albpetrol to Ministry of Economy, Trade and Energy dated 14 September 2011.

meet the reduced obligations and by letter of 9 December 2011, Albpetrol had to remind Claimant to fulfill its obligations until 31 December 2011.[1156]

1024. Respondents argue that Claimant did not do so, but, by signing a "Reconciliation Act" on 31 December 2011, it recognized the unfulfilled obligations *vis-à-vis* Respondent,[1157] which it again failed to meet, leading to the conclusion of an "Agreement" between Claimant and Albpetrol containing a confirmation of the debts and Claimant's undertaking to meet its obligations in a detailed settlement schedule until 30 June 2012.[1158]

1025. Respondents contend that Claimant again did not meet its obligations, and apparently "*was not even considering to pay its obligations*". Respondents has filed letters in which Albpetrol unsuccessfully reminded Claimant to perform its obligations.[1159]

1026. As a conclusion to its position on Claimant's alleged "*theft of oil and money*"[1160] between 2011 and 2013, Respondents argue: *"One may wonder today why Albpetrol was so overly patient with the Claimant in the period before October 2013. Albpetrol wrote letters for the file, and the Claimant pocketed Albpetrol's oil. Any enforcement of Albpetrol's rights by Albpetrol's former management?* Nothing. *The Claimant simply ignored Albpetrol's letters as if the Claimant never had to fear the termination of the Agreements. The file (to the extent available today) reads as if an "invisible hand" had been protecting the Claimant since the contract award in 2007. The proceeds of the Claimant's constant use of Albpetrol's PEP and ASP oil disappeared – presumably in the pockets of the Claimant's shareholders, because the Claimant was and is failing to honour its commitments to a high number of creditors*".[1161]

1027. As for Claimant's allegations regarding the responsibility for the 2011 events that Claimant characterizes as *force majeure*, Respondents argue that the responsibility for the power outage was constantly discussed and is still disputed between the Parties. As explicitly stated in the conversion agreement between the Claimant and Albpetrol dated 28 February 2014, 4,611.80 tons of crude oil related to the *force majeure* issue (9% of the Claimant's overall debt of 51,181,25 tons at that time) were provisionally deducted

[1156] Statement of Defence, para. 138, p. 47, referring to **R-27** – Letter from Albpetrol to Claimant dated 9 December 2011.
[1157] Statement of Defence, para. 139, p. 47, referring to **R-28** – Reconciliation Act between Albpetrol and the Claimant dated 31 December 2011.
[1158] Statement of Defence, para. 140, pp. 47-48, referring to **R-29** – Agreement between Albpetrol and the Claimant dated 27 January 2012.
[1159] Statement of Defence, para. 141, p. 48, referring to **R-30** – Letter from Albpetrol to Claimant dated 3 April 2012; **R-31** – Letter from Albpetrol to Claimant dated 9 August 2012; **R-32** – Letter from Albpetrol to Claimant dated 20 February 2013; **R-33** – Letter from Albpetrol to Claimant dated 19 March 2013; **R-34** – Letter from Albpetrol to Claimant dated 9 October 2013.
[1160] Statement of Defence, para. 134, p. 46.
[1161] Statement of Defence, para. 143, pp. 48-49.

for further discussion, so that no offset is warranted. Respondents also contend that Claimant did not pay the debts that it undertook to pay in this agreement.[1162]

c) Albpetrol's notice of material breach of contract of 4 November 2013

1028. Respondents explain that, in the summer of 2013, the Democratic Party lost the elections and a new government was elected under the leadership of the Socialist Party, which decided changes in Albpetrol's management. In particular, Mr. Puka became the CEO of Albpetrol in October 2013 and tried to sanction Claimant's fundamental contract breaches while facing the responsibility to collect Claimant's debts that had accrued in the last six years.[1163]

1029. Respondents contend that, in line with Article 24 of the Petroleum Agreements, on 4 November 2013, Albpetrol gave written notice to Claimant of its intention to terminate the Petroleum Agreements due to the various material breaches of Claimant's obligations.[1164] As stated in this "*material breach notice*", until 30 September 2013, Claimant's outstanding obligations *inter alia* comprised:

- 38,952.54 tons of crude oil;
- 8,094,914.21 Nm^3 of natural gas;
- ALL 439,452,648.00 (Albanian Lek)[1165] for unpaid services;
- USD 660,000 for non-spent annual training bonuses and various other breaches of contractual obligations.[1166]

1030. Respondents reiterate that within six years, Claimant has not paid its obligations and "*misused for itself*" an amount of oil owed to Albpetrol which translated into a monetary value of about USD 25,644,705.02 until 31 December 2013.[1167]

d) Respondents' argument that Albpetrol could always lift its oil from Claimant's storage facilities

1031. In the material breach notice, Respondents addressed Claimant's allegation that Albpetrol was not prepared to receive crude oil, whereas, according to Respondents,

[1162] Rejoinder Brief, para. 399, p. 106, referring to **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014.
[1163] Statement of Defence, para. 144, p. 49.
[1164] Statement of Defence, para. 145, p. 49, referring to **R-35** – Letter from Albpetrol to Claimant dated 4 November 2013; **RWS-1** – First Witness Statement of Endri Puka.
[1165] According to Respondents, 1 USD equaled approximately 105 ALL at the time of submission of the Statement of Defence (Statement of Defence, para. 146, p. 49).
[1166] Statement of Defence, para. 146, p. 49.
[1167] Statement of Defence, para. 147, pp. 49-50, referring to **RWS-1** – First Witness Statement of Endri Puka.

"*Claimant on purpose prevented Albpetrol's pick-up of oil, but later claimed 'for the file' that Albpetrol had failed to take delivery*".[1168]

1032. Respondents claim that Albpetrol thus had "*no other option*" than to initiate the termination procedure of the Petroleum Agreements.[1169]

i. Respondents' argument that Albpetrol's ability to lift oil is a "*non-issue*" and was mainly caused by Claimant

1033. Respondents explain that (i) Claimant should have notified Albpetrol of 222,648.77 tons of crude oil for delivery between 2007 and 2017, (ii) Claimant only notified Albpetrol of 153,703.17 tons, as it failed to notify Albpetrol in due time and to prepare the remaining 68,954.60 tons for delivery, and (iii) of the 153,703.17 tons of crude oil notified, Albpetrol managed to pick-up 152,218.17, meaning that the balance not picked up by Albpetrol, mainly in 2011 and 2012 was just 1,485 tons, *i.e.* 0.67% of the total quantity owed to Albpetrol.[1170]

1034. According to Respondents, the reason why Albpetrol was sometimes not able to lift its share of oil was mainly due to Claimant not respecting the minimum notice period for the lifting of the oil, in violation to the standard industry practice that a contractor gives a notice for the dates and the quantities of oil to be delivered in a given month at least five business days before the end of the previous month.[1171]

1035. Respondents claim that correspondence between Albpetrol and Claimant shows that Claimant permanently announced oil deliveries late in view of the above-mentioned practice, and regularly asked for the lifting of oil between 1 to 3 days in advance of the delivery date, or even called Albpetrol the same day, did not adhere to the agreed oil lifting schedules by not being present when Albpetrol's trucks arrived, and had already sold the oil owed to Albpetrol to its other contract partners when Albpetrol's trucks arrived.[1172]

1036. Respondents also argue that Claimant's argument that Albpetrol did not lift its share of oil are misleading, as exhibit C-174, for instance, does not refer to "*oil not lifted*" but to "*oil lifted slowly*", so that it is no evidence for Albpetrol's alleged failure to lift oil. Respondents add that this letter only refers to 535 tons of crude oil.[1173]

[1168] Statement of Defence, para. 148, p. 50, referring to **R-35** – Letter from Albpetrol to Claimant dated 4 November 2013; **RWS-1** – First Witness Statement of Endri Puka.
[1169] Statement of Defence, para. 152, p. 51.
[1170] Rejoinder Brief, paras. 254-257, pp. 70-71, referring to Monthly and quarterly reports of the Claimant for the oilfields (provided by flash drive only); **RWS-2** – Second Witness Statement of Endri Puka, para. 17, p. 4.
[1171] Rejoinder Brief, para. 258, p. 71, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 18, p. 4.
[1172] Rejoinder Brief, para. 261, p. 72; Respondents' Post-Hearing Brief, para. 140, pp. 41-42, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 22, pp. 4-5; Hearing Transcript Day 2, pp. 97:10-99:9.
[1173] Rejoinder Brief, para. 262, p. 72.

ii. Respondents' argument that Claimant prevented Albpetrol from lifting its oil

1037. First, Respondents argue that, after 23 October 2013, when Albpetrol allegedly did not lift its oil in Gorisht and Claimant transferred Albpetrol's oil to the "*oil port*" of Petrolifera in the harbour city of Vlore, Albpetrol's employees inspected the decantation station in Gorisht and found Claimant's allegation to be untrue, as Albpetrol's oil was still there, and Albpetrol could have taken its oil at any moment, after due information.[1174]

1038. Second, according to Respondents, on 30 and/or 31 October 2013, after investigating Claimant's charges that Albpetrol had not lifted its oil, Albpetrol found out that its employees had been present at the Gorisht station, and that they were prepared to take delivery of Albpetrol's crude oil. However, Claimant's employees prevented the Albpetrol employees to take the oil, and began instead to unload Depot No. 3 for the account of Claimant, for its export to Vlore, and during such unloading by Claimant, the Albpetrol employees were prevented by Claimant from unloading PEP&ASP for Albpetrol.[1175]

1039. According to Respondents, the few wrong examples given by Claimant "*cannot defeat the suspicion of a constant, year-long misappropriation of oil and gas*". If Claimant was right with its allegations, it would have "*shown its respect for third-party ownership by storing the oil in escrow and/or by reimbursing the value of such oil that may have been subject to an emergency* immediately *to the entitled party (mostly: Albpetrol)*", which was not done. Respondents argue that, instead, Claimant sent the proceeds of the unlawful taking of Albpetrol's oil to its shareholders and ultimate beneficiaries and not to its creditors.[1176]

iii. Respondents' argument that Claimant permanently failed to deliver Albpetrol's oil because it had pre-sold huge quantities to third parties

1040. Respondents argue that one reason why Claimant permanently failed to deliver Albpetrol's oil was that Claimant had entered into an oil delivery contract with the very large international oil trading company, Trafigura PTE Ltd., in January 2013 which provided for delivery obligations of Claimant between 45,000 cubic meters and 100,000 cubic meters of crude oil per year.[1177]

1041. Respondents contend that Claimant could not extract this amount of oil per year (as cost recovery petroleum and Claimant's share of profit petroleum, if any)[1178] and that according to Albpetrol's final calculations for the four quarters of the first year of the Trafigura contract (Q2/2013 to Q1/2014), Claimant had only an amount of 18,700 tons

[1174] Statement of Defence, para. 149, p. 50.
[1175] Statement of Defence, para. 150, p. 50, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1176] Statement of Defence, para. 151, pp. 50-51.
[1177] Rejoinder Brief, para. 264, p. 73, referring to **R-170** – Crude Oil Sales Contract between the Claimant and Trafigura PTE Ltd dated 12 November 2012; **RWS-2** – Second Witness Statement of Endri Puka, para. 25, p. 5; Respondents' Post-Hearing Brief, para. 141, p. 42, referring to Hearing Transcript Day 2, p. 105:3-25.
[1178] Rejoinder Brief, para. 264, p. 73.

of Cost Recovery Petroleum available from its operations on the two oil fields of Cakran and Gorisht, out of the minimum obligations of 45,000 tons.[1179]

1042. Respondents state that, in addition, in early 2013, Claimant obtained from Trafigura a credit line of USD 20 million, of which Claimant drew an up-front pay of USD 7 million, recorded in Claimant's books as "*overdraft*". According to Respondents, (i) Claimant's audit report for the end of 2013, available online via the Albanian Company Register, indicate that the amount owed to Trafigura was USD 4,799,564.36 and that the overdraft had to be paid back to Trafigura in crude oil, and (ii) the loan bore expensive interest of Libor +6%.[1180]

1043. Finally, Respondents contest Claimant's argument that it made little sense for Claimant to keep sales proceeds in escrow for Albpetrol because Albpetrol could not take cash payments before Joint Instruction No. 1 was promulgated in 2015.[1181] The Joint Instruction No 1 of 26 May 2015 of the Ministry of Energy and the Ministry of Finance only established some rules on how to convert crude oil into cash and pursuant to the 28 February 2014 Conversion Agreement, Albpetrol accepted around USD 7 million from Claimant in cash for a part of the Albpetrol oil that Claimant had illegally sold until the end of 2013.[1182]

e) <u>Conversion of Claimant's debts from crude oil to cash in the 28 February 2014 Conversion Agreement</u>

1044. Respondents contend that following Albpetrol's first notice of material breach, Claimant attempted to negotiate with Albpetrol but eventually did not pay its debts.

1045. Indeed, Respondents argue that because Claimant "*could not dispute*" the suspected misappropriation of oil and its various other breaches of contract, representatives of Albpetrol and Claimant met in the Advisory Committee Meeting of 21 November 2013 during which, to avoid termination, Claimant proposed to convert its debts to crude oil and gas to cash and assured payment within six months.[1183]

1046. According to Respondents, Claimant's proposal led to the conclusion of the 28 February 2014 Conversion Agreement between Clamant and Albpetrol in which Claimant *inter alia* committed to pay to Albpetrol the amount of USD 15,384,169 within six months, for wrongfully undelivered PEP&ASP.[1184] The number stated in the Agreement was

[1179] Rejoinder Brief, para. 265, p. 73, referring to **R-171** – Chart comparing the Claimant's PEP&ASP obligations towards Albpetrol with the Claimant's obligations to Trafigura; **RWS-2** – Second Witness Statement of Endri Puka, para. 25, p. 5.
[1180] Rejoinder Brief, para. 266, p. 73, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 26, p. 5.
[1181] Rejoinder Brief, para. 268, p. 74, referring to Reply, para. 82, p. 13.
[1182] Rejoinder Brief, para. 268, p. 74, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 30, p. 6.
[1183] Statement of Defence, para. 153, p. 51, referring to **R-36** – Minutes of Advisory Committee Meeting of 21 November 2013, (1).
[1184] Statement of Defence, para. 154, p. 51, referring to **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014.

later mutually corrected by the Parties to USD 17,360,774.37 without VAT (20,832,929.24 with VAT) and despite Respondents issuing invoices to Claimant, Claimant did not pay its debts.[1185]

f) Albpetrol's second and third notice of material breach of contract of 26 May 2014 and of 26 June 2014

1047. Respondents allege that instead of paying its debts, in the following months, Claimant continued to use crude oil owed to Albpetrol as PEP&ASP for itself, which led Albpetrol to give written notice to Claimant on 26 May 2014 based on "*the various material breaches of* […] *Claimant's fundamental duties and obligations*".[1186]

1048. Respondents argue that after Albpetrol and Claimant agreed on a new delivery plan for the crude oil owed as PEP&ASP for the year 2014, in May/June 2014, Claimant failed to meet such delivery plan,[1187] "*still seemed to misappropriate crude oil in June 2014*" and did not comply with its payment obligations under the Agreements and the 28 February Conversion Agreement, so that Albpetrol repeated its notice of material breach of contract on 26 June 2014.[1188]

1049. Respondents allege that after it issued the notices of material breach of contract, Albpetrol reminded Claimant several times to pay its debts as stipulated in the 28 February 2014 Conversion Agreement,[1189] which Claimant did not do.[1190]

g) Albpetrol's fourth notice of material breach of contract

1050. Respondents argue that as a consequence of Claimant's continued material breaches of contract, Albpetrol was forced to issue to Claimant another notice of material breach of fundamental duties and obligations on 10 February 2016.[1191]

1051. Respondents contend that, after Claimant objected to that material breach notice, Albpetrol further substantiated Claimant's shortcomings by letter dated 26 February 2016. In particular, Respondents mentioned:

- The increase of Claimant's PEP&ASP obligations towards Albpetrol during the year 2015;

[1185] Statement of Defence, paras. 155-156, p. 51.
[1186] Statement of Defence, paras. 157-158, p. 52, referring to **R-38** – Letter from Albpetrol to the Claimant dated 26 May 2014.
[1187] Statement of Defence, para. 159, p. 52, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1188] Statement of Defence, para. 160, p. 52, referring to **R-39** – Letter from Albpetrol to the Claimant dated 26 June 2014.
[1189] Statement of Defence, para. 161, pp. 52-53, referring to **R-40** – Letter from Albpetrol to the Claimant dated 28 August 2014; **R-41** – Letter from Albpetrol to the Claimant dated 22 September 2014; **R-42** – Letter from Albpetrol to the Claimant dated 6 October 2014; **R-43** – Letter from Albpetrol to the Claimant dated 3 November 2014; **R-44** – Letter from Albpetrol to the Claimant dated 6 November 2014.
[1190] Statement of Defence, para. 162, p. 53.
[1191] Statement of Defence, para. 180, p. 57, referring to **R-61** – Letter from Albpetrol to Claimant dated 10 February 2016.

- Claimant's debts towards Albpetrol for a number of services provided by Albpetrol, including payments for electricity services and electric energy;

- The drop of oil production numbers from 2012 to 2015 (minus 48% for the Cakran Oilfield and minus 20% for the Gorisht Oilfield);

- The worrying discrepancies between the production data reported by Claimant and Albpetrol's test results, which suggested that Claimant in fact produced much higher amounts of oil than it reported;

- The significant environmental problems caused by Claimant, such as several oil water leakages which allowed contaminated water to pollute the environment;

- Claimant's failure to submit working programs and budget as foreseen in the Petroleum Agreements;

- Claimant's non-fulfillment of its investment obligations;

- Claimant's failure to submit its Quaterly Reports as foreseen in the Petroleum Agreements; and

- Claimant's non-payment of the owed annual training bonuses of USD 110,000 per year.[1192]

1052. Respondents contest Claimant's suggestion[1193] that Albpetrol's letter dated 26 February 2016 was the "*First Notice*" of material breach of contract; Respondents' position is that they had already issued three notices of material breach of contract so that the fourth did not come as a surprise for Claimant.[1194]

h) <u>Albpetrol's fifth and sixth notices of material breach of contract</u>

1053. Respondents argue that Claimant further refused to commence rectifying the material breaches of its fundamental duties and obligations under the Petroleum Agreements, in particular the non-fulfillment and further increase of the overdue PEP&ASP obligations towards Albpetrol, so that, on 7 March 2016, Albpetrol gave Claimant the fifth notice of material breach of fundamental duties and obligations under the Petroleum Agreement.[1195]

[1192] Statement of Defence, para. 181, pp. 57-58, referring to **R-62** – Letter from Albpetrol to Claimant dated 26 February 2016; **RWS-1** – First Witness Statement of Endri Puka.
[1193] Statement of Claim, para. 159, p. 28.
[1194] Statement of Defence, para. 182, p. 58.
[1195] Statement of Defence, para. 184, p. 59, referring to **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016.

1054. Respondents argue that contrary to what Claimant suggests,[1196] Albpetrol's letter dated 7 March 2016 was not the "*Second Notice*" of material breach of contract.[1197]

1055. Finally, on 7 April 2016, Albpetrol issued the sixth material breach notice to Claimant, based on the fact that Claimant, despite various reminders, had not paid the owed annual training bonuses of USD 110,000 per year.[1198]

i) Respondents' argument that Claimant's breaches did not stop following Claimant's change in ownership

1056. One of the arguments made by Respondents is that despite several changes in Claimant's ownership, Claimant did not pay its debts to Albpetrol.

1057. First, Respondents argue that in late 2014/early 2015, Claimant was sold to new shareholders, namely a company of the TransAtlantic Group, and changed its name from Stream Oil & Gas Ltd. (Cayman Islands) to TransAtlantic Albania Ltd. (Cayman Islands).

1058. According to Mr. Puka, in September 2014, Mr. Tartari and Mr. Kapotas told the Albpetrol management that Claimant was not able to perform its obligations and would likely be sold to a company able to settle the relevant obligations with Albpetrol, most likely one of the TransAtlantic Group owned and managed by American oil billionaire Malone Mitchell III.[1199]

1059. Mr. Puka also testifies that during a conference on oil and gas held in Athens, Mr. Mitchell stated that he was ready to immediately pay part of Claimant's obligations because, according to him, the 28 February 2014 Conversion Agreement only foresaw a step-by-step payment of the obligations, and after further negotiations, they both agreed "*by way of handshake agreement*" that the liabilities would be reduced immediately by not less than 70% of their total value.[1200]

1060. Respondents argue that Claimant's original shareholders made "*two astonishingly good deals*" by (i) being awarded the licences in the conditions described and "*pocketing*" from Albpetrol as described above,[1201] and (ii) selling Claimant for approximately USD 45,000,000 (net, after the deduction of debts) to the new owners of the TransAtlantic Group,[1202] *i.e.* earning more than the equivalent of USD 50 million in just 6 years "*without any commitment justifying these profits*".[1203]

[1196] Statement of Claim, para. 162, p. 28.
[1197] Statement of Defence, para. 185, p. 59.
[1198] Statement of Defence, para. 186, p. 59, referring to **R-64** – Letter from Albpetrol to Claimant dated 7 April 2016.
[1199] Statement of Defence, para. 163, p. 53, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1200] Statement of Defence, para. 164, p. 53, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1201] Statement of Defence, para. 166, p. 54.
[1202] Statement of Defence, para. 167, p. 54.
[1203] Statement of Defence, para. 168, p. 54.

1061. Respondents argue that although Albpetrol was confident that the situation would improve with the TransAtlantic Group, in particular since, on 22 January 2015, TransAtlantic Petroleum Ltd, in the capacity of Claimant's sole shareholder, proposed to transfer money to Claimant and subsequently to Albpetrol for 70% of the value only upon completion of the neutralization process.[1204]

1062. Respondents claim that after Albpetrol addressed the issue of Claimant's unpaid debts on 26 January 2015 and February 2015,[1205] Claimant responded that TransAtlantic as the sole shareholder of Stream "[stood] *committed to pay what [was] properly owed*",[1206] which it did not. Claimant's new owners suffered from the high price they had paid for Claimant and from the strongly decreasing oil price in 2014/2015.[1207]

1063. Respondents contend that Claimant thus continued to sell the oil and gas that it owed to Albpetrol for its own account and continued to breach other obligations under the Agreements ("*e.g. non-payment of services provided by Albpetrol, non-payment of training bonuses, etc.*") *over the course of the year 2015*,[1208] as evidenced by a number of letters from Albpetrol that, according to Respondents, were not contradicted by Claimant.[1209]

1064. According to Respondents, by letter of 5 January 2016, Claimant explicitly confirmed the continued breaches of contract by summarising that Claimant's obligations had grown between 1 January 2015 and 30 September 2015, "*meaning that* […] *Claimant – again – continued to deliver less oil/gas than it was obliged to under the Agreements*". Such letter shows that Claimant materially breached its contractual obligations in the course of 2015 and that in only nine months, it *inter alia* failed to deliver another 2,155.4 tons of crude oil for the Carkan Oilfield and 7,354.98 tons of crude oil for the Gorisht Oilfield.[1210]

[1204] Statement of Defence, paras. 169-170, pp. 54-55, referring to **R-45** – Letter from TransAtlantic Petroleum Ltd. to Albpetrol dated 20 January 2015.
[1205] Statement of Defence, para. 171, p. 55, referring to **R-46** – Letter from Albpetrol to Claimant dated 26 January 2015; **R-47** – Letter from Albpetrol to Claimant dated 19 February 2015.
[1206] Statement of Defence, para. 172, p. 55, referring to **R-48** – E-Mail from Mr. Doug Nester to Albpetrol dated 20 February 2015.
[1207] Statement of Defence, para. 173, p. 55, referring to **R-49** – Chart of oil price development.
[1208] Statement of Defence, para. 174, p. 55.
[1209] Statement of Defence, para. 175, p. 56, referring to **R-50** – Letter from Albpetrol to Claimant dated 9 April 2015; **R-51** – Letter from Albpetrol to Claimant dated 17 April 2015; **R-52** – Letter from Albpetrol to Claimant dated 9 July 2015; **R-53** – Letter from Albpetrol to Claimant dated 22 July 2015; **R-54** – Letter from Albpetrol to Claimant dated 13 October 2015; **R-55** – Letter from Albpetrol to Claimant dated 28 October 2015; **R-56** – Letter from Albpetrol to Claimant dated 3 November 2015; **R-57** – Letter from Albpetrol to Claimant dated 11 December 2015; **R-58** – Letter from Albpetrol to Claimant dated 16 December 2015; **R-59** – Letter from Albpetrol to Claimant dated 23 December 2015.
[1210] Statement of Defence, paras. 176-178, pp. 56-57; Rejoinder Brief, para. 251, p. 69, referring to **R-60** – Letter from Claimant to Albpetrol dated 5 January 2016.

1065. Second, Respondents argue that in early 2016, Claimant was then allegedly acquired by new owners and allegedly changed its name to GBC Oil Company Ltd. but continued not to pay its debts.[1211]

1066. According to Respondents, in view of the repeated change of Claimant's shareholders, Claimant and Albpetrol met with representatives of the Ministry on 5 May 2016 to discuss Claimant's "*various material breaches of contract*" and "*massive debts*". Respondents argue that the following occurred during this meeting:

- Albpetrol notified Claimant that it would terminate the Petroleum Agreements if Claimant's material breaches of contract were not being rectified within the next four months;

- Claimant recognised, again, the obligations towards Albpetrol;

- Claimant undertook to take measures to rectify its breaches of contract within the next four months;

- Claimant undertook to issue a bank guarantee for its outstanding obligations towards Albpetrol.[1212]

1067. Respondents allege that by letter dated 8 June 2016, Claimant once again confirmed its obligations toward Albpetrol in writing,[1213] but did not pay its debts.[1214] Albpetrol thus reminded Claimant to pay it overdue liabilities for services provided by Albpetrol in the period up to 31 May 2016.[1215]

1068. Respondents affirms that on 13 July 2016, Claimant's bank account were seized due to "*obligations unconditionally acknowledged*" by Claimant against Albpetrol in the amount of USD 13,856,932 and ALL 5,011,884.[1216]

1069. Respondents argue that on 22 July 2016, Claimant's administrator, Mr. Naim Kasa, confirmed to the bailiff that Claimant would settle its debts towards Albpetrol,[1217] but that Claimant did not pay its debts.[1218]

[1211] Statement of Defence, para. 187, p. 59.
[1212] Statement of Defence, para. 188, pp. 59-60, referring to **R-65** – Signed Minutes of Meeting of 5 May 2016.
[1213] Statement of Defence, para. 189, p. 60, referring to **R-66** – Letter from Claimant to Albpetrol dated 8 June 2016.
[1214] Statement of Defence, para. 190, p. 60.
[1215] Statement of Defence, para. 191, p. 60, referring to **R-67** – Letter from Albpetrol to Claimant dated 22 June 2016.
[1216] Statement of Defence, para. 192, p. 60, referring to **R-20** – Seizure Order of bailiff Mr. Vako dated 13 July 2016.
[1217] Statement of Defence, para. 193, p. 60, referring to **R-68** – Signed Minutes of Meeting of 22 July 2016.
[1218] Statement of Defence, para. 194, p. 61.

2. Respondents' allegations of further material breaches of contract by Claimant

a) Claimant's alleged "*VAT scam*"

1070. Respondents contend that during the contractual period, Claimant had developed a "*deceitful scheme*" to "*earn money*", based on the VAT system in place in Albania for the petroleum operations in question. Claimant used the scheme of a triangular set-off to pay its creditors and tried to effect payment without using its accounts, because they were often subject to seizure measures.[1219]

1071. Respondents explain that in Albania, VAT is due by the seller or the service provider when an invoice is issued, irrespective of whether or not the debtor of the invoice actually pays on the invoice, and that the debtor (buyer or recipient of services) can claim compensation for its VAT obligations from the tax office if the balance between the VAT issued and the VAT received is negative, irrespective of whether the invoice is actually paid.[1220]

1072. According to Respondents, suppliers such as Albpetrol issued invoices to Claimant and paid the VAT to the Albanian State. Claimant did not pay on these invoices but announced the invoiced VAT to the Albanian tax office and deducted it from the VAT amounts due on Claimant's own invoices. The mathematical result of this subtraction was often a negative balance, which Claimant then claimed in cash from the tax office. Respondents claim that Claimant "*earned*" around USD 4.5 million with this scheme, referring to the witness statement of Mr. Crawford,[1221] who even complained of late or non-payment by the tax office.[1222]

1073. Respondents argue that Albpetrol was a victim of this scheme, as Claimant did not pay the invoices issued by Albpetrol (see above a)) and yet claimed a VAT refund from the tax office.[1223]

1074. For instance, Respondents indicate that Claimant asked Albpetrol to issue invoices on 19 January 2017 (USD 875,119.30 for the receivables for Gorisht-Kocul of 2015) and on 20 January 2017 (USD 1,392,124.80 for the receivables for Cakran-Mollaj of 2014), for which Albpetrol had to pay VAT in the amount of 20%,[1224] whereas Claimant did not pay the invoices and claimed the VAT in the amount of 20% back from the tax office.[1225]

[1219] Statement of Defence, para. 202, p. 62, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1220] Statement of Defence, para. 195, p. 61.
[1221] Statement of Defence, para. 196, p. 61, referring to First Witness Statement of Mark Crawford, para. 41, p. 10.
[1222] Statement of Defence, para. 197, p. 61, referring to First Witness Statement of Mark Crawford, para. 43, p. 10.
[1223] Statement of Defence, paras. 198-199, pp. 61-62.
[1224] Statement of Defence, para. 200, p. 62.
[1225] Statement of Defence, para. 201, p. 62, referring to **RWS-1** – First Witness Statement of Endri Puka.

1075. Finally, Respondents deny Mr. Crawford's statement[1226] that in late December 2016 or early January 2017, the Albanian tax authorities transferred to Albpetrol USD 2.42 millions of VAT reimbursements meant for GBC. Respondents' explanation is that Albpetrol had some obligations towards the Tax Office, and the Tax Office set off Claimant's claim for VAT reimbursement against claims outstanding from Albpetrol. The Tax Office was asked *by Claimant* to set off Claimant's VAT reimbursement claim against the Tax Office with Albpetrol's debts *vis-à-vis* the Tax Office because of a debt of Claimant *vis-à-vis* Albpetrol.[1227] Respondents argue that, otherwise, the Tax Office is not legally allowed to net a potential VAT reimbursement claim with outstanding obligations of another tax payer.[1228]

1076. In their Rejoinder Brief, Respondents argue that Claimant gives theoretical explanations as to the VAT system in Albania but does not dispute the fact that it cashed in VAT refunds for invoices of Albpetrol based on the 28 February 2014 Conversion Agreement on which Claimant never paid.[1229]

1077. Respondents contend that to avoid this scenario from happening again, Albpetrol expressly discussed with Claimant that payment should be effected immediately upon Albpetrol issuing the invoices, but that Claimant did not pay on the invoices issued in January 2017.[1230]

1078. Finally, Respondents argue that Claimant wrongfully insinuates that its failure to pay on the invoices could not have had any impact on Albpetrol's decision to terminate the contract,[1231] given that the Petroleum Agreements had already been terminated, whereas the invoices were issued on 19 and 20 February 2017 and set payment deadlines of ten days.[1232]

b) <u>Claimant's alleged failure to invest as agreed</u>

1079. Respondents argue that another breach of Claimant was that it did not procure the investments in the Cakran and Gorisht Oilfields as required under the Petroleum Law of 1993, the License Agreements and the Petroleum Agreements.[1233] Respondents' position is that although Claimant alleges to have invested approximately USD 81,000,000 in the Oilfields, it fails to substantiate such investments.[1234]

1080. Regarding the Petroleum Law of 1993, Respondents contend that it requires:

[1226] First Witness Statement of Mark Crawford, para. 42, p. 10.
[1227] Statement of Defence, para. 202, p. 62.
[1228] Statement of Defence, para. 202, p. 62, referring to **RWS-1** – First Witness Statement of Endri Puka; Rejoinder Brief, para. 314, p. 87.
[1229] Rejoinder Brief, paras. 307-309, p. 85.
[1230] Rejoinder Brief, paras. 310-312, pp. 85-86, referring to **R-111** – E-Mail from Claimant to Albpetrol dated 16 January 2017.
[1231] Reply, para. 97, p. 16.
[1232] Rejoinder Brief, para. 315, p. 87.
[1233] Statement of Defence, para. 203, p. 62.
[1234] Rejoinder Brief, para. 280, p. 77.

"(*I*) *to encourage exploration for and production of oil and natural gas;*

(*II*) *to rehabilitate existing facilities and enhance the recovery of oil and gas from already established reserves;*

(*III*) *to ensure that the development of these non-renewable resources take place in accordance with national interests, in an orderly way, in accordance with applicable international standards;*

(*IV*) *to ensure that petroleum operations do not endanger human life or cause damages to the environment*;"

and that its Article 5(2) prohibits the Ministry to enter "*into a Hydrocarbon Agreement with any Person unless the Ministry is satisfied that the Person with whom the Petroleum Agreement is to be made, has or can acquire the financial resources and technical competence required to discharge the obligations of the Contractor under the Petroleum Agreement*".[1235]

1081. As for the License Agreements, Respondents argue that they require:

in Recital H. "[…] *that oil and gas Reservoirs underlying in the Contract Area be exploited with high efficiency and in rational manner, in conformity with the general accepted practices of the international petroleum industry*;"

and according to Art. 3.3 "*The LICENSEE [the Claimant] shall:* […]

(ii) Secure all technical resources and employ advanced scientific methods, procedures, technologies and equipment generally accepted in the international petroleum industry […]"

1082. As far as the Petroleum Agreement is concerned, Respondents argue that the basic requirements are referenced in it:

"*Recital* […] *Whereas, Contractor [the Claimant] has the adequate capital, technical and commercial capacity, personal and organizational capacity required to successfully complete the operations specified below* […]"

"*12.4 Contractor* [the Claimant] *shall endeavour to achieve the efficient use and safe development for and production of Petroleum and optimise the ultimate economic recovery of Petroleum from the Project Area. (…)*"

[1235] Statement of Defence, para. 204, pp. 62-63.

1083. In summary, according to Respondents, the Albanian State allows to grant oil licenses to contractors in order to substantially enhance the oil extraction capacity of the licensed oilfields.[1236]

1084. Respondents argue that the concrete level of investments for every year and every oilfield is proposed by the contractor itself (*i.e.* Claimant) via the yearly Work Plan & Budgets, which are then approved by Respondents, which means that "*the level of investment becomes binding with the approval of the respective 'Work Plan & Budget'*".[1237] Respondents argue that: "[i]*n response to the alleged modification of the 'Work Plan & Budgets', Claimant bases its argumentation on Articles 7.2(d) of the License Agreements but forgets to mention that the remaining part of this provision specifically prohibits any modification to the 'Work Plan & Budgets' which would prevent its general objective* [… (*such modifications should not change the general objective of the approved Annual Program and Budge*)]".[1238]

1085. It is Respondents' position that the development, exploration and maintenance of equipment in normal and usable conditions are the general objectives of the Work Plan & Budgets and the Petroleum Operations, and that they require minimum investments which have not been undertaken by Claimant.[1239]

i. <u>Claimant's alleged failure to fulfill its investment obligations</u>

1086. Respondents estimate the amount invested by Claimant over the years between USD 10 to US 20 million.[1240]

1087. Respondents contend that the yearly "Work Plan & Budgets" of the Cakran and Gorisht Oilfields prepared by Claimant for the years 2015 and 2016 show that Claimant did not fulfill its investment obligations at all.[1241]

1088. According to Respondents, in 2015, Claimant undertook to make investments ("**CAPEX**") in the amount of USD 3,002,000 for the Cakran Oilfield and USD 4,196,000 for the Gorisht Oilfield,[1242] but failed to comply with these obligations, as it invested only USD 32,307 for the Cakran Oilfield and USD 219,354 for the Gorisht Oilfield, as evidenced by the quarterly reported prepared by Claimant for the year 2015.[1243]

[1236] Statement of Defence, para. 207, p. 63.
[1237] Rejoinder Brief, para. 287, p. 79.
[1238] Rejoinder Brief, para. 288, p. 79.
[1239] Rejoinder Brief, para. 289, p. 79.
[1240] Rejoinder Brief, para. 281, p. 77, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 58, p. 10.
[1241] Statement of Defence, para. 208, p. 64.
[1242] Statement of Defence, para. 209, p. 64, referring to **R-69** – Excerpt of the Work Plan and Budget 2015 for the Cakran oilfield; **R-70** – Excerpt of the Work Plan and Budget 2015 for the Gorisht oilfield.
[1243] Statement of Defence, para. 210, p. 64, referring to **R-71** – Excerpt of the Quarterly Reports 2015 for the Cakran oilfield; **R-72** – Excerpt of the Quarterly Reports 2015 for the Gorisht oilfield.

1089. Respondents contend that in the year 2016, prior to the termination of the Agreements, Claimant undertook to make investments ("CAPEX") in the amount of USD 3,496,061 for the Cakran Oilfield and USD 3,698,000 for the Gorisht Oilfield,[1244] but its "*investments*" (i) for the Gorisht Oilfield for the first 8 months (and the whole year) of 2016 was only USD 63,653.11[1245] and (ii) for the Cakran Oilfield was USD 0.[1246]

1090. Respondents argues that Claimant has not disputed the "*catastrophic state of the oilfields*" alleged by Respondents on the basis of photos and the Witness Statements of Mr. Puka, and argue that the simple reference to Claimant's own expert report, which does not provide explanations for the conditions of the oilfield, and to press releases, in order to prove the alleged investments is not sufficient.[1247]

1091. Respondents also point out that Claimant did not present invoices and supporting documentation for its alleged investments.[1248]

ii. Respondents' argument that Claimant's alleged investments were in fact never made

1092. Respondents argue that after Albpetrol's former CEO Mr. Puka entered his office, in March 2014, he tasked an Albpetrol audit team to investigate all the investments that Claimant had allegedly made in the year before Mr. Puka's start, *i.e.* from Q4/2012 to Q3/2013.[1249]

1093. Respondents argue that the audit was completed in late 2014 and that Claimant had not cooperated in providing the documents supporting its allegations that certain capital costs and operational costs had indeed been spent. Respondents submit a letter sent by Albpetrol to Claimant in which the audit team "*had to object*" to alleged capital and operational costs in an amount of USD 40,182,910 (LEK 4,219,205,558) only for the year 2014.[1250]

1094. Respondents criticize the absence of a service contract for works that Claimant pretended to have ordered, documents supporting invoices, construction permits, project design documentation, bill of works, site diaries, sites measurement books, schedules of values, *i.e.* all these documents confirmed and signed by a licensed supervisor as

[1244] Statement of Defence, para. 211, p. 64, referring to **R-73** – Excerpt of the Work Plan and Budget 2016 for the Cakran oilfield; **R-74** – Excerpt of the Work Plan and Budget 2015 for the Gorisht oilfield.
[1245] Statement of Defence, para. 212, p. 65, referring to **R-75** – Excerpt of the Quarterly Reports 2016 for the Gorisht oilfield.
[1246] Statement of Defence, para. 213, p. 65, referring to **R-76** – Excerpt of the Quarterly Reports 2016 for the Cakran oilfield.
[1247] Rejoinder Brief, paras. 282-283, pp. 77-78, referring to Deloitte Lost Profits Rebuttal Report, Schedule 28 cited in Reply, para. 102, p. 16; **C-177** – News Release: Stream Provides Operational Update (27 June 2011); **C-178** – News Release: Stream Provides Operational Update (23 April 2012) cited in Reply, para. 103, p. 16.
[1248] Rejoinder Brief, para. 284, p. 78.
[1249] Rejoinder Brief, para. 291, pp. 79-80, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 59, p. 10.
[1250] Rejoinder Brief, paras. 292-293, p. 80, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 60, p. 10; **R-172** – Letter from Albpetrol to the Claimant dated 26 December 2014 including table of Claimant's alleged but unsubstantiated capital- and operational costs.

required by Law No. 8402 dated 10.09.1998 on the control and discipline of construction works, as amended.[1251]

1095. Finally, Respondents contend that Claimant was often unable to allocate costs and investments incurred to the relevant Oilfield, even though the three Oilfields have separate costs accounts, which is "*a typical problem if there is no documentation available and if services are invoiced for works that have in reality not been performed*".[1252]

iii. Examples for Claimant's alleged investments which were allegedly never conducted

1096. In their Rejoinder Brief, Respondents list some examples of alleged investments which were never conducted, referred to in the audit report.[1253]

1097. Respondents thus argue that the biggest part of Claimant's alleged investments remained unproven, even today. Once there was a new management in place for Claimant (after Mr. Mitchell's Transatlantic company acquired the shares in Claimant), the declaration of annual investments "*fell from in average ca. USD 15 million per year to USD 279,180 in 2015 and to USD 63,650 in 2016*", and only the latter two positions reflect the condition in which the oilfields are today.[1254]

1098. Respondents conclude that Claimant was engaged in "*a process of destroying the oil fields by 'squeezing' the existing wells to the ultimate*" and by failing to make the necessary (and agreed) investments. In particular, Respondents blame Claimant for neither preserving the existing wells nor engaging in improving the oil extraction capacity of the licensed oilfields, as would be the guiding principles for private contractors under the Petroleum Law and the License Agreements.[1255]

1099. In response to Claimant's argument that it never distributed any dividends to its shareholders,[1256] Respondents argue that they do not know whether this statement is true, but suggests that Claimant has "*chosen an alternative way to channel the Claimant's money to 'friends and supporters' of the Claimant's management: The way*

[1251] Rejoinder Brief, paras. 295-296, pp. 80-81, referring to **RWS-2** – Second Witness Statement of Endri Puka, paras. 63-64, p. 11; **R-172** – Letter from Albpetrol to the Claimant dated 26 December 2014 including table of Claimant's alleged but unsubstantiated capital- and operational costs.
[1252] Rejoinder Brief, para. 297, p. 81, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 65, p. 11.
[1253] Rejoinder Brief, paras. 298-303, pp. 81-84, referring to **RWS-2** – Second Witness Statement of Endri Puka, paras. 67-72 *et seq.*, pp. 11 *et seq.*; **R-172** – Letter from Albpetrol to the Claimant dated 26 December 2014 including table of Claimant's alleged but unsubstantiated capital- and operational costs; **R-173** – Letter from Albpetrol to the Claimant dated 30 June 2016 including table of Claimant's alleged but unsubstantiated capital- and operational costs.
[1254] Rejoinder Brief, para. 304, p. 84, referring to **RWS-2** – Second Witness Statement of Endri Puka, paras. 72 *et seq.*, pp. 13 *et seq.*
[1255] Statement of Defence, para. 214, p. 65.
[1256] Reply, para. 61, p. 10.

via sham contracts and overstated invoices is a well-known method for these purposes".[1257]

c) Claimant's alleged insufficient funding to conduct Petroleum Operations

1100. Respondents recall that pursuant to Article 3.3(a) of the License Agreements, Claimant had to secure all financial and technical resources and had to employ advanced scientific methods generally accepted in the international petroleum industry.[1258]

1101. Respondents argue that, in bad financial condition for years, Claimant failed to honour a multitude of obligations to its suppliers so that it was facing legal proceedings followed by private law enforcement measures, such as seizure measures and freeze of bank accounts. Claimant could not even pay a big portion of its suppliers and utility providers like the electricity provider OSHEE and Petrolifera that are vital to conduct petroleum operations.[1259]

1102. Respondents contend that contrary to what Claimant alleges,[1260] its financial condition is of "*vital importance*" for these proceedings as it is key for Claimant's ability to conduct oil operations in Albania.[1261]

1103. Respondents call Claimant's financial situation "*catastrophic*", notably on the ground that (i) Claimant's Financial Statements for the year 2016 produced in the Document Production Phase show short-term debts in the amount of USD 63,692,221.10 (LEK 6,687,683,216) as of 31 December 2016,[1262] and (ii) Claimant's Financial Statements for the year 2017 produced in the Document Production Phase show short-term debts in the amount of USD 62,347,845.81 (LEK 6,546,523,810) as of 31 December 2017[1263] in Albania towards a very high number of creditors.

1104. Respondents thus contend that Claimant was not able to perform its obligations under the agreements because no reasonable contractor in Albania would perform any services for Claimant anymore, so that it was Albpetrol's "*obligation*" to terminate the agreements.[1264]

1105. First, Respondents claim that there was a shut-down of Claimant's activities by seizure measures and, in particular, that by letter of 29 April 2016, Albpetrol informed Claimant that, on 30 March 2016, the bailiff Ermir Godaj had notified Albpetrol of the seizure of some of Claimant's assets at Usoje, Mallakaster. On 28 April 2016, Albpetrol received

[1257] Rejoinder Brief, para. 305, p. 84.
[1258] Statement of Defence, para. 215, p. 65.
[1259] Statement of Defence, para. 216, pp. 65-66.
[1260] Reply, paras. 105-106, p. 17.
[1261] Rejoinder Brief, para. 322, p. 89.
[1262] Rejoinder Brief, para. 323, p. 89, referring to **R-174** – Claimant's Financial Statements as of 31 December 2016 (1 USD equals 105 Albanian LEK).
[1263] Rejoinder Brief, para. 323, p. 89, referring to **R-162** – Claimant's Financial Statements as of 31 December 2017 (1 USD equals 105 Albanian LEK).
[1264] Rejoinder Brief, para. 325, p. 90.

the notification from this bailiff that he had started to sell the assets seized which, according to Respondents, meant that Claimant had done nothing to prevent final enforcement measures.[1265]

1106. Second, Respondents allege a shut-down of Claimant's activities due to non-payment and wrongful termination of workers by Claimant, as when Claimant was allegedly acquired by new owners and allegedly changed its name to GBC Oil Company Ltd. in early 2016, it stopped to fully pay the workers' salaries and fired some of the workers.[1266] Respondents submit in that respect a "*notice*" of the workers from the Cakran Oilfield with a list of signatures of workers, and an "*open letter*" of the workers from the Gorisht Oilfield to the Albanian Government and the Albanian media dated 31 May 2016.[1267]

1107. Respondents accuse Claimant of not having money left to pay its workers after "*having forwarded loads of funds to its shareholders*"[1268] and contest Claimant's version that the reason for this crisis was an illegal strike.[1269]

1108. According to Respondents, the non-payment of the workers led to an uncontrolled mass shut down of the wells in the Cakran and Gorisht Oilfields, which constituted an "*immediate threat to human health and environment*" as uncontrolled wells can notably cause the increase of pressure in the columns of the wells, which can lead to uncontrolled blow-outs.[1270]

1109. Respondents also argue that Claimant did not take the necessary immediate steps pursuant to Article 9.2(b) of the License Agreements, which once again proved that Claimant was not fit to conduct oil operations at all, but rather created for a considerable time a serious risk for the life and health of its workers and for the environment.[1271]

1110. Respondents argue that on 5 April 2016, Albpetrol feared the potentially catastrophic consequences of the shut-down of the wells and took the initiative to send an inspection team to the Cakran and Gorisht Oilfields, and immediately provided Claimant with

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[1265] Statement of Defence, para. 217, p. 66, referring to **R-77** – Letter from Albpetrol to the Claimant dated 29 April 2016.
[1266] Statement of Defence, para. 218, p. 66.
[1267] Statement of Defence, para. 219, p. 66, referring to **R-78** – Notice of the workers from the Cakran-Mollaj oilfield with a list of signatures of workers dated 22 April 2016; **R-79** – "Open letter" of the workers from the Gorisht-Kocul oilfield to the Albanian Government and the Albanian media dated 31 May 2016.
[1268] Statement of Defence, para. 220, p. 66.
[1269] Rejoinder Brief, para. 335, p. 91, referring to **R-78** – Notice of the workers from the Cakran-Mollaj oilfield with a list of signatures of workers dated 22 April 2016; **R-79** – "Open letter" of the workers from the Gorisht-Kocul oilfield to the Albanian Government and the Albanian media dated 31 May 2016.
[1270] Statement of Defence, para. 221, p. 67, referring to **R-80** – Letter from Albpetrol to the Claimant dated 5 April 2016; **R-81** – Letter from Albpetrol to the Claimant dated 6 April 2016; **R-82** – Letter from Albpetrol to the Claimant dated 26 April 2016; **R-82A** – Letter from Albpetrol to the Claimant dated 22 June 2016; **R-83** – Letter from Albpetrol to the Claimant dated 29 June 2016.
[1271] Statement of Defence, para. 222, p. 67; Rejoinder Brief, paras. 328-329, p. 90.

detailed hour-per-hour descriptions of the inspection process and its outcome, even targeting specific wells to facilitate Claimant's interventions.[1272]

1111. Respondents state that Albpetrol sent a second notice a few hours after it was informed that the employees were about to escalate further and damage the wells even more, and asked Claimant to discuss the issue in person,[1273] to which Claimant did not answer, so that Albpetrol reiterated its warning notice on 26 April 2016, 22 June 2016 and 29 June 2016.[1274] On 28 November 2016, *i.e.* more than 7 months after Albpetrol had sent its first notice, Claimant eventually responded to Albpetrol, by simply indicating that "*the situation has been solved and since yesterday noon, all wells have been reinstalled and the situation is fully normalized*".[1275]

1112. Third, Respondents argue that Claimant's workers even turned to the Ministry of Energy and Industry due to Claimant's "*scandalous conduct and status*".[1276] In that respect, Respondents submit (i) a letter dated 26 May 2016 sent by the MEI to Albpetrol that contained a letter from the workers of the Gorisht Oilfield dated 25 April 2016 in which the workers complained about unpaid salaries, lack of investments and the catastrophic condition of the oilfield[1277] and (ii) a letter from the workers of the oilfields operated by Claimant, dated 20 April 2016, sent by the MEI to Albpetrol on 16 June 2016, according to which the workers complained about unpaid salaries and threats by Claimant's directors, Mr. Kasa.[1278]

1113. Finally, according to Respondents, on 8 July 2016, Albpetrol received a letter from the Ministry of Energy and Industry according to which Claimant's workers of the Gorisht Oilfield had sent letters to the highest authorities of the Republic of Albania, the Prime Minister, the President of the Republic, the President of the Parliament and the Advocate General. Respondents complained about the work conditions, about unpaid salaries, about investments that were not made so that the oilfields were in decay, and about the fact that people who requested to be paid were apparently fired by Claimant, resulting in the shut-down of a big portion of the petroleum activities.[1279]

1114. Respondents conclude that Claimant is in "*total financial decay*" and indicate that the blockage of its page in the Albanian Commercial Register due to its over-indebtedness

[1272] Rejoinder Brief, para. 330, pp. 90-91.
[1273] Rejoinder Brief, para. 331, p. 91, referring to **R-175** – E-Mail of Endri Puka (Albpetrol) to Doug Nester (Claimant) dated 5 April 2016.
[1274] Rejoinder Brief, para. 332, p. 91, referring to **R-82** – Letter from Albpetrol to the Claimant dated 26 April 2016; **R-176** – Letter from Albpetrol to Claimant dated 26 April 2016; **R-82A** – Letter from Albpetrol to the Claimant dated 22 June 2016; **R-83** – Letter from Albpetrol to the Claimant dated 29 June 2016.
[1275] Rejoinder Brief, para. 333, p. 91, referring to **R-177** – Letter from Claimant to Albpetrol dated 28 November 2016.
[1276] Statement of Defence, para. 223, p. 67.
[1277] Statement of Defence, para. 223, p. 67, referring to **R-84** – Letter from Ministry of Energy to Albpetrol dated 26 May 2016 including letter of Gorisht oilfield workers dated 25 April 2016.
[1278] Statement of Defence, para. 224, p. 68, referring to **R-85** – Letter from Ministry of Energy to Albpetrol of 16 June 2016 including letter of the Claimant's oilfield workers dated 20 April 2016.
[1279] Statement of Defence, para. 225, p. 68, referring to **R-86** – Letter from Ministry of Energy to Albpetrol of 8 July 2016, Prot. No. 339/2.

makes it impossible for Claimant to conduct further business in Albania because no third party will contract with it.[1280]

1115. Respondents finally argue that Claimant could not have restarted its operations in its state of total financial decay, as since early 2017, the Oilfields have been closed,[1281] the electricity was cut off due to Claimant's debts,[1282] Claimant was facing millions of debts[1283] and was engaged in dozens of court proceedings.[1284]

d) Claimant's alleged environmental contraventions and safety breaches

1116. Respondents argue that Claimant did not conduct its Petroleum Operations in a safe and proper manner, as it regularly contaminated the environment and did not take remedial measures to repair the damage caused to the environment, in breach of Article 9.2 of the License Agreements which contains environmental obligations for Claimant ("*Environment and Safety*"):

> "*(a) LICENSEE* [the Claimant] *shall conduct Petroleum Operations in a safe and proper manner in accordance with Albanian Law and generally accepted international petroleum industry practice.(…)*
>
> *(c) In the event AKBN reasonably determines that any works or installations erected by LICENSEE [the Claimant] or any Petroleum Operations conducted by LICENSEE endanger or may endanger persons or third party property or cause pollution or harm the environment to an unacceptable degree, AKBN may require LICENSEE* [the Claimant] *to take remedial measures within a reasonable period and to repair any damage to the environment (…)*".[1285]

1117. In response to Claimant's position on this issue, Respondents argue that Article 20 of the Petroleum Agreements requires Claimant to conduct safe environmentally acceptable, reasonable, and sustainable Petroleum Operations.[1286] The "*baseline study*" mentioned by Claimant is a simple handover certificate that was duly completed and approved before Claimant's breach of Articles 20.1, 20.2 and 20.6 of the Petroleum Agreements, which is undisputed by Claimant, so that Claimant is fully responsible and accountable for its environmental contraventions and safety breaches.[1287]

[1280] Rejoinder Brief, para. 336, pp. 91-92.
[1281] Rejoinder Brief, para. 337, p. 92, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 32, pp. 6-7.
[1282] Rejoinder Brief, para. 338, p. 92, referring to **R-99** – Letter from OSHEE to Albpetrol dated 30 March 2018; **RWS-2** – Second Witness Statement of Endri Puka, para. 33, p. 7.
[1283] Rejoinder Brief, para. 339, p. 92, referring to **R-174** – Claimant's Financial Statements as of 31 December 2016 (1 USD equals 105 Albanian LEK).
[1284] Rejoinder Brief, paras. 340-341, pp. 92-93.
[1285] Statement of Defence, paras. 228-229, p. 69.
[1286] Rejoinder Brief, para. 345, pp. 93-94, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 20.1, 20.2, 20.6, pp. 30-31.
[1287] Rejoinder Brief, para. 346, p. 94.

1118. First, Respondents allege safety concerns and environmental pollution.

1119. According to Claimant, on 8 May 2015, Albpetrol's administrator Mr. Puka was informed by letter of the Ministry that residents of the village of Kocul had filed a petition with the Ministry on 28 April 2015 informing about the continued environmental pollution caused by Claimant on and around the Gorisht oilfield, and that they had unsuccessfully addressed the issue several times to Claimant.[1288]

1120. Respondents contend that, as Claimant did not react, on 27 June 2016, the residents of Kocul followed up with another letter to Claimant announcing a strike due to the continued misconduct of Claimant in connection with the Gorisht Oilfield, notably mentioning "*dead livestock, broken roads, dirty water and even lost lives because of* [Claimant's] *deadly gas*".[1289] This letter was forwarded by the residents to Albpetrol on 11 July 2016.[1290]

1121. Respondents argue that Albpetrol once again addressed Claimant by letter of 27 July 2016 in order to stop and repair the environmental pollution and to improve working safety,[1291] to which Claimant did not react, as evidenced by another letter of the residents of Kocul dated 2 August 2016 in which they informed Albpetrol of the outcome of the strike.[1292]

1122. Respondents thus contend that contrary to what Mr. Grezda stated,[1293] it is not true that Claimant acted "*with reasonable efficiency and haste*" to repair equipment and infrastructure and to clean up and remediate the affected sites.[1294] This is evidenced by the fact that Albpetrol is aware of many court decisions rendered against Claimant pursuant to which Claimant was obliged to pay damages to villagers because of land pollution.[1295]

1123. Respondents also contest Mr. Grezda's statement that the Ballsh treatment facility operated by Albpetrol causes environmental concerns for the Kocul villagers, as it is located more than 20 kilometers away from the Kocul villages and both places are

[1288] Statement of Defence, para. 230, p. 69, referring to **R-87** – Letter from Ministry to Albpetrol dated 8 May 2015 including letter of residents of the village of Kocul dated 28 April 2015.
[1289] Statement of Defence, para. 231, p. 69; **R-178** – Environmental complaint letter to GBC from Kocul village dated 27 June 2016.
[1290] Statement of Defence, paras. 232, pp. 69-70, referring to **R-88** – Letter from residents of the village of Kocul to Albpetrol dated 11 July 2017 including letter from residents of the village of Kocul to the Claimant dated 27 June 2016.
[1291] Statement of Defence, para. 233, p. 70, referring to **R-89** – Letter from Albpetrol to the Claimant dated 27 July 2016.
[1292] Statement of Defence, para. 234, p. 70, referring to **R-90** – Letter from residents of the village of Kocul to Albpetrol dated 2 August 2016.
[1293] Second Witness Statement of Kreshnik Grezda, paras. 21 *et seq.*, pp. 5 *et seq.*
[1294] Rejoinder Brief, para. 370, p. 98, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 46, pp. 8-9.
[1295] Rejoinder Brief, para. 371, p. 98, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 48, p. 9.

separated by hills, a valley and a river. Claimant is thus responsible for all environmental damage caused to the villagers of Kocul.[1296]

1124. Second, Respondents allege cracks in oil pipelines and oil tanks.

1125. Respondents contend that, on 12 May 2015, Albpetrol conducted an inspection of the part of the Ballsh Oilfield operated by Claimant and *inter alia* found out that one of Claimant's pipelines had a crack leading to an oil contamination of country side of 50m^2, which Albpetrol repaired.[1297]

1126. Respondents also claim that, on 24 June 2016, Albpetrol informed Claimant of a crack in the oil tank no. 59 in the Cakran Oilfield which caused massive environmental pollution due to the spilling of oil, and Albpetrol unsuccessfully asked for immediate repair and cleaning of the site.[1298]

1127. Finally, Respondents allege that on 5 December 2016, Albpetrol informed Claimant about a crack of a pipeline on the Cakran Oilfield which was not repaired by Claimant and had led to significant environmental pollution.[1299]

1128. In their Rejoinder Brief, Respondents note that Claimant did not provide any comments on this point.[1300]

1129. Third, Respondents argue that there were life-threatening increases of H2S gas-levels of up to 500ppm on the Gorisht Oilfield, posing a severe risk for the health and life of employees and population around.

1130. In their Rejoinder Brief, Respondents summarize the findings of Mr. Stephen Rogers of Arthur D. Little – who visited the oilfields – regarding the dangerousness of the H2S, the fact that according to him, simply venting the gas into the atmosphere, the disposal path chosen by Claimant, is not acceptable under any generally accepted international petroleum industry practice, and the lack of flaring on-site.[1301]

1131. Respondents argue that although Albpetrol had informed Claimant of the presence of dangerous levels of H2S by letter of 6 October 2015, e-mail of 6 November 2015 and

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[1296] Rejoinder Brief, para. 372, p. 99, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 51, p. 9.
[1297] Statement of Defence, para. 236, p. 70, referring to **R-91** – E-mail from Mr. Sheko from Albpetrol to Mr. Derhemi from Albpetrol dated 26 May 2015 including inspection report dated 12 May 2015.
[1298] Statement of Defence, paras. 237-238, pp. 70-71, referring to **R-92** – Letter from Albpetrol to the Claimant dated 24 June 2016.
[1299] Statement of Defence, para. 239, p. 71, referring to **R-93** – Letter from Albpetrol to the Claimant dated 5 December 2016.
[1300] Rejoinder Brief, para. 388, p. 103.
[1301] Rejoinder Brief, paras. 361-368, pp. 97-98, referring to **RER-2** – Expert Report of Stephen Rogers, Section 5.3, pp. 47 *et seq.*; **R-179** – Letter of Bankers Petroleum to Albpetrol regarding gas treatment in Patos Marinza 30 July 2018.

e-mail of 11 November 2015,[1302] Claimant did not react to Albpetrol's request to set up a joint monitoring program.[1303]

1132. Respondents also contend that Claimant did not take the required measures to immediately reduce the H2S gas-levels on the Gorish Oilfield given that, as shown above, the emission of H2S gas caused at least one lethal accident, the death of Mr. Rito Latifaj.[1304]

1133. Respondents argue that Claimant does not provide any proof that it communicated detectors and safety rules, measures or training to its employees,[1305] and point out that even if it was the case, such measures would not have prevented the H2S gas release like up-to-date safety installations, which are industry standard in the international oil industry, would do.[1306]

1134. According to Respondents, criminal proceedings have recently been open pursuant to a decision of the Appeal Court of Vlore, regarding the death of Mr. Rito Latifaj's due to intoxication by gases emitted from Claimant's wells caused by Claimant's failure to comply with safety rules.[1307]

1135. Fourth, Respondents mention an uncontrolled well breakdown on the Cakran Oilfield (Ca-54), of which it claims that Albpetrol informed Claimant on 11 November 2016,[1308] and which Claimant did not repair.[1309]

1136. Respondents argue that Claimant fails to demonstrate that it reacted promptly and correctly to the blow-up and instead produces evidence demonstrating that Albpetrol fixed the issue, with Mr. Grezda admitting that Claimant "*reported the issue and sought assistance from Albpetrol well control unit*".[1310] It would have been for Claimant, as operator of the oilfield, to prevent such breakdown and deal with the incident.[1311] Respondents point out Mr. Grezda's statement that Claimant was officially fined USD

[1302] Statement of Defence, para. 240, p. 71, referring to **R-94** – Letter from Albpetrol to the Claimant dated 6 October 2015; **R-95** – E-mail from Mr. Derhemi of Albpetrol to Mr. Nester of the Claimant dated 6 November 2015; **R-96** – E-mail from Mr. Derhemi of Albpetrol to Mr. Nester of the Claimant dated 11 November 2015.
[1303] Rejoinder Brief, paras. 379-382, p. 101.
[1304] Statement of Defence, paras. 241-242, p. 71; Rejoinder Brief, para. 361, p. 97, referring to **R-178** – Environmental complaint letter to GBC from Kocul village dated 27 June 2016.
[1305] Rejoinder Brief, para. 373, p. 100, referring to Reply, para. 113, p. 18.
[1306] Rejoinder Brief, paras. 374-376, p. 100.
[1307] Rejoinder Brief, para. 378, p. 100, referring to **R-181** – Decision of the Appeal Court of Vlore dated 11 January 2018.
[1308] Statement of Defence, para. 243, p. 72, referring to **R-97** – E-mail from Mr. Derhemi of Albpetrol to Mr. Kasa of the Claimant dated 11 November 2016 with forwarded e-mails.
[1309] Statement of Defence, para. 244, p. 72.
[1310] Rejoinder Brief, para. 383, pp. 101-102, referring to Second Witness Statement of Kreshnik Grezda, para. 25, p. 6.
[1311] Rejoinder Brief, para. 384, p. 102.

15,000 following this incident,[1312] and argue that it "*once again proves that the Claimant did not act in line with its duties and obligations*".[1313]

1137. Respondents contend that the Albpetrol team "*got the crisis under control*", at a cost of ALL 7,944,748[1314] (about USD 75,000) that Claimant never paid. According to Respondents, this emergency intervention by Albpetrol followed a notification earlier in 2016 by Albpetrol to Claimant that six other wells on the same field were also in a hazardous state, to which Claimant did not react.[1315]

1138. Fifth, Respondents argue that Claimant was fined by the Ministry of Environment on 11 November 2016 in the amount of ALL 2,000,000 due to the lack of technical capacities to control a gas accident at a well of the Cakran Oilfield, leading to environmental damage. The Ministry of Environment also ordered Claimant to control the gas accident and prevent future environmental pollution,[1316] and Claimant did not react to the Ministry of Environment's decisions.[1317] In their Rejoinder Brief, Respondents note that Claimant did not provide any comments on this point.[1318]

1139. Sixth and finally, Respondents argue that Claimant's "*permanent environmental misconduct*" was "*bluntly evidenced by the catastrophic devastating state*" of the Cakran and Gorisht Oilfields shown in pictures taken right after the takeover process in January/February 2017.

1140. In response to the Tribunal's question of 31 January 2019,[1319] Respondents submitted new exhibits R-3 and R-4 with their Post-Hearing Brief, containing detailed information as to the name of the wells video-taped and the date of taking of the videos, of which the photographs submitted are screenshots. Respondents argued that (i) all the videos/photographs stemmed from Claimant's Project Area and not of an "*Albpetrol Zone*", as suggested by Claimant, and that (ii) the videos/photographs did not show abandoned but active wells or sites, as could be verified with the monthly and quarterly reports of Claimant for the Oilfields.[1320]

[1312] Second Witness Statement of Kreshnik Grezda, para. 25, p. 6.
[1313] Rejoinder Brief, para. 387, p. 103.
[1314] Rejoinder Brief, para. 385, p. 102, referring to **R-184** – Invoice of Albpetrol dated 16 November 2016, together with detailed work schedule to close the fountain in the Cakran-54 well.
[1315] Rejoinder Brief, para. 386, p. 102, referring to **R-185** – Health and Safety risk notification from Albpetrol to the Claimant dated 6 April 2016.
[1316] Statement of Defence, para. 245, p. 72, referring to **R-98** – Letter from the Ministry of Environment to Albpetrol dated 14 November 2016 including Decision on Administrative Penalty against the Claimant dated 11 November 2016.
[1317] Statement of Defence, para. 246, p. 72.
[1318] Rejoinder Brief, para. 388, p. 103.
[1319] Tribunal's email of 31 January 2019, Question 2: "*Respondents are requested to provide information as to the source of the photographic material that they submitted in this arbitration (in their written pleadings and at the hearing), and the circumstances and date of its making*."
[1320] Respondents' Post-Hearing Brief, paras. 26-32, pp. 11-13, referring to Monthly and quarterly reports of the Claimant for the oilfields including the basic data for the calculation of the Claimant's debts (provided by USB flash drive only).

1141. Respondents indicate that the significant pollution on the oilfields by far exceeded the normal state of pollution one can expect on each and any oilfield.[1321]

1142. In their Rejoinder Brief, Respondents indicate that when visiting the oilfields, Mr. Rogers identified the presence of "*extensive oil contamination across all-three field areas, extensive oil spillage around well-sites and around the central gathering, treatment and storage facilities, as well as along the frequently ruptured flow-lines that connect the wells to the gathering system*".[1322]

1143. Respondents explain the reasons why the facilities and operations that Mr. Rogers saw were far from meeting generally accepted standards of international petroleum industry practice, and the conditions of the Petroleum and License Agreements.[1323] Mr. Rogers disagrees with Mr. Bertram as to who is responsible for the environmental costs resulting from the contamination that took place after the assets were taken over.[1324]

e) Respondents' argument that Claimant's failure to pay electricity costs stopped oil production for around two months

1144. Respondents allege that after Albpetrol had served the Termination Notices on 19 September 2016, Claimant continued to be responsible for the operations in the oilfields. Respondents would have stopped or postponed the termination procedures if Claimant had substantially rectified its contract breaches or brought a bank guarantee for the outstanding amounts.[1325]

1145. Respondents argue that, however, Claimant's conduct confirmed that Albpetrol's decision to terminate the Petroleum Agreements was right, as, in December 2016, Albpetrol learned from its monitoring teams on the Gorisht Oilfield that the electricity supply by Albanian electricity grid provider OSHEE had been stopped due to unpaid invoices for which Claimant was liable, which led to an interruption of activities in the Gorisht Oilfield for approximately 8 weeks in December 2016 and January 2017.[1326]

1146. Respondents contend that Albpetrol has verified the information with OSHEE and was informed that Claimant had not paid its monthly bills from January to October 2016, amounting to an outstanding obligation of ALL 126,250,097. Claimant still has not paid this obligation.[1327]

[1321] Statement of Defence, para. 247, pp. 72-73, referring to **R-3** – Photos of the Cakran-Mollaj oilfield of late January/early February 2017; **R-4** – Photos of the Gorisht-Kocul oilfield of late January/early February 2017; **RWS-1** – First Witness Statement of Endri Puka.
[1322] Rejoinder Brief, para. 350, p. 95, referring to **RER-2** – Expert Report of Stephen Rogers, Section 5.4, Figures 15, 16, 17, pp. 48-51.
[1323] Rejoinder Brief, paras. 353-360, pp. 95-97.
[1324] Rejoinder Brief, paras. 351-352, p. 95, referring to Second Witness Statement of Robin G. Bertram, paras. 115 *et seq.*, pp. 19 *et seq.*
[1325] Statement of Defence, para. 249, p. 73.
[1326] Statement of Defence, para. 250, p. 73.
[1327] Statement of Defence, para. 251, p. 73, referring to **R-99** – Letter from OSHEE to Albpetrol dated 30 March 2018; **RWS-1** – First Witness Statement of Endri Puka.

1147. In their Rejoinder Brief, Respondents note that Claimant does not dispute its failure to pay electricity costs which led to a production stop in December 2016 and January 2017.[1328]

f) Claimant's alleged failure to pay training bonuses

1148. Respondents argue that, until 30 September 2013, after more than six years of contractual relationship, Claimant intentionally failed to spend any training bonuses as provided by Article 10.2 of the Petroleum Agreements, which constitutes a material breach.[1329]

1149. Respondents point out that pursuant to Article 10.2, the yearly bonus that has to be paid in connection with the three Oilfields amount to USD 60,000[1330] and refer to two instances where Claimant refused to pay the amount of EUR 1,435 for a training in Norway, and the amount of EUR 1,646 for a training in Italy, both trainings being offered by the host countries.[1331]

1150. Respondents contend that the disputes alleged by Claimant on that issue[1332] originated from the fact that Claimant did not want to spend training bonuses for Albpetrol staff as agreed, but wanted Albpetrol specialists to take part in trainings for Claimant's workers to avoid any monetary expenses.[1333] The kind of training offered by Claimant was not suitable for the Albpetrol specialists, and it was not in Claimant's prerogative to decide which training Albpetrol must choose for its employees.[1334]

1151. Moreover, Respondents claim that whether or not training bonuses were also meant to be addressed in the Amending Agreements (drafted in 2015), as alleged by Claimant,[1335] cannot excuse the fact that Claimant has not fulfilled its respective payment obligations since 2007.[1336]

1152. As for Claimant's assertion that it told Albpetrol that it would pay the training bonuses directly to independent institutions,[1337] Respondents argue that it is not true[1338] and that, in any event, Albpetrol is entirely free in choosing what kind of training is suitable for

[1328] Rejoinder Brief, para. 391, pp. 103-104.
[1329] Rejoinder Brief, paras. 270-271, p. 75, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 10, p. 20.
[1330] Rejoinder Brief, para. 278, p. 77.
[1331] Rejoinder Brief, paras. 276-277, p. 76, referring to **RWS-2** – Second Witness Statement of Endri Puka, paras. 42-43, p. 8.
[1332] Reply, para. 200, p. 34.
[1333] Rejoinder Brief, para. 272, p. 75, referring to **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013; **C-121** – Minutes of the Thirteenth Meeting of the Advisory Committee held 5 December 2014; **RWS-2** – Second Witness Statement of Endri Puka, para. 39, pp. 7-8.
[1334] Rejoinder Brief, para. 273, p. 75.
[1335] Reply, para. 200, p. 34.
[1336] Rejoinder Brief, para. 274, pp. 75-76.
[1337] Reply, para. 201, p. 34.
[1338] Rejoinder Brief, para. 275, p. 76, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 41, p. 8.

its staff, and is not obligated to present any explanation for the training conducted, which it has done anyway.[1339]

1153. Respondents conclude that the payment of training bonuses is not an issue with their other contractors such as Sherwood or Transoil, with the exception of Phoenix Petroleum Ltd, the other company of Claimant's director Mr. Kasa.[1340]

g) Claimant's alleged "*diesel scam*"

1154. In their Rejoinder Brief, Respondents allege another "*strong suspicion of fraud*", namely that Claimant asserted costs of ALL 251,658,380 (approximately USD 2.5 million) for the purchase of 2000 cubic meters of Diesel which allegedly were injected into wells of the Gorisht Oilfield to promote oil extraction, and alleged that Claimant's staff performed those injections over a period of 16 days in 16 wells.[1341]

1155. Respondents contend that the Albpetrol technical team asked to investigate the event, as part of an investigation on the alleged investments, concluded that it could only be a scam, for at least the following reasons.

1156. First, Respondents argue that there is no engineering reason to inject Diesel in wells such as in the Gorisht Oilfield, because the density of oil produced in this field is so light that it does not need to be diffused by Diesel. Albpetrol thus did not inject Diesel in the Gorisht wells before or after Diesel injections by Claimant in 2012.[1342]

1157. Second, Respondents argue that there is no recognized engineering practice or engineering logic in injecting that amount of Diesel into wells of the size of the Gorisht wells in only 16 days, as the Albpetrol technical staff evaluated that only a fraction of the 2000m^3 would have had to be used in view of the size of the wells, *i.e.* in aggregate around 220m3 for 16 wells.[1343]

1158. Third, Respondents argue that to perform this exercise, Claimant would have needed about 70 trucks with pressure pumps to inject the Diesel in order to push it into the lime stone formation. The Albpetrol technical team is not aware that such trucks ever entered into the Gorisht Oilfield, and some of the 16 wells cannot be accessed by trucks.[1344]

1159. Respondents conclude that Claimant "*must have done something else with the 2000 m3 of Diesel it had purchased*" exempt of taxes, as was permitted if the Diesel was destined for industrial use such as injection in wells, but not if the Diesel was sold for regular

[1339] Rejoinder Brief, para. 275, p. 76.
[1340] Rejoinder Brief, para. 279, p. 77.
[1341] Rejoinder Brief, para. 316, pp. 87-88, referring to **RWS-2** –Second Witness Statement of Endri Puka, paras. 52 *et seq*., pp. 8 *et seq.*
[1342] Rejoinder Brief, para. 318, p. 88, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 54, pp. 9-10.
[1343] Rejoinder Brief, para. 319, p. 88, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 55, p. 10.
[1344] Rejoinder Brief, para. 320, p. 88, referring to **RWS-2** – Second Witness Statement of Endri Puka, para. 56, p. 10.

purposes.[1345] In the latter case, Claimant could have made a profit of more than USD 1 million to the detriment of the Albanian State.[1346]

3. The termination of the Petroleum Agreements for the Cakran and the Gorisht Oilfields

a) Albpetrol's Termination Notices of 19 September 2016

1160. On 19 September 2016, Albpetrol terminated the Petroleum Agreements for the Cakran and Gorisht Oilfields.[1347]

1161. Respondents contend that at the end of the year 2015, Claimant's debts towards Albpetrol amounted to USD 28,717,311.59, that over the year 2016, Claimant increased its debt in kind by 2,684.20 tons of crude oil (equalling to a value of USD 523,419) and that during this year, Albpetrol was able to reduce Claimant's overall debts only by engaging a bailiff who collected around USD 1.5 million (see above).[1348]

1162. Respondents also argue that (i) the fact that a high number of Claimant's assets had been blocked due to Claimant's debts towards Albpetrol and third parties indicated that Claimant would never be in a position to meet any of its obligations towards Albpetrol in the future,[1349] (ii) that there was no big hope that Claimant's shareholders would start investing money, instead of "*squeezing the practically gratuitous licenses to the ultimate*"[1350] and that (iii) Claimant's total lack of investment had led to a massive reduction of the oil production the field.[1351]

b) Claimant's alleged failure to "*substantially rectify*" its contract breaches

1163. Respondents argue that after Albpetrol issued the Termination Notices, Claimant, in bad faith, wrote letters containing false statements.[1352] Respondents allege that Claimant lied several times about the alleged payment of its debts, when Claimant's director (i) indicated to a court bailiff, by letter of 16 January 2017, that "*an amount greater than USD 13 million ha*[d] *been paid*" on Claimant's debts to Albpetrol[1353] and (ii) announced to a court bailiff, by letter of 17 January 2017, that "*Transatlantic ha*[d] *paid*

[1345] Rejoinder Brief, para. 321, p. 89, referring to **R-173** – Letter from Albpetrol to the Claimant dated 30 June 2016 including table of Claimant's alleged but unsubstantiated capital- and operational costs; **RWS-2** – Second Witness Statement of Endri Puka, para. 57, p. 10.
[1346] Rejoinder Brief, para. 321, p. 89.
[1347] Statement of Defence, para. 252, pp. 73-74, referring to **R-100** – Termination letter from Albpetrol to Claimant regarding the Cakran-Mollaj Oilfield dated 19 September 2016; **R-101** – Termination letter from Albpetrol to Claimant regarding the Gorisht-Kocul Oilfield dated 19 September 2016.
[1348] Statement of Defence, para. 253, p. 74, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1349] Statement of Defence, para. 255, p. 74.
[1350] Statement of Defence, para. 256, p. 74.
[1351] Statement of Defence, para. 257, p. 74.
[1352] Statement of Defence, paras. 258-259, p. 75, referring to Statement of Claim, paras. 176 *et seq*., pp. 30 *et seq*.
[1353] Statement of Defence, para. 260, p. 75, referring to **R-102** – Letter from Mr. Fatbardh Ademi (the Claimant's director) to Mr. Vako (the court bailiff) dated 16 January 2017.

its obligations to Albpetrol".[1354] Both statements turned out to be lies, as the money that Claimant's director allegedly had paid when writing its letter to the bailiff was never transferred to Albpetrol.[1355]

1164. Respondents' position is that, in light of all the breaches of Claimant, there was no reason for Albpetrol to revoke the Termination Notices of the Petroleum Agreements.[1356]

1165. In response to Claimant's allegations, Respondents argue that after they issued the Termination Notices of the Petroleum Agreements, Claimant continued its efforts to win time and opportunity to misappropriate crude oil by pretending its willingness to pay. Respondents refer to two letters of Claimant dated 4 October 2016 in which Claimant argued that it had reduced its obligations throughout 2016 by 1,393 tons of crude oil (compared to the end of 2015) for the Cakran Oilfield and that it had "*almost fulfilled*" its obligations for the Gorisht Oilfield, "*which meant that Claimant further increased its obligations*". Claimant argued that it had thereby commenced to "*substantially rectify*" its breach of contract.[1357]

1166. Respondents argue that, on the contrary, Claimant even increased its debts in kind (in oil) for the Cakran and the Gorisht Oilfield by 145.78 tons over the first 8 months of 2016, specifying that while Claimant reduced its obligations for the Cakran Oilfield by 843.61 tons, it increased its obligations by 989.39 tons for the Gorisht Oilfield.[1358]

1167. Respondents object to the argument that there was a "*substantial rectification*" of the material breach committed by Claimant.[1359] Respondents argue in that regard that (i) what the Parties meant by "*substantially rectify a contract breach*" can be taken from the 28 February 2014 Conversion Agreement and is "*a rectification of at least 70% of a liability*"[1360] and (ii) the Oxford Dictionary defines the grammatical sense of the word "*substantially*" as "*considerable importance, size or worth*".[1361]

[1354] Statement of Defence, para. 260, p. 75, referring to **R-103** – Letter from Mr. Fatbardh Ademi (the Claimant's director) to Mr. Vako (the court bailiff) dated 17 January 2017.
[1355] Statement of Defence, para. 261, p. 75.
[1356] Statement of Defence, para. 263, p. 76.
[1357] Statement of Defence, para. 265, p. 76, referring to **R-104** – Response to termination letter from Claimant to Albpetrol regarding the Cakran-Mollaj oilfield dated 4 October 2016; **R-105** – Response to termination letter from Claimant to Albpetrol regarding the Gorisht-Kocul oilfield dated 4 October 2016; Statement of Claim, para. 176, p. 30.
[1358] Statement of Defence, para. 266, pp. 76-77, referring to **R-106** - Letter from Albpetrol to the Claimant dated 16 December 2016 which summarizes the number and, according to Respondents, shows the difference between the PEP&ASP obligations and the actual monthly oil delivery numbers by Claimant during the year 2016 for the Cakran and Gorisht Oilfields month-by-month.
[1359] Statement of Defence, para. 267, p. 77.
[1360] Statement of Defence, para. 267, p. 77, referring to **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014: "*14.* (…) *the Parties may agree to extend the term of this Agreement for another period necessary to enable Stream to fulfill the obligation foresee herein, only if at the end of the term provided for in paragraph 11 above, Stream has met more than 70% of the liability provided for in this Agreement* (…)".
[1361] Statement of Defence, para. 268, p. 77.

1168. Respondents argue that, even taking into account Claimant's own figures for the reduction of its debts during the year 2016 (1.393 tons of crude oil, *i.e.* under the terms of the 28 February 2014 Conversion Agreement, a reduction of debts by not more than USD 786,994.83 with a price of USD 78,53 per barrel crude oil), Claimant has, in the best-case scenario, reduced its debt in kind over the course of 2016 by 2.74% (USD 786,994.83 / USD 28,717,311.59 debts of Claimant at the end of the year 2015).[1362]

1169. Respondents further contend that this examination of Claimant's (failed) efforts to "*substantially rectify*" contract breaches over the year 2016 does neither take into account Claimant's other contract breaches such as the Profit Tax owed to the Albanian State amounting to USD 7,642,952, the "*continued contractual breaches*" such as lacking investments over the course of 2016 or the "*untenable environmental conditions*" of the oilfields, for which a huge investment was required, after having neglected the site and equipment for years".[1363]

c) Further correspondence after Albpetrol's Termination Notices of the Petroleum Agreements

1170. According to Respondents, notwithstanding its termination notice, Albpetrol gave Claimant the chance to pay its debts and thereby avoid the execution of the termination procedure.[1364]

1171. Respondents argue that on 20 October 2016, Albpetrol reminded Claimant to make the overdue payments for services by Albpetrol in the amount of ALL 176,788,336, but that Claimant did not even pay this portion of its debts.[1365]

1172. Respondents argue that, instead, Claimant engaged in "*stalling tactics*" claiming that it needed invoices, and that it wished to provide a bank guarantee. However, Claimant "*already availed of several invoices*" which were issued after the conversion of Claimant's debts of crude oil into cash on 28 February 2014, as Albpetrol pointed out in a letter dated 24 October 2016,[1366] and were not paid by Claimant.[1367]

1173. Respondents allege that, in the same letter, Albpetrol indicated that it would review its position regarding the termination of the Petroleum Agreements if Claimant paid at least its obligations summed up in the 28 February 2014 Conversion Agreement, and that Albpetrol never indicated that it would not terminate the Petroleum Agreements.[1368]

[1362] Statement of Defence, paras. 270-271, p. 77.
[1363] Statement of Defence, para. 272, pp. 77-78.
[1364] Statement of Defence, para. 274, p. 78.
[1365] Statement of Defence, paras. 275-276, p. 78, referring to **R-107** – Letter from Albpetrol to Claimant dated 20 October 2016.
[1366] Statement of Defence, para. 277, p. 78, referring to **R-108** – Letter from Albpetrol to Claimant dated 24 October 2016.
[1367] Statement of Defence, para. 278, p. 78.
[1368] Statement of Defence, para. 279, p. 78, referring to **R-108** – Letter from Albpetrol to Claimant dated 24 October 2016.

1174. Respondents further argue that whilst Claimant claimed on several occasions that it would immediately pay its debts, it did not.[1369]

1175. According to Respondents, "[i]*nstead of simply paying the outstanding debts, the Claimant tried to delay the unavoidable termination of its contracts by engaging in negotiations regarding the new – and still growing – debts of the Claimant*", which resulted in two further Agreements dated 19 January 2017 in which claims in the amount of USD 875,119.30 and USD 1,392,124.80 for PEP&ASP "*in kind*" obligations in the year 2015 were converted into cash.[1370]

1176. Respondents argue that, however, it was always clear that Albpetrol continued to seek payment of the much higher outstanding debts of Claimant in the amount of USD 13,856,932 for the pre-2014 PEP&ASP obligations and USD 5,248,413.89 for the 2014 PEP&ASP obligations previously agreed in the 28 February 2014 Conversion Agreement. Respondents' position is that Albpetrol never waived these claims and, accordingly, Claimant cannot show any such waiver.[1371]

1177. Respondents argue that Claimant could have paid its 2014 PEP&ASP obligations and its other undisputed obligations, as Albpetrol reminded Claimant that the invoice for the 2014 PEP&ASP was ready to be picked up at Albpetrol's office since March 2015 and that several issued invoices were unpaid.[1372] Instead of paying its debts, Claimant (i) falsely told the court bailiff that it had paid a part of its debts to Albpetrol[1373] in order to try to have the seizure orders lifted,[1374] and (ii) requested from Albpetrol to commit to withdraw from the termination of the Petroleum Agreements as a (new) counter-performance for the of 19 and 20 January 2017 agreements (the "**Conversion Agreements**"),[1375] to which Albpetrol responded by reminding Claimant of its promise that it had at least USD 4 million available on their accounts to pay part of its debts, and that it should simply honor the terms of the agreements between the parties.[1376]

[1369] Statement of Defence, para. 280, p. 79, referring to **R-109** – Letter from the Claimant to Albpetrol dated 31 October 2016, **R-110** – Letter from the Claimant to Albpetrol dated 7 November 2016; **R-111** – E-Mail from Claimant to Albpetrol dated 16 January 2017.

[1370] Statement of Defence, para. 281, p. 79; **C-87** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Gorisht-Kocul Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 19 January 2017; **C-88** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Cakran-Mollaj Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 20 January 2017.

[1371] Statement of Defence, para. 281, p. 79.

[1372] Statement of Defence, paras. 282-283, pp. 79-80, referring to **R-112** – E-Mail from Albpetrol to the Claimant dated 11 January 2017; **R-113** – E-Mail from Albpetrol to the Claimant dated 17 January 2017.

[1373] Statement of Defence, paras. 284-287, p. 80, referring to **R-102** – Letter from Mr. Fatbardh Ademi (the Claimant's director) to Mr. Vako (the court bailiff) dated 16 January 2017; **R-103** – Letter from Mr. Fatbardh Ademi (the Claimant's director) to Mr. Vako (the court bailiff) dated 17 January 2017.

[1374] Statement of Defence, para. 285, p. 80.

[1375] Statement of Defence, para. 288, p. 80, referring to **R-114** – E-mail from Mr. Fatbardh Ademi (the Claimant's director) to Albpetrol dated 31 January 2017.

[1376] Statement of Defence, para. 289, p. 80, referring to **R-115** – E-mail from Albpetrol to Mr. Fatbardh Ademi (the Claimant's director) dated 31 January 2017.

1178. To conclude, Respondents allege that Claimant's conduct was "*symptomatic*" for the whole contractual period, described in the following terms:

- "*The Claimant makes a promise (like in the Conversion Agreements of 19 and 20 January 2017: Payment of USD 954,675 and USD 1,518,681 due within 10 days);*
- *Somebody else (here: Albpetrol) relies on that commitment and performs (issuance of invoices and payment of VAT and Profit Tax);*
- *The Claimant does not pay;*
- *The Claimant starts manoeuvring when requested to perform (here: Mr. Ademi promised that 'Transatlantic is paying' a part and will be bringing a 'guarantee' for another part;*
- *The Claimant does not perform;*
- *The Claimant keeps on 'winning time' which enables it to continue selling crude oil due for Albpetrol's PEP&ASP on own account;*
- *The Claimant tries to lure the contract partner by way of proposing to renew an old promise (that is binding and enforceable) against new and more considerations by the contract partner (here: the request that Albpetrol commits to revoke the terminations in order to allow the payment of the approx. only USD 2.5 million owed according to the Conversion Agreements of 19 and 20 January 2017)*".[1377]

1179. Therefore, Respondents argue that they did not withdraw their termination and "*rightly took back*" the Cakran and Gorisht Oilfields at the end of January/beginning of February 2017, a take-over that went "*smoothly*" and "*without any problems*", the workers being "*happy* […] *because they had not been paid for months*", and without the police being present, contrary to what Claimant alleges.[1378]

4. <u>Respondents' argument that Claimant's actions qualify as material breaches that justified the termination of the Petroleum Agreements which in, turn, led to the termination of the License Agreements</u>

a) <u>Respondents' argument that Claimant's actions qualify as material breaches of the Petroleum Agreements</u>

1180. Respondents object to Claimant's argument that only the PEP&ASP obligations could qualify as repeated and material breaches of its fundamental duties and obligations under the Petroleum Agreements.

[1377] Statement of Defence, para. 290, pp. 80-81.
[1378] Statement of Defence, paras. 291-293, pp. 81-82, referring to **R-3** – Photos of the Cakran-Mollaj oilfield of late January/early February 2017; **R-4** – Photos of the Gorisht-Kocul oilfield of late January/early February 2017; **RWS-1** – First Witness Statement of Endri Puka.

i. The legal requirements for the termination of the Petroleum Agreements

1181. Respondents argue that the three steps for termination set out in Article 24.2.1 of the Petroleum Agreements were respected, namely (i) the issuance of a notice of material breach, which triggers a six-month deadline for rectification and the issuance of a termination notice. Although the termination process did not require it, Albpetrol offered to stop the handover process if Claimant paid a certain part of its debts.[1379]

1182. Respondents argue that, contrary to what Claimant alleges, Article 24.2.1 of the Petroleum Agreements does not foresee that grounds for termination must be set out in the Termination Notices.[1380]

1183. According to Respondents, it "*may make sense in a contractual relationship to name termination grounds in the breach notice, but the Petroleum Agreement do not even require that kind of substantiation for a breach notice to be effective*", and Claimant's "*overly formalistic approach*" cannot be justified where the debtor was engaged in multiple fundamental intentional breaches of the contracts.[1381] The intentions of reasonable parties concluding contracts would have to be interpreted so that intentional contract breaches have to be omitted immediately, and their "*rectification*" cannot be "*allowed*" by a 6-month rectification deadline. Respondents contend that the same applies to fundamental intentional or unintended breaches that cannot be rectified by the debtor anymore: "[i]*t would be overly formalistic to require a 'waiting period' of 6 months' time if the breach cannot be rectified by the debtor, anyway. Such a case is given, for instance, if the mutual trust required for something as substantial as the Petroleum Agreements has inevitably been destroyed by the debtor*".[1382]

1184. Thus, Respondents' position is that all of Claimant's repeated material breaches of its fundamental contractual duties and obligations are valid termination grounds.[1383]

ii. Claimant's alleged repeated material breaches of its fundamental contractual duties and obligations

1185. First, Respondents contend that they highlighted fundamental and repeated breaches of Claimant in six notices of material breach, pursuant to Article 24.2.1 of the Petroleum Agreements.

1186. Respondents refer to Albpetrol's first notice of material breach dated 4 November 2013, in which it stated Claimant's outstanding obligations of, *inter alia*, (i) 38,952.54 tons of crude oil that had been misappropriated by Claimant, (ii) 8,094,914.21 Nm^3 of natural

[1379] Respondents' Post-Hearing Brief, paras. 144-145, p. 43.
[1380] Rejoinder Brief, para. 406, p. 109.
[1381] Rejoinder Brief, para. 407, p. 109.
[1382] Rejoinder Brief, para. 407, p. 109.
[1383] Rejoinder Brief, para. 408, p. 109.

gas, (iii) ALL 439,452,648.00 for unpaid services and (iv) USD 660,000 for non-spent annual training bonuses and various other breaches of contractual obligations.[1384]

1187. Respondents state that, in the second and third notices of material breach of 26 May 2014 and 26 June 2014, Albpetrol again notified Claimant of its repeated and intentional breaches of its fundamental contractual duties and obligations after (i) not paying the settlement amount as per the 28 February 2014 Conversion Agreement and (ii) in connection with the continued non-fulfillment and non-payment of obligations under the Agreements between the Parties.[1385]

1188. Respondents state that, in the fourth notice of material breach of 5 January 2016, Albpetrol again notified Claimant of its repeated and intentional breaches of its fundamental contractual duties and obligations after (i) not paying the settlement amount as per the 28 February 2014 Conversion Agreement and (ii) in connection with the continued non-fulfillment and non-payment of obligations under the Agreements between the Parties.[1386]

1189. Respondents argue that, in the fifth notice of material breach of 7 March 2016, Albpetrol again notified Claimant of its repeated and intentional breaches of its fundamental contractual duties and obligations after (i) not paying the settlement amount as per the 28 February 2014 Conversion Agreement and (ii) in connection with the continued non-fulfillment and non-payment of obligations under the Agreements between the Parties.[1387]

1190. Finally, Respondents argue that on 7 April 2016, Albpetrol issued the sixth material breach notice to Claimant, based on the fact that Claimant, despite various reminders, had still not paid the owed annual training bonuses of USD 110,000 per year.[1388]

1191. Second, Respondents reiterate their argument that Claimant did not rectify or had not commenced to substantially rectify its contract breach for non-payment of PEP&ASP obligations. It is thus referred to section 6.2.B.(3)(b) above for Respondents' argument in that respect. Respondents also contest the "*full factual matrix*" set out by Claimant in order to demonstrate that it had started to substantially rectify the PEP&ASP Liability.[1389]

[1384] Rejoinder Brief, para. 411, p. 110, referring to **R-35** – Letter from Albpetrol to Claimant dated 4 November 2013.
[1385] Rejoinder Brief, para. 412, p. 111, referring to **R-38** – Letter from Albpetrol to the Claimant dated 26 May 2014; **R-39** – Letter from Albpetrol to the Claimant dated 26 June 2014.
[1386] Rejoinder Brief, para. 413, p. 111, referring to **R-60** – Letter from Claimant to Albpetrol dated 5 January 2016.
[1387] Rejoinder Brief, para. 414, p. 111, referring to **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016.
[1388] Rejoinder Brief, para. 415, p. 112, referring to **R-64** – Letter from Albpetrol to Claimant dated 7 April 2016.
[1389] Rejoinder Brief, paras. 444-456, pp. 119-122, referring to Reply, paras. 129 *et seq.*, pp. 21 *et seq*.

1192. Third, Respondents argue that Claimant did not rectify or had not commenced to substantially rectify the other contract breaches highlighted in the six notices of material breach of contract.

1193. In particular, Respondents contend that Claimant (i) did not settle or substantially start to settle its debts deriving from the conversion agreement between Claimant and Albpetrol dated 28 February 2014, and does not even argue that it did so,[1390] (ii) did not settle its debts for unpaid services *vis-à-vis* Albpetrol,[1391] and (iii) did not settle or even start to settle its debts for unpaid training bonuses *vis-à-vis* Albpetrol.[1392]

1194. Fourth, Respondents argue that Claimant's further breaches equally justify the contract termination. According to Respondents, it is not required to explicitly name contract breaches that serve as termination grounds in the termination letter, as long as they existed by the time of issuance of the respective termination letter,[1393] so that the other alleged breaches can serve as termination grounds. Such alleged breaches prove that Claimant is an "*entirely unreliable oil extraction contractor which made it unreasonable for the Respondents to continue the contractual relationships with the Claimant who had triggered even extraordinary contractual termination rights for the Respondents without further formal requirements under the Petroleum Agreement*".[1394]

1195. According to Respondents, it stems from the above that Albpetrol terminated the Petroleum Agreements lawfully, and that the termination would even have been justified without any deadline ("*for cause*") in view of Claimant's "*continued and always renewed material contract breaches*".[1395]

b) <u>Respondents' argument that the termination of the Petroleum Agreements led to the immediate termination of the License Agreements</u>

1196. For the reasons set out below, Respondents argue that the termination of the Petroleum Agreements led to the automatic termination of Claimant's position as Licensee under the respective License Agreements, so that Claimant can no longer claim any licensing rights under the Cakran and Gorisht License Agreements.

i. <u>Respondents' argument that effective Petroleum Agreements are a condition precedent and a condition subsequent for Claimant's licensing rights</u>

1197. Respondents point out that each Instrument of Transfer states in its Preamble that it is "*subject to Stream* [the Claimant] *entering into a Petroleum Agreement*" and each Instrument of Transfer states that:

[1390] Rejoinder Brief, para. 433, p. 116.
[1391] Rejoinder Brief, para. 435, p. 116.
[1392] Rejoinder Brief, para. 436, pp. 116-117.
[1393] Rejoinder Brief, para. 440, p. 117.
[1394] Rejoinder Brief, para. 441, pp. 117-118.
[1395] Statement of Defence, paras. 294-295, p. 82.

"*(4) This Instrument of Transfer is conditional upon Albpetrol and* Stream [the Claimant] *entering into the said Petroleum Agreement* […]

(5) Following execution of this Instrument of Transfer, the interests of Stream [the Claimant] *and Albpetrol shall be as defined in the said Petroleum Agreement.*"[1396]

1198. According to Respondents, the Instruments of Transfer thereby clarify (i) that the legal relationship between Claimant and Albpetrol "*after the transfer of licensing rights to* […] *Claimant*" is not governed by the License Agreements, but only by the Petroleum Agreements, and (ii) that the transfer of licensing rights to Claimant is always subject to the rights stipulated under the Petroleum Agreements, as otherwise the license rights would come without obligations.[1397]

1199. Respondents argue that therefore, the Instruments of Transfer have legal effect under the *condition precedent* that the Petroleum Agreements have been effectively concluded, and under the *condition subsequent* that the Petroleum Agreements have been terminated. This is because, without the Petroleum Agreements, Claimant would enjoy no licensing rights under the connected License Agreements, so that the termination of the Petroleum Agreements leads to the immediate lapse of Claimant's rights under the License Agreements.[1398] In their Post-Hearing Brief, Respondents contend that pursuant to a reasonable interpretation of the wording and the purpose of the Instrument of Transfer and the connected "*product sharing agreements*", the transfer of licensing rights does not depend on the "*conclusion*" of the Petroleum Agreements, but on their "*continued existence*".[1399]

1200. Respondents argue that this mechanism is in fact confirmed by Claimant itself, which framed each set of License/Petroleum Agreements as one "*Product Sharing Agreement*".[1400] The License Agreement cannot be executed without the Petroleum Agreement, which is confirmed by various contract provisions also in the License Agreements, such as Article 6.1, Article 6.4 and Article 27.1 of the License Agreements.[1401]

ii. <u>Respondents' argument that the License Agreements cannot be terminated for Claimant's breaches of the Petroleum Agreements</u>

1201. Respondents contest Claimant's theory that it is possible to benefit from exploration and extraction rights under the License Agreements without having to share the extracted petroleum (which is only stipulated in the Petroleum Agreements), as it would mean

[1396] Statement of Defence, para. 462, p. 118; Rejoinder Brief, para. 460, p. 124.
[1397] Statement of Defence, para. 462, p. 118; Rejoinder Brief, para. 461, p. 124.
[1398] Statement of Defence, para. 463, p. 118; Rejoinder Brief, para. 462, p. 125.
[1399] Respondents' Post-Hearing Brief, para. 163, p. 48.
[1400] Rejoinder Brief, para. 463, p. 125, referring to Statement of Claim, paras. 4 *et seq*., pp. 1 *et seq.*
[1401] Rejoinder Brief, para. 463, pp. 125-126; Respondents' Post-Hearing Brief, paras. 161-162, p. 48.

that Claimant is better off under the License Agreements after its material contract breaches that led to the termination of the Petroleum Agreements.[1402]

1202. Respondents also contest Claimant's argument that the License Agreements could have been terminated.[1403]

1203. First, Respondents allege that the catalogue for termination rights in Article 24.1 of the License Agreements does not contain any termination ground in case a "*foreign partner*" disregards its product sharing duties under the parallel Petroleum Agreements.[1404]

1204. Second, Respondents argue that the License Agreements award the "*right to cancel*" only to AKBN, which is not a party to the License Agreements. According to Respondents, the termination clause is pathological.[1405]

1205. Third, Respondents argue that the last sentence in Article 24.1 of the License Agreements "*protects the first Licensee (Albpetrol) and is not at the Licensor's and the second Licensee's (Claimant's) disposal. As Albpetrol removed the Claimant's rights to* 'conduct Petroleum Operations in the Project Area' *(Art. 2.2 in connection with Art. 2.4, 2.5 PA) by way of terminating the PAs, it had also remedied* 'the situation with regard to […] [the] License Agreement[s]' *in the meaning of Art. 24.1 LA: Albpetrol had terminated the second authorization Claimant requires for conducting Petroleum Operations in the Project Areas. The authorization under the LAs alone is not sufficient to exploit the oilfields. For this reason already, the termination of the three-sided LAs was not possible for the Licensor. Albpetrol, who had not breached the LAs, had the right to further enjoy licensing rights under the LAs*".[1406]

iii. <u>Respondents' additional arguments</u>

1206. Another argument made by Respondents is that even if the license rights still existed, Claimant would still lack authorization to conduct Petroleum Operations in the Project Area, given that Albpetrol has removed Claimant's rights to "*conduct Petroleum Operations*" (see above) by way of terminating the Petroleum Agreements.[1407]

1207. Respondents also reiterate their argument on the prevalence of the Petroleum Agreements over the License Agreements pursuant to Article 6.4 of the License Agreements, which is developed in the section on jurisdiction.[1408]

[1402] Respondents' Post-Hearing Brief, para. 165, p. 49.
[1403] Respondents' Post-Hearing Brief, para. 166, p. 49, referring to Hearing Transcript Day 1, pp. 143:20 *et seq*.
[1404] Respondents' Post-Hearing Brief, para. 166, pp. 49-50.
[1405] Respondents' Post-Hearing Brief, para. 166, p. 50.
[1406] Respondents' Post-Hearing Brief, para. 167, p. 50.
[1407] Respondents' Post-Hearing Brief, para. 168, p. 50.
[1408] Respondents' Post-Hearing Brief, para. 169, pp. 50-51.

1208. Finally, Respondents argue that the effectiveness of the License Agreements depends on the Council of Ministers' approval of the related Petroleum Agreements and that there is no reason to believe that the Council of Ministers approved Claimant's license rights independent of existing, defining and limited related Petroleum Agreements.[1409]

5. Respondents' arguments on Claimant's right to damages for the alleged wrongful termination of the Cakran and Gorisht License Agreements

1209. As detailed in section 7.2.B. below, Respondents consider that Claimant is not entitled to damages for the wrongful termination of the Cakran and Gorisht License Agreements. In their analysis, Respondents do not distinguish the principle of entitlement to compensation and the fact that Claimant's loss of profit in case of continued operations would be zero, so that the Tribunal will address both together below.

C. Decision of the Tribunal

1210. In view of the disagreement of the Parties on both the effectiveness of the termination and the consequences of termination of the Petroleum Agreements on the License Agreements, the Tribunal will first rule on this issue of the consequences of termination (1.), before turning to the merits of the termination of the Cakran and Gorisht Petroleum Agreements (2.).

1. On the consequences of termination of the Petroleum Agreements on the License Agreements

1211. The Tribunal first notes that, although Claimant characterizes its claims concerning the Gorisht and Cakran Oilfields as claims relating to a "*confiscation*" by Respondents, neither the License Agreements nor the Petroleum Agreements contain provisions pertaining to the term "confiscation". The Licence Agreements and the Petroleum Agreements only contain provisions on termination.[1410]

1212. Pursuant to Claimant's logic, the "*confiscation*" of the Cakran and Gorisht Oilfields by Respondents results from a wrongful termination of the Petroleum Agreements[1411] and the fact that, in any event, the License Agreements were not properly terminated.[1412] Therefore, the Tribunal would reach the conclusion that there was no "*confiscation*" by Respondents if it found that the Petroleum Agreements were lawfully terminated and that, as a consequence, Claimant lost its rights under the License Agreements.

1213. It is undisputed between the Parties that Respondents terminated the Petroleum Agreements and not the License Agreements; however, the Parties disagree as to the

[1409] Respondents' Post-Hearing Brief, paras. 171-172, p. 51.
[1410] **C-2**, **C-3** and **C-4** – License Agreements, Article 24, pp. 61-62; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 24, pp. 32-33.
[1411] Statement of Claim, para. 273, p. 44; Reply, para. 124, p. 20; Claimant's Post-Hearing Brief, para. 144, pp. 29-30.
[1412] Claimant's Post-Hearing Brief, para. 193, p. 39.

consequences of these facts, on the basis of their respective interpretations of the interplay between the two agreements.

1214. The Tribunal recalls that under the Instrument of Transfer annexed to the Petroleum Agreement, "*in consideration of and subject to Stream entering into a Petroleum Agreement (as defined in the said Licence Agreement) with Albpetrol*", Albpetrol transferred its rights, privileges and obligations under the License Agreement to Stream "*subject to*" the Petroleum Agreement.

1215. Item (4) of the Instrument of Transfer also provides that "*the Instrument of Transfer is conditional upon Albpetrol and Stream entering into the* […] *Petroleum Agreement*" and Item (5) states that "*following execution of this Instrument of Transfer, the interests of Stream and Albpetrol shall be defined in the said Petroleum Agreement*".

1216. In addition, Article 1.41 of the Petroleum Agreements defines the License Agreements as the License Agreements "*granted by the Ministry and the AKBN to Albpetrol governing Petroleum Operations in the Contract Area, and to which Contractor will become a party upon execution and registration of the Instrument of Transfer attached as Annex E*".[1413]

1217. Therefore, it is clear from the wording of several provisions of the Petroleum Agreements and its annexes that all the rights and interests of Claimant as Licensee under the License Agreements are conditional upon the continuing existence of a Petroleum Agreement for the benefit of the Licensee.

1218. Moreover, the License Agreements themselves define a Licensee as "*Albpetrol and* […] *any* [of] *its permitted transferee, successor or assignee*".[1414] This is a status that could be acquired through the Instrument of Transfer contained in the Petroleum Agreements.

1219. This wording also indicates that the rights of a Licensee, and in particular of Claimant, under the License Agreements, are conditional upon a valid and standing position as Albpetrol's "*permitted transferee, successor or assignee*" under the Petroleum Agreements.

1220. In the Tribunal's opinion, Claimant can thus benefit from a position under the License Agreements only to the extent that it is and remains a party to the Petroleum Agreements, as argued by Respondents.[1415]

1221. It follows that, if the Petroleum Agreements were to come to an end, in particular by termination, Claimant would lose its contractual position as Licensee and its rights under the License Agreements.

[1413] **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 1.41, p. 6 (emphasis added).
[1414] **C-2**, **C-3** and **C-4** – License Agreements, Article 1.1, p. 10.
[1415] Statement of Defence, para. 462, p. 118; Rejoinder Brief, para. 461, p. 124.

1222. To answer Claimant's argument on the absence of cross-default provisions between the License Agreeements and the Petroleum Agreements, the Tribunal considers that cross-default provisions are not necessary given that, as explained above, Claimant's rights under the License Agreements would automatically lapse at the termination of the Petroleum Agreements.

1223. The Tribunal thus finds that, if the termination of the Petroleum Agreements by Respondents was factually and legally grounded, Claimant would have lost its position under the License Agreements and thus would not be able to claim damages for Respondents' breaches of the Cakran and Gorisht License Agreements. In such a case, contrary to what Claimant argues,[1416] it would not have been necessary for Respondents to issue notices of material breach under the License Agreements which would have stayed in force between the MIE, AKBN and Albpetrol.

1224. On the contrary, it is only if the termination of the Petroleum Agreements was not factually and legally grounded, that the Tribunal would have to analyse the liability of AKBN and the MIE *vis-à-vis* Claimant under the License Agreements.

1225. In that respect, the Tribunal recalls that it can examine questions and facts relating to the Petroleum Agreements, including the validity of their termination, in order to draw consequences regarding the rights of Claimant under the License Agreements.

2. <u>On the merits of the termination of the Cakran and Gorisht Petroleum Agreements – analysis of Claimant's alleged material breach regarding the PEP&ASP Liability</u>

1226. As a reminder, Article 24.2 of the Petroleum Agreements provides that these Agreements can be terminated by Albpetrol pursuant to the following conditions:

> "*This Agreement may be terminated by Albpetrol by giving no less than one hundred and twenty (120) days written notice to Contractor in the following events:*
>
> *24.2.1 if Contractor has repeatedly committed a material breach of its fundamental duties and obligations under this Agreement and has been advised by Albpetrol of Albpetrol's intention to terminate this Agreeement. Such notice of termination shall only be given if Contractor upon receiving notice from Albpetrol that it is in material breach and does not rectify or has not commenced to substantially rectify such breach within (6) months;* […]*"*

1227. In its ruling on the merits of the termination of the Cakran and Gorisht Petroleum Agreements, the Tribunal will limit its review to Claimant's alleged material breach concerning the PEP&ASP Liability given that the Termination Notices were based only on the March 2016 Breach Notice which referred to Claimant's material breach

[1416] Statement of Claim, para. 265, p. 144.

concerning the PEP&ASP Liability.[1417] The Tribunal's decision not to rule on the other alleged material breaches is also justified by the fact that Respondents' allegations in that respect are quite confusing and based on limited or inconclusive evidence. In any event, in light of the Tribunal's decision on the PEP&ASP Liability, a ruling on the other alleged material breaches is not necessary, as explained below.

a) Identification of a material breach of the Cakran and Gorisht Petroleum Agreements

1228. The Tribunal will assess whether Claimant's alleged failure to respect its PEP&ASP obligations constitutes a material breach of the Cakran and Gorisht Petroleum Agreements under English law, which is applicable to the Petroleum Agreements. The Tribunal's analysis will focus in particular on the following definition of the term "*material breach*" provided by Claimant: "[a breach] *which in all the circumstances is wholly or partly remediable and is or, if not remedied, is likely to become, serious in the wide sense of having a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms*".[1418]

1229. While Claimant disagrees that it owes to Albpetrol the amount of USD 27,778,871.29 alleged by Respondents as of 31 December 2016, it also acknowledges that an amount of PEP&ASP was due to Albpetrol at the time of the March 2016 Breach Notice.[1419]

1230. The Tribunal notes that, between 2011 and 2016, Claimant failed to deliver important quantities of crude oil to Albpetrol for the Gorisht and Cakran Oilfields, thereby generating monetary debts towards Albpetrol. This can be seen not only in Respondents' submissions, but also in Claimant's submissions, and in particular in the Deloitte Lost Profit Report, which shows a significant and cumulative balance between the PEP&ASP owed and the PEP&ASP delivered over these years.[1420]

1231. The Tribunal will now assess Claimant's position in response to Respondents' argument that such failure constituted a material breach.

[1417] **C-17** – Letter from Albpetrol Sh. A. regarding Notice of Termination of the Petroleum Agreement for Cakran-Mollaj Oilfield dated September 19, 2016 (English translation); **C-18** – Letter from Albpetrol Sh. A. regarding Notice of Termination of the Petroleum Agreement for Gorisht-Kocul Oilfield dated September 19, 2016 (English translation); **C-16** – Letter from Albpetrol Sh. A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016; **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016.

[1418] **CL-57** – *National Power plc v United Gas Company Limited*, [1998] Lexis Citation 2811 (Ch D), p. 42, cited in Claimant's Post-Hearing Brief, para. 155, p. 31.

[1419] Claimant's Post-Hearing Brief, para. 156, p. 31.

[1420] Deloitte Lost Profits Report, Schedule 29 submitted with Claimant's Statement of Claim; Statement of Defence, para. 124, p. 44 (table p. 42 ("*Situation on 31.12.2013*")); Statement of Defence, para. 125, p. 44 (table p. 42 ("*Situation on 31.12.2014*")); Statement of Defence, para. 126, p. 44 (table p. 43 ("*Situation on 31.12.2015*"); Statement of Defence, para. 127, p. 44 (table p. 43 ("*Situation on 31.12.2016*")); Monthly and quarterly reports of the Claimant for the oilfields including the basic data for the calculation of the Claimant's debts (provided by USB flash drive only).

1232. Claimant's first argument is that some PEP&ASP obligations claimed by Respondents fail to offset amounts due by Albpetrol to Claimant for over-deliveries from the Ballsh Oilfield.

1233. The Tribunal acknowledges that, when negotiating the January 2017 Cash Payment Agreements, Mr. Puka from Albpetrol indicated that if payments were made by Claimant under these Agreements, the remaining amounts to be delivered in kind would not constitute a cause for termination of the Petroleum Agreements given that they amounted to the amounts delivered in excess for the Ballsh Oilfield.[1421] It thus clearly appears that, for Albpetrol, the offset of amounts due by Albpetrol to Claimant for over-deliveries was conditional upon the payment by Claimant of the amounts due concerning the Gorisht and Cakran Oilfields, as set out in the January 2017 Cash Payment Agreements. The Tribunal also notes that the invoices issued by Albpetrol pursuant to the January 2017 Cash Payment Agreements were not paid by Claimant, due to disagreements between the Parties on the VAT due.

1234. Claimant's second argument is that its PEP&ASP obligations partly accrued as a result of Albpetrol's inability to lift its share of production.

1235. Based on the exhibits submitted by Claimant, the Tribunal acknowledges that several times between 2010 and 2012, and one time in 2015, Claimant pointed out that certain amounts of crude oil had not been lifted by Albpetrol, which resulted in a delay in processing for Claimant.[1422]

1236. However, Claimant does not precisely quantify the aggregate impact of Albpetrol's failure to lift the oil on the PEP&ASP Liability.

1237. On the other hand, Respondents do submit elements to quantify the impact of Albpetrol's failure to lift the oil on the PEP&ASP Liability. In particular, Respondents explain that (i) Claimant should have notified Albpetrol of 222,648.77 tons of crude oil for delivery between 2007 and 2017, (ii) Claimant only notified Albpetrol of 153,703.17 tons, as it failed to notify Albpetrol in due time and to prepare the remaining 68,954.60 tons for delivery, and (iii) of the 153,703.17 tons of crude oil notified, Albpetrol managed to pick-up 152,218.17 tons. According to Respondents, the quantities that were not picked up by Albpetrol, mainly in 2011 and 2012, amounted to only 1,485 tons, *i.e.*

[1421] **C-85** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 17 January 2017.

[1422] **C-28** – Letter No. 616/2010 from Stream to Albpetrol dated 21 May 2010; **C-29** – Letter No. 18/11 from Stream to Albpetrol dated 25 January 2011; **C-30** – Letter No. 502/11 from Stream to Albpetrol dated 29 August 2011; **C-31** – Letter No. 659/11 from Stream to Albpetrol and AKBN dated 3 October 2011; **C-32** – Letter No. 734/11 from Stream to Albpetrol dated 9 November 2011; **C-33** – Letter No. 736/11 from Stream to Albpetrol dated 11 November 2011; **C-34** – Letter No. 756/11 from Stream to Albpetrol and AKBN dated 16 November 2011; **C-35** – Letter No. 57/12 from Stream to Albpetrol dated 30 January 2012; **C-36** – Letter No. 78/12 from Stream to Albpetrol dated 13 February 2012; **C-37** – Letter No. 88/12 from Stream to Albpetrol and AKBN dated 15 February 2012; **C-38** – Letter No. 100/12 from Stream to Albpetrol dated 21 February 2012; **C-39** – Letter No. 132/12 from Stream to Albpetrol and AKBN dated 7 March 2012; **C-40** – Letter No. 154/12 from Stream to Albpetrol and AKBN dated 16 March 2012; **C-41** – Letter No. 235/15 from TransAtlantic to Albpetrol dated 1 September 2015.

0.67% of the total quantity owed to Albpetrol.[1423] These figures are not disputed by Claimant.

1238. As can be seen in Mr. Puka's witness statement, Respondents also submit details on specific instances where Albpetrol was not able to lift its share of oil because Claimant did not respect the minimum notice period of five business days before the end of the month preceding delivery, by asking for the lifting of oil one, two or three days in advance of the delivery date or on the same day.[1424]

1239. Moreoever, Respondents refer to two occurences in October 2013 where Albpetrol could have lifted oil but was not told that the oil was available or was prevented from lifting it by Claimant's employees.[1425]

1240. Claimant does not expressly contest these aspects of the factual background.

1241. Claimant's third argument is that the PEP&ASP obligations claimed by Albpetrol do not take into account the *Force Majeure* Amounts, *i.e.* amounts owed by Albpetrol to Claimant resulting from a declaration of *force majeure* relating to the Gorisht and Cakran Oilfields for a period during which Claimant was contractually relieved of its PEP&ASP obligations.[1426] According to Claimant, the *Force Majeure* Amounts concern 4,611.80 tons of petroleum.[1427]

1242. Nevertheless, and more generally, as a conclusion to these three arguments, it appears that (i) even if the over-deliveries concerning the Ballsh Oilfield were to be considered as offsetting the PEP&ASP Liability for the Cakran and Gorisht Oilfields despite the fact that the January 2017 Cash Payment Agreements were not performed, the amount of 14,601.92 tons invoked in Claimant's Post-Hearing Brief is largely inferior to the overall PEP&ASP Liability. Similarly, (ii) the quantities of oil that were not lifted by Albpetrol amounted only to a very small amount of the overall PEP&ASP Liability (0.67% of the total quantity owed to Albpetrol), and (iii) the *Force Majeure* Amounts concern 4,611.80 tons of petroleum out of 74,884.32 tons owed by Claimant to Albpetrol for the Gorisht and Cakran Oilfields,[1428] which is not significant compared to the overall PEP&ASP Liability. Moreover, even if the *Force Majeure* Amounts were disputed, they did not prevent Claimant from paying the undisputed balance.

1243. Therefore, it follows from the above that, even if taken at face value, the facts alleged by Claimant regarding the amounts that should be offset, or regarding Respondents'

[1423] Rejoinder Brief, paras. 254-257, pp. 70-71, referring to Monthly and quarterly reports of the Claimant for the oilfields (provided by flash drive only); **RWS-2** – Second Witness Statement of Endri Puka, para. 17, p. 4.
[1424] Rejoinder Brief, para. 258, p. 71, referring to **RWS-2** – Second Witness Statement of Endri Puka, paras. 18, 22, p. 4.
[1425] Statement of Defence, paras. 149-150, p. 50, referring to **RWS-1** – First Witness Statement of Endri Puka.
[1426] Statement of Claim, para. 133, p. 23, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 23, p. 60; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 17, pp. 27-28.
[1427] Statement of Claim, para. 133, p. 23, referring to **C-48** – Letter No. 243/15 from TransAtlantic to Albpetrol dated 11 September 2015; Reply, para. 121, p. 20; Claimant's Post-Hearing Brief, para. 17, pp. 3-4.
[1428] Deloitte Lost Profits Report, Schedule 29.

failure to take delivery of oil, do not prevent a finding that Claimant's PEP&ASP Liability is significant.

1244. The Tribunal is of the opinion that Claimant's failure to respect its PEP&ASP obligations, which is demonstrated by a significant and cumulative balance between the PEP&ASP owed and the PEP&ASP delivered to Albpetrol since 2011, could have been remedied, and that it had a serious effect on the benefit that Respondents would have otherwise derived from performance of the Petroleum Agreements in accordance with their terms, given that Respondents suffered an important loss in quantities of crude oil that would otherwise have been delivered.

1245. In that sense, the Tribunal finds that Claimant's repeated failure to respect its PEP&ASP obligations constitutes a material breach of the Cakran and Gorisht Petroleum Agreements under the law applicable to these Agreements, *i.e.* English law, pursuant to the definition of a "*material breach*" mentioned above.[1429]

b) <u>On whether Claimant rectified or commenced to substantially rectify its material breach</u>

1246. Pursuant to Article 24.2 of the Petroleum Agreements, Albpetrol can only issue a notice of termination if, upon receiving a notice of material breach, Claimant has not rectified nor has commenced to rectify substantially such breach within six months. The Parties disagree as to whether, when it received the Termination Notices, Claimant had rectified or commenced to rectify substantially the material breach alleged in the Breach Notices.

1247. The Tribunal has previously ruled that Claimant has repeatedly committed a material breach of its fundamental duties and obligations under the Cakran and the Gorisht Petroleum Agrements. In the light of that previous finding, the Tribunal now turns to examine whether Claimant rectified or commenced to substantially rectify such material breach.

1248. The Tribunal takes note of Claimant's arguments that (i) its cumulative PEP&ASP obligations for 2015 and 2016 indicated a positive delivery balance of 930.15 tons for the Cakran Field and -9,715.57 tons for the Gorisht Field, and that Claimant over-delivered from the Ballsh Field in the amount of 6,680.93 tons, that (ii) throughout 2016 and up to August 2016, Claimant accrued no additional PEP&ASP obligations for the Oilfields, having over-delivered in this period from the Cakran Field and Ballsh Field by 843.7 tons and 1,700.94 tons, respectively, and only having under-delivered from the Gorisht Field by 989.33 tons".[1430]

[1429] See para. 1228 above; Claimant's Post-Hearing Brief, para. 155, p. 31, referring to **CL-57** – *National Power plc v United Gas Company Limited*, [1998] Lexis Citation 2811 (Ch D), p. 42: "[a breach] *which in all the circumstances is wholly or partly remediable and is or, if not remedied, is likely to become, serious in the wide sense of having a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms*".
[1430] Reply, para. 129, p. 21.

1249. The Tribunal is not persuaded by Respondents' argument that the Parties necessarily intended the word "*substantially*" in Article 24.2 of the Petroleum Agreements to mean "*a rectification of at least 70% of a liability*", as in the 28 February 2014 Conversion Agreement.[1431] In the Tribunal's view, the percentage provided by Claimant is arbitrary and unsubstantiated, and the Oxford Dictionary definition provided by Respondents stating that the grammatical sense of the word "*substantially*" is "*considerable importance, size or worth*"[1432] is more accurate for purposes of interpretation.

1250. Against this background, the Tribunal notes that, even if Claimant over-delivered crude oil for the Ballsh and Cakran Oilfields between the beginning of 2016 and August 2016, it still under-delivered for the Gorisht Oilfield during that period, thereby leading to a negative balance of 145.63 tons for the Cakran and Gorisht Oilfields which are concerned with the Termination Notices.[1433]

1251. Moreover, by simply over-delivering crude oil in 2016, Claimant did not substantially rectify the breach, which it could have done by settling the Cakran and Gorisht PEP&ASP Liability acknowledged for the years 2011 to 2015. For instance, Claimant could have showed its willingness to resolve PEP&ASP Liability by paying the amount due for the 71,033.93 tons that it admits owing[1434], minus the *Force Majeure* Amounts that Claimant was disputing and the amounts allegedly owed by Albpetrol for the Ballsh over-deliveries. However, Claimant did not proceed that way, and did not begin to make significant rectifications with respect to its past debts either.

1252. Therefore, the Tribunal rules that when Claimant received the Termination Notices on 19 September 2016, it had not rectified or commenced to rectify substantially its material breach of the Cakran and Gorisht Petroleum Agreements since receiving the March 2016 Breach Notice.

c) <u>On whether Respondents affirmed Claimant's material breach</u>

1253. As for Claimant's argument that Albpetrol repeatedly affirmed Claimant's material breaches of the Cakran and Gorisht Petroleum Agreements so that the breaches cannot be relied upon for the issuance of the Termination Notices, the Tribunal is of the opinion that, in the present case, Albpetrol cannot be considered as having affirmed Claimant's material breach and is therefore not precluded from asserting Claimant's material breaches under English law.

[1431] Statement of Defence, para. 267, p. 77, referring to **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014: "*14.* (…) *the Parties may agree to extend the term of this Agreement for another period necessary to enable Stream to fulfill the obligation foresee herein, only if at the end of the term provided for in paragraph 11 above, Stream has met more than 70% of the liability provided for in this Agreement* (…)".
[1432] Statement of Defence, para. 268, p. 77.
[1433] As the figures provided by the Parties are slightly different, the Tribunal refers to the figures provided by Claimant, which are advantageous to Claimant, given that the figures provided by Respondents lead to a finding of a negative balance of 145.78 tons.
[1434] Deloitte Lost Profits Report, Schedule 29, submitted with Claimant's Statement of Claim.

1254. Indeed, even though Albpetrol accepted to negotiate with Claimant for several years until 2017, and to enter into agreements to settle Claimant's debts,[1435] Albpetrol has always maintained its demands to be delivered oil or to be paid by Claimant.[1436]

1255. The various opportunities that Albpetrol gave to Claimant to pay its PEP&ASP debts after issuing the notices of material breach, including the November 2013, 26 May 2014 and 26 June 2014 notices, thus cannot be considered as a waiver to invoke the material breaches.

1256. This finding is reinforced by the fact that Claimant committed to pay its debts to Respondents, in particular in 2015 while the parties were negotiating the neutralization of the Royalty Tax, thereby giving Respondents reasons to believe that the matter would be resolved.[1437]

1257. Therefore, the Tribunal finds that Respondents did not affirm Claimant's material breach of the Cakran and Gorisht Petroleum Agreements.

d) <u>On the validity of the Termination Notices</u>

1258. Concerning Claimant's argument that the Termination Notices are ineffective or invalid because these notices relied upon an invalid notice of material breach, the Tribunal notes that Article 24.2 of the Petroleum Agreements does not determine the level of details that must be contained in a breach notice leading to the termination notice.

1259. In addition, in light of the English case law submitted by Claimant,[1438] the Tribunal believes that the March 2016 Breach Notice,[1439] even if it did not set out specific amounts, was sufficiently clear and unambiguous to enable Claimant to understand its contractual basis and the nature of the breach, *i.e.* the violation of Claimant's PEP&ASP obligations under the Petroleum Agreements, so as to be able to assess the validity of the notice and take steps to remedy its breach.

[1435] **R-35** – Letter from Albpetrol to Claimant dated 4 November 2013; **R-38** – Letter from Albpetrol to the Claimant dated 26 May 2014; **R-39** – Letter from Albpetrol to the Claimant dated 26 June 2014; **C-85** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 17 January 2017.

[1436] For instance, **R-30** – Letter from Albpetrol to Claimant dated 3 April 2012; **C-111** – Letter No. 2668/1 from Albpetrol to Stream dated 15 June 2012; **R-31** – Letter from Albpetrol to Claimant dated 9 August 2012; **R-32** – Letter from Albpetrol to Claimant dated 20 February 2013; **R-33** – Letter from Albpetrol to Claimant dated 19 March 2013; **R-34** – Letter from Albpetrol to Claimant dated 9 October 2013; **R-45** – Letter from TransAtlantic Petroleum Ltd. to Albpetrol dated 20 January 2015; **C-85** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 17 January 2017.

[1437] **R-45** – Letter from TransAtlantic Petroleum Ltd. to Albpetrol dated 20 January 2015: "*We understand that Albpetrol and the Ministry of Energy are in a position to take action against Stream's licenses if the payable is not satisfied. We accept that possibility, but hope our assurance that we will make the 70% payment upon final endorsement will persuade you to work with us to resolve all issues*".

[1438] **CL-63** - *QOGT Inc v International Oil & Gas Technology Ltd*, [2014] EWHC 1628 (Comm), para. 112.

[1439] **R-63** – Letter from Albpetrol to Claimant dated 7 March 2016; **C-16** – Letter from Albpetrol Sh.A. regarding Repeated Notice for Material Breach under the Petroleum Agreements for Gorisht-Kocul and Cakran-Mollaj Oilfields dated March 7, 2016.

1260. This is particularly true given the wealth of correspondence between the Parties and their attempts to agree on a way to settle amicably Claimant's PEP&ASP violations, and the fact that Claimant acknowledges that, up to 2015, it owed Albpetrol 71,033.93 tons of oil,[1440] minus the *Force Majeure* Amounts that it was disputing and the amounts allegedly owed by Albpetrol for the Ballsh over-deliveries.

1261. Therefore, the Tribunal rules that the Termination Notices issued to Claimant with respect to the Gorisht and Cakran Oilfields were valid.

1262. As a conclusion to the issue of the merits of the termination of the Cakran and Gorisht Petroleum Agreements, the Tribunal finds that their termination by Respondents was justified and valid.

1263. Therefore, pursuant to the mechanism explained in part 1 above, Claimant lost its position as Licensee under the Cakran and Gorisht License Agreements when Respondents validly terminated the corresponding Petroleum Agreements, so that Claimant cannot claim damages for Respondents' alleged breaches of the Cakran and Gorisht License Agreements.

1264. As a result of this conclusion, it is not necessary for the Tribunal to analyse the other material breaches alleged by Respondents, as indicated above.

6.3. Claimant's allegations in respect of Respondents' refusal to hand over the Ballsh Oilfield

A. Claimant's position

1265. Claimant argues that Respondents wrongfully interfered with Claimant's rights under the Ballsh License Agreement when Albpetrol refused to hand over the Ballsh Oilfield, denied Claimant access to the facilities and illegally assigned the Ballsh Oilfield to a third party.

1. Claimant's argument that it sought the handing over of the Ballsh Oilfield and that Albpetrol refused

1266. Claimant recalls that, under the License Agreements, the Licensee has the exclusive right to conduct Petroleum Operations in the Contract Area (except for areas in which it elects not to conduct Petroleum Operations), and to use, exclusively and free of charge, any existing equipment and facilities, assets, equipment, infrastructure and pipelines in the Contract Area for Petroleum Operations.[1441]

[1440] Deloitte Lost Profits Report, Schedule 29, submitted with Claimant's Statement of Claim.
[1441] Statement of Claim, para. 276, p. 44.

1267. Claimant submits that, in particular, the Licensee is entitled to take over any existing wells, assets and leases in the Contract Area,[1442] by submitting a Development Plan for some or all the Contract Area.[1443] The Licensee may request AKBN to amend an already approved Development Plan, such as by expanding the scope of the Development and Production Area,[1444] the designated portion of the Contract being the Project Area.[1445]

1268. Claimant states that pursuant to these provisions, it submitted a Development Plan indicating that its goal was to take over the entire Ballsh Oilfield in 2010,[1446] which was approved by AKBN on 16 September 2010.[1447]

1269. Claimant contends that when the Seventh Advisory Committee Meeting occurred on 28 February 2011,[1448] it agreed with Albpetrol that Albpetrol would hand over the remaining part of the Ballsh Oilfield in accordance with Stream's Work Program and Budget for 2011 at a pace of ten wells per month.[1449]

1270. Claimant states that on 31 May 2011, it formally exercised its right to expand the Ballsh Project Area to include all the remaining parts of the Contract Area under Articles 6 and 8 of the License Agreement.[1450] Pursuant to the implementing provisions of the Petroleum Agreement, including the Takeover Procedure, this election eliminated the Abpetrol Operations Zone and entitled Claimant to take over any existing wells, assets and leases in the Project Area from Albpetrol without compensation, with Albpetrol's corollary obligation to hand over the wells within two weeks and to hand over the facilities within a reasonable period of time.[1451]

[1442] Statement of Claim, para. 277, p. 44; Reply, para. 169, p. 29, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 3.4, pp. 17-18. Claimant also mentions **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 12, pp. 22-24 on the ground that it is incorporated by reference in Article 3.4(b) of the License Agreement.

[1443] Statement of Claim, para. 277, p. 44, referring to **C-2**, **C-3** and **C-4** – License Agreements, Articles 7.4(a), 8.1(a), pp. 27-29.

[1444] Statement of Claim, para. 277, p. 44, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 8.1(c), p. 30.

[1445] Statement of Claim, para. 277, p. 44, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 1.1, pp. 11-12, definition of "Project Area".

[1446] Statement of Claim, para. 209, p. 34, referring to **C-97** – Plan of Development Ballsh-Hekal, Rev. No. 3 dated 2 September 2009, pp. 42-43, with Supplementary Information Schedule A dated 31 May 2010.

[1447] Statement of Claim, para. 209, p. 34, para. 278, p. 45, referring to **C-98** – Letter No. 2431 from AKBN to Stream and Albpetrol dated 16 September 2010; **C-99** – Letter No. 6198 from MEI to AKBN dated 14 September 2010.

[1448] Statement of Claim, para. 210, p. 35, referring to **C-100** – Minutes of the Seventh Advisory Committee Meeting dated 15 March 2011; **C-101** – Resolutions of the Seventh Advisory Committee Meeting dated 15 March 2011, updated 11 July 2011.

[1449] Statement of Claim, para. 210, p. 35, referring to **C-102** – Ballsh-Hekal Work Program & Budget Rev. 3 dated 31 October 2010.

[1450] Statement of Claim, para. 211, p. 35, para. 278, p. 45, referring to **C-103** – Letter No. 196/11 from Stream to Albpetrol dated 31 May 2011.

[1451] Statement of Claim, para. 211, p. 35, para. 278, p. 45, referring to **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Article 3.5, pp. 12-13.

1271. Claimant argues that, however, Albpetrol failed and/or refused to comply with the handover procedure,[1452] so that on 16 September 2011, Claimant again requested that Albpetrol hand over the remaining portion of the Ballsh Oilfield.[1453]

1272. Claimant contends that on 26 September 2011, Albpetrol stated that it would only proceed with the Ballsh Oilfield handover if Claimant paid a portion of its unfulfilled PEP&ASP obligations relating to the Cakran and Gorisht Oilfields,[1454] to which Claimant replied that there were no unfulfilled PEP or ASP obligations for the Ballsh Oilfield, and that the PEP&ASP Liability relating to the other Oilfields did not affect the terms of the Ballsh Petroleum Agreement.[1455]

1273. Claimant claims that although Claimant and Albpetrol agreed, at the Eighth Advisory Committee Meeting dated 17 November 2011, that Albpetrol would hand over the remaining part of the Ballsh Oilfield within December 2011,[1456] on 30 November 2011, Albpetrol refused to hand it over until Claimant met its PEP&ASP obligations in respect of the Cakran and Gorisht Oilfields.[1457] On 5 January 2012, Claimant thus reminded to Albpetrol that the PEP&ASP Liability relating to the other Oilfields did not affect the terms of the Ballsh Petroleum Agreement.[1458]

1274. In response to Respondents' argument that pursuant to the 27 January 2012 Agreement, Claimant agreed to the resolution of its PEP&ASP obligation for the Gorisht and Cakran Oilfields as a condition of the Ballsh Oilfield handover,[1459] Claimant argues that each of the Petroleum Agreement and License Agreement may only be amended in writing and that rights under the agreements may only be waived in writing by the waiving party,[1460] so that any discussion between Mr. Kapotas and Mr. Puka on the 27 January 2012 Agreement, which contains no mention of the resolution of the PEP&ASP as a condition of the Ballsh Oilfield handover, is irrelevant.[1461] The fact that Albpetrol sent a letter to Claimant following the Ninth Advisory Committee Meeting does not demonstrate that Claimant agreed to Albpetrol's demand that PEP&ASP obligations be dealt with prior to the handover of the remainder of the Ballsh Oilfield.[1462] Finally,

[1452] Statement of Claim, para. 212, p. 35.
[1453] Statement of Claim, para. 213, p. 35, referring to **C-104** – Letter No. 547/11 from Stream to Albpetrol dated 16 September 2011.
[1454] Statement of Claim, para. 214, p. 35, referring to **C-105** – Letter No. 3066/1 from Albpetrol to Stream dated 26 September 2011.
[1455] Statement of Claim, para. 215, p. 35, referring to **C-106** – Letter No. 698/11 from Stream to Albpetrol dated 24 October 2011.
[1456] Statement of Claim, para. 216, p. 35, referring to **C-22** – Resolutions of the Eighth Advisory Committee Meeting dated 18 November 2011, updated 5 January 2012.
[1457] Statement of Claim, para. 217, p. 35, referring to **C-107** – Letter No. 3906/1 from Albpetrol to Stream dated 30 November 2011.
[1458] Statement of Claim, para. 218, p. 36, referring to **C-23** – Letter No. 5/11 from Stream to Albpetrol dated 5 January 2012.
[1459] Statement of Defence, para. 382, p. 100, referring to **C-111** – Letter No. 2668/1 from Albpetrol to Stream dated 15 June 2012.
[1460] Reply, para. 176, p. 30, referring to **C-2**, **C-3** and **C-4** –License Agreements, Articles 28.2, 28.4, p. 68; **C-5**, **C-6** and **C-7** and **R-1A**, **R-1B** and **R-1C** – Petroleum Agreements, Articles 26.6, 26.9, pp. 35-36.
[1461] Reply, para. 176, p. 30.
[1462] Reply, para. 176, p. 30.

Claimant refers to the following Advisory Committee meetings resolutions: (i) the resolutions of the 18 November 2011 Advisory Committee Meeting stating that the parties agreed to complete the Ballsh handover in December 2011 with no conditions,[1463] (ii) the resolutions of the 18 December 2012 Advisory Committee Meeting stating that the parties agreed to complete the Ballsh handover in 2013[1464] and (iii) the minutes and resolutions of the 21 November 2013 Advisory Committee Meeting confirming that there was no agreement to defer the handover of the Ballsh Oilfield.[1465]

1275. Claimant further contends that from March 2012 to May 2012, it made repeated requests for Albpetrol to implement the handover of the Ballsh Oilfield,[1466] following which, (i) on 20 March 2012, Albpetrol responded that it intended to comply with the handover of Ballsh as soon as it finished obligations given to it by the Ministry of the Economy in respect of a potential privatization of Albpetrol,[1467] and (ii) on 15 June 2012, Albpetrol reiterated that it would not hand over the remaining portion of the Ballsh Oilfield until Claimant fulfilled its PEP&ASP Liability and other obligations to Albpetrol.[1468]

1276. Claimant states that on 5 July 2012, it responded to Albpetrol's objections by *inter alia* reminding Albpetrol (i) of the absence of connection between the three Petroleum Agreements, (ii) of the fact that Claimant fulfilled and even exceeded its contractual obligations for the submission of PEP&ASP and (iii) of the fact that Albpetrol failed to take delivery of some crude oil.[1469]

1277. According to Claimant, at least in July 2012, Albpetrol informed the MEI that its apparent motives for not handing over the remainder of the Ballsh Oilfield was that it was "*of the opinion*" that it reserved the right to "*not use this oil field*" and that it had included those assets in a data room as part of Albpetrol's to-be-aborted privatization process.[1470]

1278. Claimant argues that on 6 December 2012, in advance of the Ninth Advisory Committee Meeting, it requested that Albpetrol commence the handover procedure of the Ballsh

[1463] Claimant's Post-Hearing Brief, para. 57, p. 10, referring to **C-22** – Resolutions of the Eighth Advisory Committee Meeting dated 18 November 2011, updated 5 January 2012.
[1464] Claimant's Post-Hearing Brief, para. 57, p. 10, referring to **C-25** – Resolutions of the Ninth Advisory Committee Meeting dated 20 December 2012, amended 4 January 2013, unsigned by Albpetrol.
[1465] Claimant's Post-Hearing Brief, para. 57, p. 10, referring to **C-26** – Resolutions of the Eleventh Advisory Committee Meeting dated 24 November 2013, revised 20 December 2013; **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013.
[1466] Statement of Claim, para. 219, p. 36, referring to **C-39** – Letter No. 132/12 from Stream to Albpetrol and AKBN dated 7 March 2012; **C-108** – Letter No. 191/12 from Stream to Albpetrol dated 30 March 2012; **C-109** – Letter No. 205/12 from Stream to Albpetrol dated 10 April 2012; **C-110** – Letter No. 281/12 from Stream to Albpetrol dated 24 May 2012.
[1467] Statement of Claim, para. 220, p. 36.
[1468] Statement of Claim, para. 221, p. 36, referring to **C-111** – Letter No. 2668/1 from Albpetrol to Stream dated 15 June 2012.
[1469] Statement of Claim, para. 222, pp. 36-37, referring to **C-24** – Letter No. 390/12 from Stream to Albpetrol dated 5 July 2012.
[1470] Reply, para. 177, pp. 30-31, referring to **R-133** – Letter from Albpetrol to the Minister of Economy, Trade and Energy, Mr. Edmond Haxhinasto, dated 16 July 2012.

Oilfield,[1471] and on 18 December 2012, the Advisory Committee agreed to complete the handover of the remaining Ballsh Contract Area within February 2013, including all producing and non-producing wells, the pipeline network in all group stations and other related infrastructure, the power supply network and related infrastructure, the equipment servicing the oilfields (trucks, tractors, rigs, etc), the Ballsh sector offices and the warehouse.[1472] The parties agreed to establish a group of experts that would prepare the inventory and complete the handover to Stream according to the provisions of the Petroleum Agreement.[1473]

1279. Claimant contends that, however, on 15 January 2013, Albpetrol took the position that the handover would only occur once the PEP&ASP Liability of the other Oilfields was fulfilled,[1474] to which Claimant again objected on 8 February 2013.[1475]

1280. Claimant states that, on 20 February 2013, Albpetrol acknowledged the validity of the handover and requested the MEI's approval in doing so.[1476] There is no evidence that the MEI gave its approval or otherwise responded.[1477]

1281. Claimant argues that, however, no action to complete the handover of the remaining portion of the Ballsh Oilfield occurred until 1 July 2015, when Albpetrol notified Claimant that it would start the procedures for the handover of the remaining portion of the Ballsh Oilfield.[1478] Albpetrol began facilitating the inventorying process of the handover until Claimant discovered that Albpetrol had been attempting to move or exclude equipment critical to the operation of the Ballsh Oilfield prior to the handover,[1479] which resulted in the handover process being further delayed.[1480]

[1471] Statement of Claim, para. 223, p. 37, referring to **C-112** – Letter No. 70/12 from Stream to Albpetrol dated 6 December 2012.
[1472] Statement of Claim, para. 224, p. 37, para. 280, p. 45, referring to **C-25** – Resolutions of the Ninth Advisory Committee Meeting dated 20 December 2012, amended 4 January 2013, unsigned by Albpetrol.
[1473] Statement of Claim, para. 280, p. 45.
[1474] Statement of Claim, para. 225, p. 37, referring to **C-113** – Letter No. 121 from Albpetrol to Stream dated 15 January 2013.
[1475] Statement of Claim, para. 225, p. 37, referring to **C-114** – Letter No. 62/13 from Stream to Albpetrol dated 8 February 2013.
[1476] Statement of claim, para. 227, p. 37, referring to **C-115** – Letter No. 529 from Albpetrol to the MEI dated 20 February 2013.
[1477] Claimant's Post-Hearing Brief, para. 54, p. 10.
[1478] Statement of Claim, para. 228, p. 37, referring to **C-116** – Letter No. 171 from Stream to Albpetrol dated 8 April 2013; **C-117** – Letter No. 429 from Stream to Albpetrol dated 14 August 2013; **C-27** – Minutes of the Eleventh Advisory Committee Meeting dated 21 November 2013; **C-118** – Letter No. 167 from Stream to Albpetrol dated 28 March 2014; **C-119** – Minutes of the Twelfth Advisory Committee Meeting held on 22 April 2014; **C-120** – Letter No. 474 from Stream to Albpetrol dated 28 October 2014; **C-121** – Minutes of the Thirteenth Meeting of the Advisory Committee held 5 December 2014; **C-122** – Letter No. 518 from Stream to Albpetrol dated 16 December 2014; **C-123** – Letter No. 529 from Stream to Albpetrol dated 22 December 2014; **C-124** – Letter No. 164 from TransAtlantic to Albpetrol dated 22 June 2015; **C-125** – Letter No. 5168/2 from Albpetrol to TransAtlantic dated 1 July 2015.
[1479] Statement of Claim, para. 228, p. 37, referring to **C-126** – Letter No. 234/15 from TransAtlantlic to Albpetrol dated 28 August 2015.
[1480] Statement of Claim, para. 228, p. 37, referring to **C-127** – Letter No. 105/16 from TransAtlantic to Albpetrol et al. dated 12 April 2016.

1282. In response to Respondents' argument that Claimant did not proceed with the take-over procedure in 2014 due to internal problems with the transfer of Claimant's business from the old owners to the TransAtlantic Group,[1481] Claimant contends that the evidence shows that after TAT acquired Claimant, Claimant requested a suspension of the Ballsh handover process because it was "*marketing itself*".[1482]

1283. Claimant indicates that in the proposed Work Program & Budget for 2016 (the "**2016 APB**"), it planned the takeover of the entire Ballsh Oilfield in the fourth Quarter 2016,[1483] but the 2016 APB was never approved. Claimant states that on 7 November 2016, it presented to Albpetrol the Work Program & Budget for 2017 wherein the takeover of the entire Ballsh Oilfield was planned for mid-year 2017, but did not receive a reply from Albpetrol.[1484]

1284. Claimant argues that, on 9 May 2017, based on its plans in the APBs, it again requested Albpetrol to start the Ballsh takeover within the month of June,[1485] and that Albpetrol took no action but requested an advisory committee meeting ("**ACM**") to discuss the details of the takeover process on 5 June 2017 and 8 September 2017.[1486]

1285. Claimant contends that after it requested an agenda for the ACM from Albpetrol on 11 September 2017 and on 10 October 2017,[1487] on 12 October 2017, Albpetrol responded, without an agenda, arguing that Claimant had not responded with a time and location for the ACM.[1488]

2. <u>Claimant's argument that Albpetrol denied GBC access to the facilities and GBC's production</u>

1286. Claimant contends that in refusing to complete the handover of the remainder of the Ballsh Oilfield, Albpetrol has maintained control of the central gathering facility in which all the petroleum in the Ballsh Oilfield is collected (the "**Facility**")[1489] which means that Albpetrol receives and controls all the oil produced by Claimant.[1490] During

[1481] Statement of Defence, paras. 393-394, p. 103.
[1482] Reply, para. 178, p. 31.
[1483] Statement of Claim, para. 229, p. 38, referring to **C-128** – Ballsh Work Program and Budget 2016 dated 1 January 2016.
[1484] Statement of Claim, para. 229, p. 38, referring to **C-129** – Ballsh Work Program and Budget 2017 dated 7 November 2016.
[1485] Statement of Claim, para. 230, p. 38, referring to **C-130** – Letter No. 85 from TransAtlantic to Albpetrol dated 9 May 2017.
[1486] Statement of Claim, para. 230, p. 38, referring to **C-131** – Letter No. 5897/1 from Albpetrol to TransAtlantic dated 8 September 2017.
[1487] Statement of Claim, paras. 231-232, p. 38, referring to **C-132** – Letter No. 140 from TransAtlantic to Albpetrol dated 11 September 2017; **C-133** – Letter No. 150 from TransAtlantic to Albpetrol dated 10 October 2017.
[1488] Statement of Claim, para. 232, p. 38, referring to **C-134** – Letter No. 5897/3 from Albpetrol to TransAtlantic dated 12 October 2017.
[1489] Statement of Claim, para. 234, p. 38.
[1490] Statement of Claim, para. 282, p. 45.

the years 2015 and 2016, Albpetrol refused Claimant access to the Facility,[1491] so that Claimant was unable to process, take and market its own share of petroleum in the approximate value of 6,680 tons.[1492]

1287. Claimant claims that, in addition, Albpetrol has marketed Claimant's share of petroleum delivered to the Facility and retained the sales proceeds for itself without compensating Claimant.[1493] Albpetrol has admitted taking and not paying for 15,000 tons of petroleum from Claimant's share of petroleum from the Ballsh Oilfield.[1494]

3. Claimant's argument that Albpetrol illegally sought to assign the Ballsh Oilfield to a third party

1288. Claimant argues that its rights in the Ballsh Oilfield were auctioned by a bailiff to the company Anio Oil and Gas Sh.A on 26 September 2017, without Claimant being present or being given notice of the proceedings, and with the notification of the auction "*going out to undisclosed recipients*" on 9 and 13 September 2017.[1495]

1289. Indeed, Claimant alleges that it had moved offices and was deemed informed of the auction's results when notice was posted by Albpetrol's private bailiff on the National Business Center website on 2 October 2017.[1496] Despite the bailiff's notification letters to the National Business Center,[1497] there is no evidence that Claimant actually received advance notice of the auction, which is reinforced by its absence at the 26 September 2017 auction and at the unsuccessful auction of 19 September 2017.[1498]

[1491] Statement of Claim, para. 235, p. 38, referring to **C-135** – Letter No. 89/16 from TransAtlantic to Albpetrol et al. dated 30 March 2016; **C-136** – Letter No. 94/16 from TransAtlantic to Albpetrol et al. dated 4 April 2016; **C-137** – Letter No. 191/16 from TransAtlantic to Albpetrol et al. dated 13 June 2016; **C-138** – Letter No. 192/16 from TransAtlantic to Albpetrol et al. dated 13 June 2016; **C-139** – Letter No. 206/16 from TransAtlantic to Albpetrol et al. dated 1 July 2016; **C-140** – Letter No. 207/16 from TransAtlantic to Albpetrol et al. dated 1 July 2016; **C-141** – Letter No. 292/16 from TransAtlantic to Albpetrol et al. dated 3 October 2016; **C-142** – Letter No. 318/16 from TransAtlantic to Albpetrol et al. dated 24 October 2016; **C-143** – Letter No. 335/16 from TransAtlantic to Albpetrol et al. dated 7 November 2016; **C-144** – Letter No. 352/16 from TransAtlantic to Albpetrol et al. dated 14 November 2016; **C-145** – Letter No. 355/16 from TransAtlantic to Albpetrol et al. dated 18 November 2016; **C-146** – Letter No. 372/16 from TransAtlantic to Albpetrol et al. dated 2 December 2016; **C-147** – Letter No. 375/16 from TransAtlantic to Albpetrol et al. dated 5 December 2016.

[1492] Statement of Claim, para. 235, p. 38, referring to First Witness Statement of Kreshnik Grezda, para. 44, p. 9.

[1493] Statement of Claim, para. 236, p. 39, para. 283, p. 45.

[1494] Statement of Claim, para. 236, p. 39, referring to **C-85** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 17 January 2017.

[1495] Reply, para. 184, p. 31, referring to **R-159** – Minutes for the development of the auction by bailiff Mr. Altin Vako dated 26 September 2017; **R-160** – Order by the bailiff Mr. Altin Vako to Albpetrol dated 28 September 2017.

[1496] Claimant's Post-Hearing Brief, para. 62, pp. 11-12, referring to **R-187** – Decision No. 10657 of the Tirana Judicial District Court dated 13 December 2017.

[1497] **R-154** – Letter of bailiff Mr. Altin Vako to National Business Center dated 13 September 2017; **R-158** – Letter of bailiff Mr. Altin Vako to National Business Center dated 20 September 2017; **R-156** – Decision on determination of the new price of the movable item (after completion of first auction) by bailiff Mr. Altin Vako dated 20 September 2017; **R-157** – Announcement on the sale of the movable item in the second auction dated 20 September 2017.

[1498] Claimant's Post-Hearing Brief, para. 62, pp. 11-12.

1290. Claimant also asserts that on 6 October 2017, after learning that Albpetrol was secretly seeking to have a bailiff assign Claimant's interests in the Ballsh Oilfield to a third party, Claimant sought information from Albpetrol.[1499] On 12 October 2017, Albpetrol confirmed the existence of the bailiff but said that it had no obligation to give Claimant any further information.[1500] Between 12 and 20 October 2017, Claimant learned that Albpetrol and the bailiff were pressuring AKBN to execute an Instrument of Transfer which would assign the Ballsh Oilfield to Anio Oil and Gas Sh.A.[1501]

1291. Claimant states that, on 17 October 2017, Claimant's counsel wrote to AKBN detailing the circumstances of the improper procedural execution by Albpetrol and the bailiff, urging AKBN to refuse to execute the Instrument of Transfer, and noting that such a transfer would be illegal and in violation of the terms of the Ballsh PSA.[1502]

1292. Claimant further states that, on 20 October 2017, its representatives met with the Executive Director of AKBN, Mr. Elion Semanaj, who confirmed that Albpetrol and the bailiff were pressuring AKBN to execute an instrument of transfer which would assign Ballsh Oilfield to Anio Oil and Gas Sh.A. Mr. Semanaj advised Claimant to meet with the Minister of Infrastructure and Energy.[1503]

1293. Claimant then contends that on 23 October 2017, its representatives had a meeting with representatives of the MEI, Mr. Semanaj and Mr. Puka, during which Claimant was told that the MEI's position was to wait for any judgment of the court to be released in respect of the bailiff process.[1504]

1294. Claimant thus indicates that it requested a written opinion of the Minister of Infrastructure and Energy on the Matter[1505] and that at the time of filing of the Statement of Claim, its counsel was in the process of setting aside the bailiff's action under Albanian Law.[1506]

4. <u>Claimant's argument that Respondents wrongfully interfered with Claimant's rights to the handover of the Ballsh Oilfield</u>

1295. Claimant argues that through the actions described above, Albpetrol, AKBN and the MEI, who both participated in committee meetings and were copied in correspondence

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[1499] Statement of Claim para. 238, p. 39, referring to **C-148** – Letter No. 148/17 from TransAtlantic to Albpetrol dated 6 October 2017.
[1500] Statement of Claim, para. 239, p. 39, referring to **C-149** – Letter No. 6698/1 from Albpetrol to TransAtlantic dated 12 October 2017.
[1501] Statement of Claim, para. 240, p. 39, referring to First Witness Statement of Kreshnik Grezda, paras. 48-49, p. 10.
[1502] Statement of Claim, para. 241, p. 39, referring to **C-150** – Letter from Stikeman Elliott to the AKBN dated 17 October 2017.
[1503] Statement of Claim, para. 242, p. 39, referring to First Witness Statement of Kreshnik Grezda, para. 49, p. 10.
[1504] Statement of Claim, para. 243, p. 39, referring to First Witness Statement of Kreshnik Grezda, para. 51, pp. 10-11.
[1505] Statement of Claim, para. 243, p. 39.
[1506] Statement of Claim, para. 244, p. 40, referring to First Witness Statement of Kreshnik Grezda, para. 54, p. 11.

relating to the handover, have failed to ensure that Claimant's rights reasonably required to perform the Petroleum Operations were respected,[1507] by breaching Claimant's rights under the Ballsh License Agreement, including its Articles 3.2, 3.4, 3.5 and 10.[1508] Indeed, such conduct is wrongful, amounts to interference with and taking by the Government of Claimant's entitlements under the License Agreement and undermines the commercial principles of the parties having entered into the License Agreements.[1509]

1296. Claimant argues in particular that (i) Albpetrol never had any right to refuse to hand over any part of the Ballsh Oilfield on conditions, and that (ii) there has never been any extant precondition to the handover of the remainder of the Ballsh Oilfield, notably the fact that Claimant performs PEP&ASP obligations in respect of the Ballsh Oilfield or the other Oilfields.[1510]

1297. Claimant's position is that the Ballsh PSA does not relate to the other oilfields in any way, and that, even if a condition could be implied that Claimant had to perform its PEP&ASP obligations with respect to the Ballsh License Agreement, it had performed, by over-delivering in respect of the Ballsh Oilfield.[1511]

1298. Furthermore, Claimant concludes that, although Respondents bear the burden of showing that they were not required to perform the handover, they have not convincingly argued or substantiated why they should not have performed the handover.[1512] For instance, all allegations pertaining to another corporation, Phoenix Petroleum, are irrelevant matters,[1513] and the bailiff's actions are irrelevant to Respondents' breach of obligations in respect of the handover.[1514]

1299. Claimant contends that, during the negotiation of the Amending Agreements and the Settlement Agreement, Albpetrol proposed to deduct the value of Claimant's oil from the Ballsh Oilfield that Albpetrol had taken from the outstanding PEP&ASP Liability under the PSA for the Gorisht Oilfield.[1515] Albpetrol acknowledged in its email dated 11 January 2017 to GBC that Albpetrol had taken and not paid for 15,000 tons of GBC's oil from the Ballsh Oilfield.[1516] This netting-off arrangement is now moot as a result of the Government's wrongful confiscation of the Cakran and Gorisht Oilfields.[1517]

[1507] Statement of Claim, para. 284, p. 46; Claimant's Post-Hearing Brief, para. 204, p. 41.
[1508] Statement of Claim, para. 285, p. 46.
[1509] Statement of Claim, para. 285, p. 46.
[1510] Reply, paras. 173, p. 30.
[1511] Reply, paras. 173, 175, p. 30; Claimant's Post-Hearing Brief, para. 203, p. 41.
[1512] Reply, para. 174, p. 30.
[1513] Reply, para. 179, p. 31, referring to Statement of Defence, paras. 409-417, pp. 105-107.
[1514] Reply, para. 180, p. 31.
[1515] Statement of Claim, para. 286, p. 46, referring to **C-14** – Agreement for Settlement of the Mutual Obligations between Albpetrol Sh.A., TransAtlantic Albania Ltd. (formerly known as Stream Oil & Gas Ltd.), the Ministry of Finance and the Ministry of Economic Development, Tourism, Trade and Entrepreneurship dated July 1, 2015, Annex 1.2.
[1516] Statement of Claim, para. 287, p. 46, referring to **C-81** – Email from Endri Puka, Albpetrol, to Fatbardh Ademi, GBC, dated 11 January 2017.
[1517] Statement of Claim, para. 287, p. 46.

1300. Claimant also argues that since confiscating the Gorisht and Cakran Oilfields, Albpetrol has continued to prevent Claimant from accessing its crude oil from the Ballsh Field, and has refused to provide GBC with the proceeds of sale from the crude oil (the outstanding balance of 15,000 tons or the oil produced since that calculation). Claimant continued to operate the Ballsh Oilfield in 2017, incurring costs and expenses each month and not receiving any revenues from these investments.[1518]

1301. According to Claimant, the actions of the Government are a "*continuation of its long running breach of the Ballsh License Agreement, and appear designed to force GBC to interrupt operations, which the Government could use as a foil for justifying seizing the Ballsh Oilfield, and to otherwise starve the Claimant of financial resources*".[1519] Claimant also considers that the seizure occurred during these proceedings as a way to frustrate the arbitration process.[1520]

5. Claimant's arguments on the termination of the Ballsh License Agreements and its right to damages

1302. Finally, Claimant submits that despite the seizure and the sale of the Ballsh Oilfield, there is no evidence that any of the Respondents have or purported to terminate the Ballsh Petroleum Agreement or License Agreement.[1521]

1303. Claimant argues that, contrary to what Respondents allege,[1522] the seizure and sale by public auction of Claimant's rights under the Ballsh Petroleum Agreement does not lead to a lapse of the Instrument of Transfer or the automatic termination of the License Agreements.[1523]

1304. Claimant argues that its cause of action stems from the fact that if a party is in default of performing a contractual right, such as enabling the handover of the Ballsh Oilfield, it triggers a damages claim for late performance under Articles 103(1) and 107(2) SCO.[1524]

1305. According to Claimant, the condition for the application of Article 103(1) is that the respondent is in default of performing an obligation due to its fault, which is presumed,[1525] default occurs if there is a fixed time for performance or if the claimant reminds the respondent to perform.[1526] Once the respondent is in default, this triggers

[1518] Statement of Claim, para. 288, p. 46; Claimant's Post-Hearing Brief, para. 60, p. 11, referring to First Witness Statement of Kreshnik Grezda, paras. 46-47, p. 10.
[1519] Statement of Claim, para. 289, p. 46.
[1520] Reply, para. 180, p. 31.
[1521] Claimant's Post-Hearing Brief, para. 63, p. 12.
[1522] Statement of Defence, para. 439, p. 112.
[1523] Reply, para. 180, p. 31.
[1524] Claimant's Post-Hearing Brief, para. 212, p. 43.
[1525] Claimant's Post-Hearing Brief, para. 214, p. 43, referring to **CL-68** – Wiegand, Art. 103 in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), paras. 2-3.
[1526] Claimant's Post-Hearing Brief, para. 214, p. 43, referring to Article 102 of the Swiss Code of obligations.

the damages claim under Article 103(1), which compensates for any financial detriment due to the delay in performance,[1527] which includes lost profit.[1528]

1306. Claimant states that if the respondent is in default, no additional period is necessary[1529] and the rights under Article 107(2) SCO become immediately available pursuant to Article 108 SCO if it follows from the respondent's conduct that a time limit would be futile.[1530] In the case at hand, since Respondents claim that they sold the Ballsh Oilfield by action by using a private bailiff, no additional time period was necessary.[1531]

1307. Claimant argues that of the three options offered by Article 107(2) SCO,[1532] it chose not to forego performance with regard to the Ballsh Oilfield and instead chose to claim specific performance, *i.e.* the handover of the Ballsh Oilfield and damages for the continued late delivery.[1533]

1308. Claimant contends that because Respondents did not terminate the Ballsh License Agreement, and that such termination would in any event be invalid, Claimant continues to be the holder of the rights pursuant to the Ballsh License Agreement, including the "*exclusive rights*" to "*use for its own account, sell, exchange, export, realize or possess the Petroleum extracted from the Contract Area, and take profit from and title to such extracted Petroleum*".[1534] The purported "*sale*" of Claimant's rights to a third party is without legal effect to Claimant's entitlements, as only Claimant coud validly sell its rights under the Ballsh License Agreement, as the holder of the rights.[1535] In Claimant's opinion, if the "*sale*" has rendered the performance of the License Agrement impossible, Claimant is entitled to damages under Article 97(1) SCO in lieu of performance.[1536]

[1527] Claimant's Post-Hearing Brief, para. 214, p. 43, referring to **CL-68** – Wiegand, Art. 103 in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), para. 5.
[1528] Claimant's Post-Hearing Brief, para. 214, p. 43, referring to **CL-68** – Wiegand, Art. 103 in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), para. 6.
[1529] Article 107(1) SCO: "*Where the obligor under a bilateral contract is in default, the oblige is entitled to set an appropriate time limit for subsequent performance or to ask the court to set such time limit*".
[1530] Claimant's Post-Hearing Brief, para. 215, p. 43, referring to Article 108 SCO.
[1531] Claimant's Post-Hearing Brief, para. 215, p. 43.
[1532] Article 107(2) SCO: "*If performance has not been rendered by the end of that time limit, the oblige may compel performance in addition to suing for damages in connection with the delay or, provided he makes an immediate declaration to this effect, he may instead forego subsequent performance and either claim damages for non-performance or withdraw from the contract altogether*".
[1533] Claimant's Post-Hearing Brief, para. 216, pp. 43-44.
[1534] Claimant's Post-Hearing Brief, para. 217, p. 44, referring to **C-2**, **C-3** and **C-4** – License Agreements, Article 3.2(d).
[1535] Claimant's Post-Hearing Brief, para. 217, p. 44.
[1536] Claimant's Post-Hearing Brief, para. 217, p. 44, referring to **CL-69** – Wiegand, Art. 97 in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), paras. 7-11.

1309. Claimant argues that, contrary to what Respondents contend, Article 119 SCO[1537] would only apply if there was a case of impossibility that was caused without any responsibility of Respondents, which Respondents have the burden of proving.[1538]

1310. Claimant contends that, in the case at hand, the impossibility of the handover is due to Respondents' illegal seizure of the Ballsh Oilfield and the "*sale*" of Claimant's rights to the Ballsh Oilfield in breach of the License Agreements, and that Respondents fail to meet their burden of proving that the impossibility is not attributable to them at all.[1539]

1311. Claimant specifies that all three Respondents are liable to Claimant's damages claim based on the above breach of the Ballsh License Agreement: the MEI and AKBN because they failed to ensure and assist Claimant in obtaining the balance of the Ballsh Oilfield although Claimant was entitled to it and requested it,[1540] and Albpetrol because it wrongfully interfered with Claimant's Project Area within the Contract Area and thereby breached Article 6.2 of the Ballsh License Agreement.[1541]

B. Respondents' position

1312. Respondents argue that Claimant has no claims in connection with the handover of the Ballsh Oilfield, on the ground that Claimant has not shown a cause of action, and that Respondents were exempt from handing over the Ballsh Oilfield due to Claimant being an unreliable partner and to Claimant's breaches of the License Agreements and Petroleum Agreements for the Cakran and Gorisht Oilfields.

1. Respondents' argument that Claimant has not shown a cause of action under the License Agreement for the handover dispute with Albpetrol

1313. First, Respondents contend that Claimant no longer holds claims in relation to the Ballsh Oilfield due to the seizure and sale by public auction process, which led to immediate loss of Claimant's rights under the Ballsh License Agreement as Claimant also lost its rights arising from the Instrument of Transfer.[1542]

1314. Second, Respondents contend that Claimant has no claims against the Ministry, as the Ministry did not breach the Ballsh License Agreement in the context of the handover dispute (see below).[1543] Claimant cannot sue the Ministry because it has never requested the handover of the Ballsh Oilfield from the Ministry or AKBN.[1544]

[1537] Article 119 SCO: "*An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor*".
[1538] Claimant's Post-Hearing Brief, para. 218, p. 44, referring to **CL-70** – Wiegand, Art. 119 in: Basler Kommentar OR I (Honsell et al. eds., 6th ed. 2015), para. 20.
[1539] Claimant's Post-Hearing Brief, para. 218, p. 44.
[1540] Claimant's Post-Hearing Brief, para. 219, p. 45, referring to **C-2**, **C-3** and **C-4** – License Agreements, Articles 3.4, 7.4(a), 8.1(a), 6.2 and 3.5(c).
[1541] Claimant's Post-Hearing Brief, para. 219, p. 45.
[1542] Statement of Defence, paras. 496-498, p. 125.
[1543] Statement of Defence, paras. 499-506, pp. 125-126.
[1544] Rejoinder Brief, para. 504, p. 135.

1315. Third, Respondents argue that Claimant has no claims against AKBN as AKBN is not a party to the Ballsh License Agreement, so that Claimant cannot bring claims against AKBN under the Ballsh License Agreement.[1545]

1316. Fourth, Respondents reiterate their objections regarding jurisdiction over Albpetrol under the License Agreements and argue that in any event, Albpetrol has not breached any obligations under the Ballsh License Agreement (see below).[1546]

1317. Fifth, Respondents reiterate their argument that Articles 6.2 and 8 of the License Agreements are not suitable causes of action against Albpetrol[1547] (see above paras. 631 et *seq.*) and argue that Article 3.4(b) is not suitable either, notably on the ground that Article 12.1 of the Petroleum Agreement is the provision that governs a potential handover and it is not incorporated by reference to Article 3.4(b) of the License Agreements.[1548]

2. Respondents' argument that Claimant is "*totally unreliable as proven by massive sale of crude oil belonging to third parties and by severe contractual breaches*"

1318. Respondents acknowledge that in the course of the year 2011, Claimant requested the handover of the Ballsh Oilfield from Albpetrol, but they dispute that Claimant and Albpetrol agreed on the unconditional handover of the Ballsh Oilfield in the course of 2011.[1549]

1319. On the contrary, Respondents state that Albpetrol consistently made it very clear to Claimant that the Oilfields could only be handed over if Claimant paid its PEP&ASP liabilities and debts.[1550]

1320. The reason for Respondents' position was that Claimant had shown that it was "*entirely unreliable*" because it had failed to meet a substantial part of its legal obligations to Albpetrol as it was in delay with a million-USD amount for PEP&ASP obligations for the Cakran and Gorish Oilfields, was suspected of having misappropriated thousands of tons of crude oil that had to be allocated to Albpetrol as PEP and ASP, and Claimant did not demonstrate commitment to remedy its breaches, but invited Albpetrol to assume that the breach of contract was "*a normal fact*".[1551]

1321. Respondents argue that Albpetrol thus feared that, once it had received the Ballsh Oilfield, Claimant would also sell oil owned by the State and allocate it to Albpetrol as its own oil, fail to invest in accordance with the Development Plan, and fail to pay its

[1545] Statement of Defence, para. 507, p. 126.
[1546] Statement of Defence, paras. 508-509, pp. 126-127.
[1547] Rejoinder Brief, paras. 507-513, pp. 136-137.
[1548] Rejoinder Brief, paras. 514-518, pp. 137-138.
[1549] Statement of Defence, para. 371, p. 98.
[1550] Statement of Defence, para. 372, p. 98, referring to **C-105** – Letter No. 3066/1 from Albpetrol to Stream dated 26 September 2011.
[1551] Statement of Defence, para. 373, pp. 98-99, referring to **C-106** – Letter No. 698/11 from Stream to Albpetrol dated 24 October 2011.

debts (PEP, ASP, taxes, services, etc.), as it did with the Cakran and Gorisht Oilfields.[1552] Therefore, it was a diligent decision to refrain from handing over the Ballsh Oilfield to Claimant, which proved to be justified in light of Claimant's subsequent conduct until 2017.[1553]

1322. Indeed, Respondents argue that Claimant's debts "*piled up continuously*" and that it failed to invest in accordance with the Plans of Development, down to practically "*zero investment*" in 2016.[1554]

1323. Respondents object to Claimant's argument that during the Eighth Advisory Committee Meeting of 17 November 2011, Albpetrol agreed unconditionally on the handover of the Ballsh Oilfield. Respondents contend that only Claimant produced self-drafted meeting minutes, which were incorrect[1555] and they submit a letter dated 30 November 2011 in which Albpetrol confirmed that the handover of the Ballsh Oilfield would only happen in case Claimant settled all its obligations for the Cakran and Gorisht Oilfields.[1556]

1324. Respondents refer to the 27 January 2012 Agreement pursuant to which Claimant agreed to pay certain debts including, according to Respondents, with the purpose of setting the condition for the handover of the Ballsh Oilfield.[1557] Respondents point out that Claimant did not pay its debts,[1558] even when on 15 June 2012, they reminded Claimant of its duty to pay debts, as confirmed in specific agreements, *inter alia* in the Agreement of 27 January 2012, before the Ballsh Oilfield could be handed over.[1559]

1325. On 16 July 2012, Albpetrol referred to the new Minister of Economy, Trade and Energy, Mr. Edmon Haxhinasto of the LSI party, clarifying that Albpetrol would not hand over the Ballsh Oilfield before Claimant pays its debts as agreed by Claimant in the Agreement of 27 January 2012.[1560]

1326. On 18 December 2012, Albpetrol and Claimant held the Ninth Advisory Committee Meeting which also dealt with the Ballsh handover dispute.[1561] On 15 January 2013, Albpetrol sent a letter to Claimant referring to the Ninth Advisory Committee Meeting

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[1552] Statement of Defence, para. 374, p. 99.
[1553] Statement of Defence, paras. 375-376, p. 99.
[1554] Statement of Defence, para. 376, p. 99.
[1555] Statement of Defence, para. 377, p. 99.
[1556] Statement of Defence, para. 378, pp. 99-100, referring to **R-132** – Letter from Albpetrol to the Claimant to Albpetrol dated 30 November 2011.
[1557] Statement of Defence, para. 380, p. 100, referring to **R-29** – Agreement between Albpetrol and the Claimant dated 27 January 2012; **RWS-1** – First Witness Statement of Endri Puka.
[1558] Statement of Defence, para. 381, p. 100.
[1559] Statement of Defence, para. 382, p. 100, referring to **C-111** – Letter No. 2668/1 from Albpetrol to Stream dated 15 June 2012.
[1560] Statement of Defence, para. 384, pp. 100-101, referring to **R-133** – Letter from Albpetrol to the Minister of Economy, Trade and Energy, Mr. Edmond Haxhinasto, dated 16 July 2012.
[1561] Statement of Defence, para. 385, p. 101.

which summarized Albpetrol's and Claimant's agreement that the handover of the Ballsh Oilfield would be made as soon as Claimant pays all of its liabilities:

> "*5. It was decided that: 'Albpetrol will transfer to Stream, the remaining part of the Ballsh-Hekal oilfield […] The delivery of the oilfield will be made after paying off liabilities by Stream'*".[1562]

1327. Respondents argue that the draft for the Advisory Committee Meeting decisions provided by Claimant's Mr. Fatbardh Ademi on 20 December 2012, amended on 4 January 2013,[1563] was incorrect as it did not mention Claimant's obligation to pay its liabilities before the handover, on which the parties had agreed. Respondents add that the draft was only signed by Mr. Ademi.[1564]

3. Respondents' argument that Claimant allegedly changed its name to Transatlantic Albania Ltd. and that the renamed Claimant refused to take over the Ballsh Oilfield

1328. Respondents claim that, in late 2014, after TransAtlantic Group took over Claimant, Respondents were prepared to hand over the Ballsh Oilfield pursuant to the procedure of Annex F to the Petroleum Agreement, without Claimant having fully paid the old debts. On 11 November 2014, Albpetrol sent a letter to Claimant in which it requested that Claimant present a plan about the handover process.[1565]

1329. Respondents argue that the Parties met on 5 December 2014 for the Thirteenth Advisory Committee Meeting, during which Albpetrol approved the plan submitted by Claimant for the handover of the Ballsh Oilfield, and that Claimant was therefore free to take over the Oilfield.[1566]

1330. According to Respondents, on 16 December 2014, Claimant requested the handover of the wells in two phases,[1567] following which Mr. Puka, who wished the handover to take place as soon as possible, sent an internal order on 23 December 2014 to establish and proceed with a working group for the handover process on Albpetrol's side, and ordered to begin the handover procedure as stipulated by Annex F to the Ballsh Petroleum Agreement.[1568]

[1562] Statement of Defence, para. 385, p. 101, referring to **C-113** – Letter No. 121 from Albpetrol to Stream dated 15 January 2013.
[1563] **C-25** – Resolutions of the Ninth Advisory Committee Meeting dated 20 December 2012, amended 4 January 2013, unsigned by Albpetrol.
[1564] Statement of Defence, para. 386, p. 101.
[1565] Statement of Defence, paras. 388-389, pp. 101-102, referring to **R-134** – Letter from Albpetrol to the Claimant dated 11 November 2014.
[1566] Statement of Defence, para. 390, p. 102, referring to **C-121** – Minutes of the Thirteenth Meeting of the Advisory Committee held 5 December 2014.
[1567] Statement of Defence, para. 391, p. 102, referring to **C-122** – Letter No. 518 from Stream to Albpetrol dated 16 December 2014.
[1568] Statement of Defence, para. 392, p. 102, referring to **R-135** – Internal order from Albpetrol of 23 December 2014.

1331. Respondents contend that, however, Claimant did not proceed with the procedure due to internal problems with the transfer of Claimant's business from the old owners to the TransAtlantic Group.[1569]

1332. Respondents argue that by letter of 22 June 2015, Claimant acknowledged that a joint group of Albpetrol and Claimant had done preparatory works in December 2014, and indicated that it wished that the group continue the handover preparation with an objective to finish the process in July 2015.[1570]

1333. Respondents state that after it informed Claimant on 1 July 2015 that the handover procedure had been prepared,[1571] on 11 July 2015, Mr. Doug Nester from Claimant informed Mr. Puka of the "*good news*" that the "*budget including investments for all of the Ballsh Field* [were] *being sent to the Board for approval*".[1572]

1334. Respondents argue that while Albpetrol was expecting Claimant to take over the Ballsh Oilfield by 28 August 2015 (as projected in a meeting of the joint working group of 20 August 2015), Claimant sent a letter to the Minister of Energy complaining that Albpetrol had removed equipment from the Ballsh Oilfield. Respondents blame Claimant for not sending this letter to Albpetrol and allege that Mr. Puka "*was confronted with this letter for the first time after receiving the Statement of Claim*".[1573]

1335. On Claimant's allegations regarding the equipment, Respondents argue that (i) there is a disproportion between the amounts of investments alleged by Claimants and this complain regarding the absence of old tractors,[1574] (ii) during the meeting of the joint working group on 20 August 20115, Claimant only requested very limited equipment to be handed over, and not the alleged missing equipment,[1575] and (iii) in any case, Claimant did not follow-up with its complaint to the Ministry, even in the next meeting of the joint working group on 2 September 2015.[1576]

1336. Respondents' position is that Claimant no longer pursued the taking over of the Ballsh Oilfield because it feared that it would not be able to run the Albanian Oilfields in a profitable manner because of the strongly declining oil price in 2014/2015.[1577]

[1569] Statement of Defence, paras. 393-394, p. 103.
[1570] Statement of Defence, para. 395, p. 103, referring to **C-124** – Letter No. 164 from TransAtlantic to Albpetrol dated 22 June 2015.
[1571] Statement of Defence, para. 396, p. 103, referring **C-125** – Letter No. 5168/2 from Albpetrol to TransAtlantic dated 1 July 2015.
[1572] Statement of Defence, para. 397, p. 103, referring to **R-136** – E-mail from Mr. Nester of the Claimant to Mr. Puka of Albpetrol dated 11 July 2015.
[1573] Statement of Defence, para. 398, p. 103.
[1574] Statement of Defence, para. 399, p. 104.
[1575] Statement of Defence, paras. 400-401, p. 104, referring to **R-137** – E-mail by Mr. Jonida Gjinaj to Mr. Eraldo Sheko of 21 August 2015.
[1576] Statement of Defence, para. 402, p. 104, referring to **R-138** – E-mail by Mr. Jonida Gjinaj to Eraldo Sheko of 2 September 2015.
[1577] Statement of Defence, para. 404, p. 104.

1337. Respondents argue that on 4 April 2016, Albpetrol again informed Claimant that all necessary steps to hand over the Ballsh Oilfield had been prepared,[1578] but that Claimant had suspended the process due to the change of its shareholders, as confirmed in Claimant's letters dated 12 April 2016 and on 11 September 2017.[1579]

4. Respondents' argument that Claimant changed its name to GBC Oil Company Ltd. and that unreliable actors took over

1338. Respondents argue that when Claimant changed owner again, Albpetrol "*could not find assurances"* that the new investor Continental Oil and Gas LLC was "*technically and financially competent to conduct petroleum operations*". Albpetrol thus "*found itself prohibited to approve the Annual Program and Budget*", which is the basic requirement for handing over an oilfield.[1580] Due to the lack of financial capacity and history of default of Claimant, Albpetrol had no reason to assume that Claimant would start complying with its obligations and was neither obliged nor entitled to hand over the Ballsh Oilfield.[1581]

1339. First, Respondents reiterate that it is unclear who the leaders and the beneficiaries are behind the investment vehicle that purchased Claimant,[1582] that Mr. Kasa's other company, Phoenix Petroleum, had committed material breaches of other petroleum agreements with Albpetrol,[1583] which led to the filing of criminal charges by Albpetrol,[1584] and reiterate the alleged falsification of invoices from Phoenix Petroleum to the company Black Swan Energy Services Corp.[1585]

1340. In addition, Respondents claim that Claimant did not pay its debts and became subject to numerous bailiff actions, covering an extensive number of invoices and estimated enforceable claims of more than USD 14,000,000 and more than ALL 12,000,000, the biggest part being obligations unconditionally acknowledged by Claimant against Albpetrol in the amount of USD 13,856,932 and ALL 5,011,884.[1586]

[1578] Statement of Defence, para. 405, pp. 104-105, referring to **R-139** – Letter from Albpetrol to the Claimant dated 4 April 2016.
[1579] Statement of Defence, paras. 405-407, pp. 104-105, referring to **C-127** – Letter No. 105/16 from TransAtlantic to Albpetrol et al. dated 12 April 2016; **C-132** – Letter No. 140 from TransAtlantic to Albpetrol dated 11 September 2007.
[1580] Statement of Defence, para. 409, p. 105.
[1581] Statement of Defence, paras. 419-421, p. 108.
[1582] Statement of Defence, para. 410, p. 105.
[1583] Statement of Defence, para. 411, pp. 105-106, referring to **R-140** – E-Mail from Mr. Puka of Albpetrol to Mr. Nester of the Claimant dated 28 December 2015; **RWS-1** – First Witness Statement of Endri Puka.
[1584] Statement of Defence, paras. 412-413, p. 106, referring to **R-141** – Criminal report of Albpetrol to the Prosecution Office at Blora Judicial District Court dated 8 April 2016; **R-142** – Criminal report of Albpetrol to the Prosecutor's Office at the Tirana Judicial District Court dated April 2017.
[1585] Statement of Defence, paras. 414-417, pp. 106-107, referring to **R-143** – E-Mail by Ms. Eva Peza to Mr. Gjiknuri, the Albanian Minister of Infrastructure and Energy, Mr. Dervishi, the Administrator of AKBN, Mr. Puka, and others dated 17 May 2016 with eight invoices; **R-144** – E-mail of Ms. Eva Peza to Mr. Endri Puka dated 10 May 2016; see above para. 354.
[1586] Statement of Defence, para. 418, pp. 107-108, referring to **R-19** – Selection of around 20 bailiff orders in the timeframe of 2 March 2016 until 3 August 2017; **R-20** – Seizure Order of bailiff Mr. Vako dated 13 July 2016.

1341. Therefore, Respondents state that Claimant had obviously no financial capacities to conduct oil operations, that no investment could be expected for the Oilfield[1587] and that any operations would had been shut down immediately after the handover because of seizures due, *inter alia*, to bailiff actions.[1588]

5. Respondents' argument that all of Claimant's rights in connection with the Ballsh Oilfield have been seized and sold by auction by the public bailiff pursuant to Albanian law

1342. Respondents state that, on 7 August 2017, all of Claimant's rights in connection with the Ballsh Petroleum Agreement were seized on the basis of enforceable titles against Claimant,[1589] and that the public bailiff who carried out the seizure informed the National Registration Center about the seizure order, which was immediately incorporated in the public company register excerpts. Respondents argue that Claimant was informed accordingly.[1590]

1343. Respondents argue that since the day of the seizure, they were legally prohibited to hand over the Ballsh Oilfield to Claimant.[1591]

1344. Respondents contend that after the market value of Claimant's rights in connection with the Ballsh Petroleum Agreement was estimated,[1592] on 5 September 2017, the bailiff gave notice of his decision for the sale of the seized and estimated rights of Claimant in connection with the Ballsh Petroleum Agreement. The decisions were forwarded to the Albanian National Registration Center and Claimant was informed accordingly.[1593]

1345. On 13 September 2017, the bailiff rendered the decision on the sale of the movable item in auction, and published the call for bids for the sale of all of Claimant's rights in connection with the Ballsh Petroleum Agreement with an announced value of USD 1,000,911.20 (80% if the estimated value). The decision was forwarded to the Albanian National Registration Center, and that Claimant was informed accordingly.[1594]

[1587] Statement of Defence, para. 419, p. 108.
[1588] Statement of Defence, para. 420, p. 108.
[1589] Statement of Defence, paras. 422, 424, pp. 108-109, referring to **R-145** – Order for imposition of conservative seizure by bailiff Mr. Altin Vako dated 7 August 2017.
[1590] Statement of Defence, para. 425, p. 109, referring to **R-146** – Letter of bailiff Mr. Altin Vako to National Business Center dated 7 August 2017.
[1591] Statement of Defence, para. 423, p. 108.
[1592] Statement of Defence, paras. 426-429, pp. 109-110, referring to **R-147** – Order for the calculation of the value of the rights by bailiff Mr. Altin Vako dated 9 August 2017; **R-148** – Letter of bailiff Mr. Altin Vako to National Business Center dated 9 August 2017; **R-149** – Expertise Act for the account of the Judicial Bailiff Officer Altin Vako dated 4 September 2017; **R-150** – Decision on determination of the value of the item by bailiff Mr. Altin Vako (based on an expertise act) dated 5 September 2017.
[1593] Statement of Defence, para. 429, pp. 109-110, referring to **R-151** – Decision for the sale of seized and estimated item by bailiff Mr. Altin Vako dated 5 September 2017; **R-152** – Letter of bailiff Mr. Altin Vako to National Business Center dated 5 September 2017.
[1594] Statement of Defence, para. 430, p. 110, referring to **R-153** – Decision on the sale of the movable item in the auction by bailiff Mr. Altin Vako dated 13 September 2017; **R-154** – Letter of bailiff Mr. Altin Vako to National Business Center dated 13 September 2017.

1346. Respondents state that the two following auctions were organized: (i) on 19 September 2017, in which no bid was made[1595] and (ii) on 20 September 2017, with a starting amount of USD 700,637.84. According to Respondents, the decisions were forwarded to the Albanian National Registration Center and Claimant was informed accordingly.[1596]

1347. The second auction was held on 26 September 2017 and, according to Respondents, the only offer came from the company Anio Oil and Gas Sh.A, which was therefore awarded all of Claimant's rights in connection with the Ballsh Petroleum Agreement.[1597] Albpetrol was notified by the bailiff of the order to transfer all of the pertaining rights in connection with Ballsh Petroleum Agreement to the winner of the auction on 28 September 2017.[1598]

1348. Respondents contend that the order was forwarded to the Albanian National Registration Center, that Claimant was informed accordingly,[1599] and indicates that Claimant's rights arising in connection with the Ballsh Oilfield have been sold to the winner of the public auction, Anio Oil and Gas SHA.[1600]

1349. Respondents contest Claimant's argument that Claimant was unaware of these enforcement measures and state that Claimant was duly informed of the seizure order of 7 August 2017.[1601] In Albania, all enforcement measures are immediately put on record in the publicly available commercial register (National Registration Center or NRC), or the National Business Center (NBC), with constitutive documents, which are publicly available on the page of the company.[1602] Respondents point out that Claimant even filed a court action against the enforcement proceedings, which was dismissed by the Tirana Judicial District Court on 13 December 2017.[1603] The Court found that the public sale by auction effected on 26 September 2017 was served on Claimant at its

[1595] Statement of Defence, para. 431, pp. 110-111, referring to **R-155** – Minutes for the development of the auction by bailiff Mr. Altin Vako dated 19 September 2017.
[1596] Statement of Defence, para. 432, p. 111, referring to **R-156** – Decision on determination of the new price of the movable item (after completion of first auction) by bailiff Mr. Altin Vako dated 20 September 2017; **R-157** – Announcement on the sale of the movable item in the second auction dated 20 September 2017; **R-158** – Letter of bailiff Mr. Altin Vako to National Business Center dated 20 September 2017.
[1597] Statement of Defence, para. 433, p. 111, referring to **R-159** – Minutes for the development of the auction by bailiff Mr. Altin Vako dated 26 September 2017.
[1598] Statement of Defence, paras. 434-435, p. 111.
[1599] Statement of Defence, para. 436, p. 112, referring to **R-160** – Order by the bailiff Mr. Altin Vako to Albpetrol dated 28 September 2017; **R-161** – Letter of bailiff Mr. Altin Vako to National Business Center dated 28 September 2017.
[1600] Statement of Defence, para. 437, p. 112.
[1601] Rejoinder Brief, para. 530, p. 141, referring to **R-146** – Letter of bailiff Mr. Altin Vako to National Business Center dated 7 August 2017.
[1602] Rejoinder Brief, para. 530, pp. 141-142, referring to **R-17** – Excerpt of the Albanian National Registration Center for "TransAtlantic Albania", formerly "Stream Oil & Gas Limited" (translation to be provided in due course) dated 7 April 2018, p. 24.
[1603] Rejoinder Brief, para. 531, p. 142, referring to **R-187** – Decision No. 10657 of the Tirana Judicial District Court dated 13 December 2017.

premises, but that Claimant had left its offices, so that the bailiff announced the sale by public auction again by publishing it in the NRC.[1604]

6. Respondents' legal grounds for their refusal to hand over the Ballsh Oilfield

1350. As indicated above, Respondents' position is that they were exempt from handing over the Ballsh Oilfield due to Claimant's breaches relating to the Gorisht and Cakran Oilfields, notably on the basis of the Agreement entered into by the Parties on 27 January 2012.

1351. Respondents also argue that under Article 82 SCO, they had a retention right until Claimant would have remedied its "*multiple, fundamental and intentional breaches*" of the Cakran and Gorisht Agreements.[1605]

1352. Indeed, Respondents contend that a debtor is entitled to refuse to provide its own performance in the event of breaches of contract by the creditor. On its face, Article 82 SCO applies to synallagmatic or bilateral contracts but it has long been established that it is applicable as well by analogy to non-bilateral contracts such as license agreements.[1606]

1353. Respondents also argue that it is generally accepted that the retention right may also be invoked in a situation where the Parties are bound to each other by more than one agreement, both of which are naturally and economically related to each other.[1607]

1354. According to Respondents, in the present case, the Petroleum and License Agreements for Ballsh are "*interlinked*" with the Cakran and Gorisht ones because they have been concluded with the same contractor, *i.e.* Claimant, at the same time and for the same subject-matter, *i.e.* petroleum sharing, and have almost identical duties for the contractor.[1608]

7. Termination of Ballsh License Agreement and arguments on Claimant's right to damages

1355. Respondents' position is that the effective seizure and sale by public auction of Claimant's rights under the Ballsh Petroleum Agreement led to the lapse of the Instrument of Transfer and, thus, to the automatic termination of the respective License Agreement.[1609]

[1604] Rejoinder Brief, paras. 532-539, pp. 142-144, referring to **R-187** – Decision No. 10657 of the Tirana Judicial District Court dated 13 December 2017.
[1605] Respondents' Post-Hearing Brief, para. 237, pp. 69-70.
[1606] Respondents' Post-Hearing Brief, para. 238, p. 70, referring to **RL-44** – Weber, Art. 82 SCO, paras. 24-26; **RL-45** – Gauch/Schluep/Emmenegger, Schweizerisches Obligationenrecht, Allgemeiner Teil, 10. Aufl., Zürich 2014, paras. 2216-2217; **RL-46** – BGE 120 II, paras. 209, 212.
[1607] Respondents' Post-Hearing Brief, para. 239, p. 70, referring to **RL-44** – Weber, Art. 82 SCO, paras. 27-28, 82a; **RL-47** – Wullschleger, 3. Aufl., Zürich 2016, Art. 82 SCO, para. 17.
[1608] Respondents' Post-Hearing Brief, para. 239, p. 70.
[1609] Statement of Defence, para. 439, p. 112.

1356. According to Respondents, Claimant is not entitled to damages for delayed hand-over performance pursuant to Articles 103(1) and 107(2) SCO. In essence, Respondents contend that Claimant has no cause of action for hand-over against any of the Respondents under the License Agreement, that Respondents could invoke a retention right against the hand-over due to Claimant's breaches of the Cakran and Gorisht contracts and that Claimant failed to plead the legal prerequisites of Articles 103(1), 107(2) and 108(1) SCO.[1610]

1357. Respondents also contend that Claimant cannot rely on damage claims due to impossibility under Article 97(1) SCO in a situation where it lost its alleged contractual rights due to self-inflicted enforcement measures, because it was Claimant's failure to timely pay the overdue part of the USD 63,692,221 it owed to its creditors that triggered the enforcement measures following which Claimant lost its Ballsh rights in public auction.[1611]

1358. Respondents state that if Claimant believed that it was entitled to stop the enforcement measures in order to retain its alleged rights in connection with the Ballsh Oilfield, it was up to Claimant to simply pay its creditors and to use the procedural means available to a debtor in Albania. The Tirana District Court ruled that the enforcement was lawful and dismissed Claimant's action.[1612]

1359. Respondents state that to the extent that a debtor is not liable for the "*impossibility*", Article 119 para. 1 SCO, which addresses the consequences of impossibility when the debtor is not accountable for it, applies instead of Article 97 para. 1 SCO. Even assuming that Albpetrol was under a hand-over duty, there would be no ground for Claimant to base its claim on "*impossibility*" pursuant to Article 97 SCO, as it has caused the impossibility itself.[1613]

C. <u>Decision of the Tribunal</u>

1360. The Tribunal will first deal with its jurisdiction over Claimant's claim relating to the handover of the Ballsh Oilfields (1) before turning, if need be, to the merits of such claim (2).

1. <u>Jurisdiction over Claimant's claim relating to the handover of the Ballsh Oilfield</u>

1361. The Tribunal needs to examine the question of its jurisdiction over Claimant's claim relating to the handover of the Ballsh Oilfield because such jurisdiction is contested by Respondents.

1362. In this regard, the Tribunal recalls that although it may analyse questions and facts relating to the Petroleum Agreements, it may do so only in order to decide claims under

[1610] Respondents' Post-Hearing Brief, paras. 241-242, p. 71.
[1611] Respondents' Post-Hearing Brief, para. 243, p. 71.
[1612] Respondents' Post-Hearing Brief, para. 244, p. 72.
[1613] Respondents' Post-Hearing Brief, paras. 245-246, pp. 72-73.

the License Agreements, which constitute the legal bases of its jurisdiction. The Tribunal does not have jurisdiction to rule on claims that fall within the scope of the Petroleum Agreements.

1363. Against this background, the Tribunal notes that most of the criticisms that Claimant addresses to Respondents concerning the handover are actually directed towards Albpetrol.

1364. For instance, Claimant's presentation of the facts shows that the correspondence on the issue was mainly between Claimant and Albpetrol, the Respondent that was asked by Claimant to proceed with the handover procedure and refused to do so.[1614]

1365. According to Claimant, it is also Albpetrol which denied Claimant access to the facilities and production in 2015 and 2016,[1615] and illegally sought to assign the Ballsh Oilfield to a third party.[1616]

1366. On the other hand, it appears that the MIE (or its predecessor, the MEI) and AKBN did not have an active role as, according to Claimant itself, they merely participated in committee meetings and were copied in correspondence relating to the handover. Claimant bases its claim against the MIE and AKBN on these actions to argue that the MIE and AKBN failed to ensure that Claimant's rights were respected.[1617] However, Claimant does not demonstrate that it requested the handover of the Ballsh Oilfield to the MIE or AKBN.

1367. Therefore, Claimant's claim relating to the Ballsh handover seem to be directed towards Albpetrol but not the MIE and AKBN, and thus falls under the Petroleum Agreements which regulate the relationships between Claimant and Albpetrol. Claimant cannot bring this claim against Albpetrol under the License Agreements. Indeed, as argued by Respondents, the Instrument of Transfer in Annex E of the Petroleum Agreements provides that Albpetrol "*transfers all its rights, privileges and obligations under the License Agreement [to Claimant] subject to said Petroleum Agreement*", so that Albpetrol could not have transferred to Claimant its rights relating to the Ballsh handover "*against itself*".[1618]

[1614] See above paras. 1266 to 1300; **C-103** – Letter No. 196/11 from Stream to Albpetrol dated 31 May 2011; **C-104** – Letter No. 547/11 from Stream to Albpetrol dated 16 September 2011 **C-105** – Letter No. 3066/1 from Albpetrol to Stream dated 26 September 2011; **C-106** – Letter No. 698/11 from Stream to Albpetrol dated 24 October 2011. **C-107** – Letter No. 3906/1 from Albpetrol to Stream dated 30 November 2011; **C-39** – Letter No. 132/12 from Stream to Albpetrol and AKBN dated 7 March 2012; **C-108** – Letter No. 191/12 from Stream to Albpetrol dated 30 March 2012; **C-109** – Letter No. 205/12 from Stream to Albpetrol dated 10 April 2012; **C-110** – Letter No. 281/12 from Stream to Albpetrol dated 24 May 2012; **C-111** – Letter No. 2668/1 from Albpetrol to Stream dated 15 June 2012; **C-112** – Letter No. 70/12 from Stream to Albpetrol dated 6 December 2012; **C-113** – Letter No. 121 from Albpetrol to Stream dated 15 January 2013.
[1615] See above para. 1286.
[1616] See above paras. 1288 to 1294.
[1617] See above paras. 1295, 1311.
[1618] Statement of Defence, para. 508, p. 126; Rejoinder Brief, para. 116, p. 37.

1368. Therefore, the Tribunal rules that it does not have jurisdiction over Claimant's claim relating to the handover of the Ballsh Oilfield.

2. Merits of Claimant's claim relating to the handover of the Ballsh Oilfield

1369. Given that the Tribunal does not have jurisdiction over Claimant's claim relating to the Ballsh handover, it will not rule on the merits of this claim.

7. DECISION OF THE TRIBUNAL ON DAMAGES ALLEGED BY CLAIMANT

1370. Claimant claims damages for Respondents' breach of the fiscal stabilization covenant, for the seizure of the three oilfields and for Respondents' failure to handover the Ballsh Field.

7.1. Damages for the breach of the fiscal stabilization covenant

A. Claimant's position

1371. Claimant states that it paid **USD 12,735,732** (LEK 1,370,577,292) in Royalty Tax between 2009 and 2017, without neutralization, and has been negatively affected by the ECC Tax Changes and the loss of the time value of money.[1619]

1372. The amount put forward by Claimant is broken down as follows:

(i) LEK 449,029,632 paid to the Tax Authority;

(ii) LEK 921,547,660 paid to the Customs Authority.[1620]

1373. According to Claimant, the Ministry of Finance has confirmed that the amounts paid by Claimant between 2009 and 2004 in Royalty Tax totaled USD 11,503,008.97.[1621]

1374. In its submissions, Claimant dit not request for interest to be awarded on the amount requested.

B. Respondents' position

1375. Respondents argue that the amount of Royalty Tax paid by Claimant wich has not been neutralized is **USD 10,385,708**, broken down as follows:

(i) USD 3,999,890 (LEK 429,606,550) paid to the Tax Authority;

(ii) USD 8,568,537 (LEK 921,547,657) paid to the Customs Authority;

[1619] Claimant's Post-Hearing Brief, para. 15, p. 3; para. 226, p. 46; First Witness Statement of Mark Crawford, para. 33, pp. 7-8; Deloitte Lost Profits Report, Schedule 33.
[1620] Deloitte Lost Profits Report, Schedule 33.
[1621] First Witness Statement of Mark Crawford, para. 34, p. 8; Deloitte Lost Profits Report, Schedule 33; **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016.

(iii) From which should be deducted USD 2,182,719 "*reimbursed by Albpetrol for outstanding PEP&ASP debts converted into cash*".[1622]

1376. Respondents indicate that they acquired knowledge of the amounts paid by Claimant as Royalty Tax from two letters of the Ministry of Finance and Economy, respectively dated 29 March 2019[1623] and 15 April 2019.[1624]

1377. Concerning the amount of USD 2,182,719 that should be deducted from the Royalty Tax paid by Claimant, Respondents argue that:

(i) The Parties concluded the 28 February 2014 Conversion Agreement, pursuant to which the Royalty Tax was set off against Claimant's debts *vis-à-vis* Albpetrol in the amount of USD 1,976,606 ("*267,253.30 barrels of oil * Royalty Tax of USD 7,396/barrel*");[1625]

(ii) The Parties concluded the January 2017 Cash Payment Agreements, or Conversion Agreements, on 19 and 20 January 2017, pursuant to which the Royalty Tax paid was set off against Claimant's debts *vis-à-vis* Albpetrol in the amount of USD 79,556.30 and USD 126,556.80 (USD 206,113 in aggregate),[1626] which is evidenced by invoices.[1627]

C. Decision of the Tribunal

1378. Based on the figures in the Parties' submissions, the Tribunal notes that the amounts of Royalty Tax paid by Claimant are relatively similar according to both Parties: the amount paid to the Customs Authority is almost identical (LEK 921,547,660 according to Claimant and LEK 921,547,657 according to Respondents) and the amount paid to the Tax Authority is between LEK 449,029,632, according to Claimant, and LEK 429,606,550 according to Respondents. The Tribunal will therefore first decide on the amount paid by Claimant to the Tax Authority.

[1622] Respondents' Post-Hearing Brief, paras. 63-64, pp. 21-22.
[1623] **R-190** – Letter of Ministry of Finance and Economy, Department of Big Tax Payers dated 29 March 2019.
[1624] **R-191** –Ministry of Finance and Economy, General Directorate of Customs dated 15 April 2019.
[1625] Respondents' Post-Hearing Brief, para. 66, p. 22, referring to **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014, Art. 8a and Art. 9.
[1626] Respondents' Post-Hearing Brief, para. 67, p. 22, referring to **C-87** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Gorisht-Kocul Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 19 January 2017, Art. 15; **C-88** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Cakran-Mollaj Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 20 January 2017, Art. 15.
[1627] Respondents' Post-Hearing Brief, para. 67, p. 22, referring to **C-89** – Invoice Nos. 8 and 10 from Albpetrol to TransAtlantic, dated 19 and 20 January 2017.

1379. To justify the figures they put forward, both Parties rely on documents issued by the Albanian Ministry of Finance and Economy.[1628] The Tribunal has two observations in that respect.

1380. First, as acknowledged by Claimant, the letter submitted by Claimant only certifies the amounts of Royalty Tax paid between 2009 and 2014.[1629] To justify the amounts paid from 2015 to 2017, Claimant only relies on Schedule 33 of the Deloitte Report.[1630] On the other hand, the letter submitted by Respondents, which do not have first-hand knowledge regarding the amount of Royalty Tax paid by Claimant,[1631] certifies the amounts paid between 2009 and 2017.[1632]

1381. Second, some amounts certified by the Ministry of Finance and Economy differ in a non-negligible way in the letters submitted by Claimant and by Respondents, particularly for the years 2010 and 2012. For instance, for the year 2010, the letter submitted by Claimant states that Claimant has paid LEK 71,110,116 to the Tax Authority whereas the letter submitted by Respondents indicates that the amount paid was LEK 67,522,044.

1382. The Tribunal is of the opinion that it must base its decision on the numbers that were certified by the Ministry of Finance and Economy. Where the numbers that are certified differ, the Tribunal must take into account the most recent confirmation of the Ministry of Finance and Economy. The Tribunal will thus take into account the numbers contained in the letter submitted by Respondents dated 29 March 2019,[1633] instead of the letter submitted by Claimant dated 3 June 2016.[1634]

1383. On this basis, the Tribunal considers that, as argued by Respondents, the total amount paid by Claimant to the Tax Authority for the Royalty Tax between 2009 and 2017 is LEK 429,606,550, as detailed in the exhibit submitted by Respondents[1635] and in Respondents' Post-Hearing Brief.[1636]

1384. As for the amount of Royalty Tax paid to the Customs Authority, again, only Respondents justify the total amount paid by a letter from the authorities,[1637] whereas

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[1628] **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016; **R-190** – Letter of Ministry of Finance and Economy, Department of Big Tax Payers dated 29 March 2019; **R-191** –Ministry of Finance and Economy, General Directorate of Customs dated 15 April 2019.
[1629] **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016; First Witness Statement of Mark Crawford, para. 34, p. 8: "*The Ministry of Finance has confirmed that the amounts paid by GBC between 2009 and 2014 in Royalty Tax totaked USD $11,503,008.97, at Exhibit C-56*".
[1630] First Witness Statement of Mark Crawford, para. 33, p. 7: "*I am aware from a review of GBC's reords and the information prepared by Deloitte LLP in the Expert Report of Carey Mamer (the "**Deloitte Report**") at Schedule 33, that from 2009 to 2017 GBC paid Royalty Tax to the Government totaling USD $12,735,732* […]"; Deloitte Lost Profits Report, Schedule 33.
[1631] Respondents' Post-Hearing Brief, para. 64, p. 21.
[1632] **R-190** – Letter of Ministry of Finance and Economy, Department of Big Tax Payers dated 29 March 2019.
[1633] **R-190** – Letter of Ministry of Finance and Economy, Department of Big Tax Payers dated 29 March 2019.
[1634] **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016.
[1635] **R-190** – Letter of Ministry of Finance and Economy, Department of Big Tax Payers dated 29 March 2019.
[1636] Respondents' Post-Hearing Brief, paras. 63-64, pp. 21-22.
[1637] **R-191** –Ministry of Finance and Economy, General Directorate of Customs dated 15 April 2019.

the official letter submitted by Claimant does not contain details on the payments made for the year 2015.[1638] To justify the amounts paid in 2015, Claimant only relies on Schedule 33 of the Deloitte Report.[1639]

1385. Therefore, the Tribunal considers that Claimant paid the total amount of LEK 921,547,657 to the Customs Authority, as detailed in the exhibit submitted by Respondents[1640] and in Respondents' Post-Hearing Brief.[1641]

1386. As to the exchange rate between LEK and USD, although both Parties seem to refer to the same exchange rate from the Bank of Albania to convert the amounts paid by Claimant in LEK to USD, the numbers used are not identical and therefore lead to slight variations of the amounts in USD.[1642]

1387. The exchange rate used by Claimant for the years 2009 to 2014 is the rate mentioned by the Ministry of Finance in its letter dated 3 June 2016.[1643] On the other hand, the exchange rate used by Respondents in their Post-Hearing Brief does not arise from the letter sent by the Ministry of Finance to Respondents in 2019 since this letter does not mention an exchange rate.[1644]

1388. For the years 2009 to 2014, the Tribunal is thus of the opinion that the exchange rate mentioned by the Ministry of Finance and used by Claimant[1645] should be used. The Tribunal will also retain the exchange rate used by Claimant for the years 2015 to 2017,[1646] given that Claimant based its calculations on the rate used by the Ministry of Finance for the previous years and that, in any event, these rates are less favorable to Claimant than the rates used by Respondents as they are higher.[1647]

1389. In conclusion, on the basis of the amounts put forward by Respondents and the exchange rates put forward by Claimant, the Tribunal finds that Claimant has paid the following amounts of Royalty Tax between 2009 and 2017:

- 2009: LEK 13,510,862 at a 94.85 LEK-USD exchange rate, *i.e.* USD 142,444.51

[1638] **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016.
[1639] First Witness Statement of Mark Crawford, para. 33, p. 7: "*I am aware from a review of GBC's reords and the information prepared by Deloitte LLP in the Expert Report of Carey Mamer (the "**Deloitte Report**") at Schedule 33, that from 2009 to 2017 GBC paid Royalty Tax to the Government totaling USD $12,735,732* […]"; Deloitte Lost Profits Report, Schedule 33.
[1640] **R-191** –Ministry of Finance and Economy, General Directorate of Customs dated 15 April 2019.
[1641] Respondents' Post-Hearing Brief, paras. 63-64, pp. 21-22.
[1642] Compare, on the one hand, **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016 and Deloitte Lost Profits Report, Schedule 33, and, on the other hand, Respondents' Post-Hearing Brief, para. 64, p. 22.
[1643] **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016.
[1644] **R-190** – Letter of Ministry of Finance and Economy, Department of Big Tax Payers dated 29 March 2019.
[1645] **C-56** – Letter No. 7280/1 from the Ministry of Finance to TransAtlantic dated 3 June 2016; First Witness Statement of Mark Crawford, para. 34, p. 8: "*The Ministry of Finance has confirmed that the amounts paid by GBC between 2009 and 2014 in Royalty Tax totaked USD $11,503,008.97, at Exhibit C-56*".
[1646] Deloitte Lost Profits Report, Schedule 33.
[1647] Compare Deloitte Lost Profits Report, Schedule 33 and Respondents' Post-Hearing Brief, para. 64, p. 22.

- 2010: LEK 73,878,474 (67,522,044 + 6,356,430) at a 103.94 LEK-USD exchange rate *i.e.* USD 710,780.00

- 2011: LEK 196,112,200 (98,553,879 + 97,558,321) at a 100.76 LEK-USD exchange rate *i.e.* USD 1,946,329.89

- 2012: LEK 394,058,920 (105,805,898 + 288,253,022) at a 108.00 LEK-USD exchange rate *i.e.* USD 3,648,693.70

- 2013: LEK 357,153,677 (33,204,572 + 323,949,105) at a 105.84 LEK-USD exchange rate *i.e.* USD 3,374,467.85

- 2014: LEK 150,734,850 (33,413,065 + 117,321,785) at a 104.96 LEK-USD exchange rate *i.e.* USD 1,436,117.09

- 2015: LEK 115,168,608 (27,059,614 + 88,108,994) at a 126.18 LEK-USD exchange rate *i.e.* USD 912,732.66

- 2016: LEK 48,111,603 at a 124.24 LEK-USD exchange rate *i.e.* USD 387,247.28

- 2017: LEK 2,425,013 at a 127.37 LEK-USD exchange rate *i.e.* USD 19,039.12

1390. The total amount of Royalty Tax paid to the Tax Authority is therefore USD 12,577,852.1.

1391. The Tribunal will now turn to the amount of USD 2,182,719 which, according to Respondents, has already been neutralized and should be deducted from the Royalty Tax paid by Claimant.

1392. The Tribunal notes that, as alleged by Respondents, under the 28 February 2014 Conversion Agreement and the January 2017 Cash Payment Agreements – or Conversion Agreements – dated 19 and 20 January 2017, the Parties did provide for set-off mechanisms between Claimant's debts and some amounts of Royalty Tax to be paid under these agreements.[1648]

1393. However, the Tribunal notes that Claimant did not pay its debts under either the 28 February 2014 Conversion Agreement or the January 2017 Cash Payment Agreements,

[1648] **R-37** – Agreement between the Claimant and Albpetrol dated 28 February 2014, Art. 8a and Art. 9; **C-87** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Gorisht-Kocul Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 19 January 2017, Art. 15; **C-88** – Agreement on Rules and Procedures for Receiving, in Cash, the Corresponding Value of the Amount of Deemed Production (PEP) and Share of Albpetrol (PPA) for Calendar Year 2015 on Cakran-Mollaj Oilfield between TransAtlantic Albania Ltd. and Albpetrol Sh.A. dated 20 January 2017, Art. 15; **C-89** – Invoice Nos. 8 and 10 from Albpetrol to TransAtlantic, dated 19 and 20 January 2017.

as argued by Respondents.[1649] Claimant does not expressly contest these aspects of the factual background.

1394. Consequently, the set-offs of the Royalty Tax amounts were not implemented and not neutralized for Claimant, so that it is not justified to deduct USD 2,182,719 from the Royalty Tax paid by Claimant.

1395. Therefore, the Tribunal finds that the amount of USD 12,577,852.1 was paid by Claimant and was not neutralized by AKBN and the MIE as it should have been under Article 3.1(c) of the License Agreements, so that pursuant to the legal mechanism described in section 6.1.C.(2) above, Claimant should be compensated by AKBN and the MIE in the amount of USD 12,577,852.1. No interest will be added to this amount as Claimant did not make a specific request in that respect.

7.2. Damages for the seizure of the Cakran and Gorisht Oilfields

A. Claimant's position

1396. On the basis of the Deloitte Lost Profits Rebuttal Report and Resource Rebuttal Report, Claimant argues that the lost profit it suffered with respect to the Cakran and Gorisht Oilfields respectively amounted to USD 21,184,000 and USD 23,514,000.[1650]

B. Respondents' position

1397. Respondents consider that Claimant has not proven any damages with respect to the termination of the Cakran and Gorisht Petroleum Agreements / License Agreements.

1398. Indeed, on the basis of the Rebuttal Expert Reports of Gervase MacGregor from BDO[1651] and Stephen Rogers from Arthur D. Little,[1652] Claimant's loss of profit in case of continued operations would be zero.[1653]

1399. Respondents also claim that that Claimant did not prove any causality for its damage claim pursuant to Swiss law, which requires (i) the existence of natural causation, "*the* condicio sine qua non *test – i.e. whether a condition is indispensable for a given result*", and (ii) a additional test of "adequacy", pursuant to which the Tribunal has to ask "*whether under the ordinary course of events and the general experience of life an act is* 'adequate' *to cause the alleged damage*".[1654]

[1649] Rejoinder Brief, para. 399, p. 106; Statement of Defence, para. 290, pp. 80-81.
[1650] Claimant's Reply, para. 136, p. 22.
[1651] **RER-3** – Second Expert Report of Gervase MacGregor.
[1652] **RER-4** – Second Expert Report of Stephen Rogers.
[1653] Respondents' Post-Hearing Brief, para. 175, pp. 52-53; Rejoinder Brief, paras. 466-467, p. 126; Statement of Defence, para. 299, p. 82.
[1654] Respondents' Post-Hearing Brief, paras. 178-179, p. 53, referring to **RL-39** – The check of causality with the assumption of hypothetical performance by the debtor is an established and accepted instrument of Swiss law on damages, cf. Gauch/Schluep/Emmenegger, Schweizerisches Obligationenrecht, Allgemeiner Teil, 10. Aufl., Zürich 2014, paras. 2947, 2949, 2956.

1400. Indeed, according to Respondents, even if it had remained the operator of the Cakran and Gorisht Oilfields after early 2017, Claimant would not have been capable of carrying out the operator's role anymore.[1655]

1401. First, Respondents argue that in 2016/2017 Claimant's "*total financial decay*" made it impossible to continue as a going concern given that its total liabilities amounted to USD 130,598,272.45 by the end of 2016[1656] with assets of only USD 32,251,508.43, leaving net liabilities of USD 98 million.[1657]

1402. Second, Respondents argue that as a result of its "*hopeless liquidity and its debts*", Claimant's electricity supply had been cut off and numerous creditors had procedures and seizures against Claimant,[1658] and that the oilfields were already shut down when taken back by Albpetrol.

1403. Third, Respondents contend that the alleged retention of financial advisors by Claimant is insufficient to remedy the situation, and that there was no sign of a "*financial reanimation*" of Claimant coverning net liabilities of USD 98 million.[1659]

1404. Respondents thus consider that the burden of substantiation and proof is on Claimant to show that it could have re-started its petroleum operations and continued them in accordance with the contractually agreed upon standard of international petroleum industry practice, which Claimant has failed to prove.[1660]

C. Decision of the Tribunal

1405. In light of its ruling that Claimant cannot claim damages for Respondents' alleged breaches of the Cakran and Gorisht License Agreements, it is not necessary for the Tribunal to rule on the amount of damages claimed by Claimant.

7.3. Damages for the failure to hand over the Ballsh Oilfield

A. Claimant's position

1406. On the basis of the Deloitte Lost Profits Rebuttal Report, Claimant argues that the damages resulting from Respondents' wrongful taking of Claimant's share of petroleum

[1655] Respondents' Post-Hearing Brief, para. 180, p. 54.
[1656] Respondents' Post-Hearing Brief, para. 180, p. 54, referring to **R-162** – Claimant's Financial Statements as of 31 December 2017 (1 USD equals 105 Albanian LEK); **R-174** – Claimant's Financial Statements as of 31 December 2016 (1 USD equals 105 Albanian LEK); Hearing Transcript Day 4, p. 92:3-10.
[1657] Respondents' Post-Hearing Brief, para. 180, p. 54, referring to **R-162** – Claimant's Financial Statements as of 31 December 2017 (1 USD equals 105 Albanian LEK); **R-174** – Claimant's Financial Statements as of 31 December 2016 (1 USD equals 105 Albanian LEK); Hearing Transcript Day 4, p. 92:12-16.
[1658] Respondents' Post-Hearing Brief, para. 180, p. 54, referring to **R-99** – Letter from OSHEE to Albpetrol dated 30 March 2018; **R-19** – Selection of around 20 bailiff orders in the timeframe of 2 March 2016 until 3 August 2017.
[1659] Respondents' Post-Hearing Brief, para. 180, p. 54.
[1660] Respondents' Post-Hearing Brief, para. 182, p. 55.

from Ballsh, Respondents' wrongful interference with Claimant's right to take its share of Ballsh petroleum and Respondents' wrongful withholding of the transfer of the Ballsh Oilfield and assets equal to USD 43,241,000.[1661]

B. Respondents' position

1407. On the basis of the Expert Reports of Gervase MacGregor from BDO[1662] and Stephen Rogers from Arthur D. Little,[1663] Respondents argue that Claimant did not sustain any damages in connection with the Ballsh Oilfield because the profit that it could likely make in connection with this oilfield, if it could conduct petroleum operations at all, would be zero.[1664]

C. Decision of the Tribunal

1408. In light of its ruling that it does not have jurisdiction over Claimant's claim relating to Respondents' refusal to hand over the Ballsh Oilfield, the Tribunal will not rule on the amount of damages claimed by Claimant.

8. DECISION OF THE TRIBUNAL ON COSTS

8.1. Claimant's position

1409. Claimant explains that it had to enter into a Litigation Funding Agreement with Bentham IMF Capital Limited ("**Bentham**"), Stikeman Eliott LLP and Habegger Arbitration to provide the funding necessary for Claimant to bring the arbitration. Therefore, if Claimant collects an arbitral award from Respondents, Claimant must reimburse Bentham for all legal and expert fees, disbursements and other costs paid on its behalf, and is thus entitled to recover these costs from Respondents since Claimant will ultimately be "*out of pocket upon reimbusing the costs to* [Bentham]".[1665]

1410. Claimant requests that Respondents be ordered to jointly and severally pay to Claimant the following amounts, plus interest of 5% per annum in each case from the date of the award until full payment:

- USD 1,556,542.67
- CAD $1,948,142.74
- CHF 541,791.90
- EUR 55,993.80 and

[1661] Deloitte Lost Profit Rebuttal Report, table 4, p. 10, p. 50.
[1662] **RER-1** – Expert Report of Gervase MacGregor; **RER-3** – Second Expert Report of Gervase MacGregor.
[1663] **RER-2** –Expert Report of Stephen Rogers. **RER-4** – Second Expert Report of Stephen Rogers.
[1664] Respondents' Post-Hearing Brief, para. 248, p. 73; Statement of Defence, para. 440, p. 12; Rejoinder Brief, para. 554, p. 147.
[1665] Claimant's Statement of Costs, paras. 4-6, p. 1, referring to **CL-76** – *ICC Commission Report, Decisions on Costs in International Arbitration*, ICC Dispute Resolution Bulletin 2015(2), p. 17 at para. 87.

- GBP 8,802.41[1666]

1411. First, Claimant states that Bentham paid the entirety of the Advance on Costs to the ICC on behalf of Claimant, without contribution from Respondents, in the amount of USD 785,000.00.[1667]

1412. Second, Claimant contends that it incurred lawyer fees and disbursements, lawyers' success fee and experts' fees and disbursements:

- Current fees and disbursements of Stikeman and Habegger (the "**Current Fees**"): Bentham paid 80% of the fees and 100% of the disbursements incurred (for a total amount of CAD $1,295,049.09 and CHF 355,686.90);[1668]

- Remaining fees (the "**Remaining Legal Fees**", amounting to 20% of fees) and disbursements to be paid by Claimant to Stikeman and Habegger (for a total amount of CAD $311,130.86 and CHF 88,252.50);[1669]

- Fees to be paid to Stikeman and Habegger for the preparation of the Statement of Costs, for the response to Respondents' Motion to Strike of 7 May 2019 and estimated fees for the review of the award (the "**Trailing Fees**") (for a total amount of CAD $22,000.00 and CHF 8,000.00);[1670]

- A success fee to Stikeman and Habegger equal and in addition to the value of the Remaining Legal Fees (the "**Lawyers' Return**") (for a total amount of CAD $315,530.86 and CHF 89,852.50). According to Claimant, such uplifts or success fees in exchange for accepting the risk of funding the claim is in effect the cost of capital and are thus recoverable;[1671]

- Fees and disbursements of Deloitte LLP, Oltion Toro, Dr. Ledina Mandija and Zelta Capital Partners Ltd (for a total amount of USD 771,542.67, CAD $4,431.93 and EUR 1,800.00).[1672]

1413. Third, Claimant indicates that it paid all the necessary expenses for the conduct of the Hearing, in the amount of EUR 54,193.80, and that its share of the costs charged by the stenographers amounted to GBP 8,802.41.[1673]

[1666] Claimant's Statement of Costs, para. 28, pp. 4-5 and Schedule A.
[1667] Claimant's Statement of Costs, para. 7, p. 2.
[1668] Claimant's Statement of Costs, paras. 8-21, pp. 2-4 and Schedule A.
[1669] Claimant's Statement of Costs, paras. 8-21, pp. 2-4 and Schedule A.
[1670] Claimant's Statement of Costs, paras. 8-21, pp. 2-4 and Schedule A.
[1671] Claimant's Statement of Costs, paras. 16-17, p. 3, referring to **CL-76** – *ICC Commission Report, Decisions on Costs in International Arbitration*, ICC Dispute Resolution Bulletin 2015(2), p. 17 at para. 92; Schedule A.
[1672] Claimant's Statement of Costs, para. 21, p. 4 and Schedule A.
[1673] Claimant's Statement of Costs, paras. 22-23, p. 4.

1414. Claimant requests that Respondents jointly and severally bear the entire costs of the arbitration and that the Tribunal award Claimant its legal fees (including the Remaining Legal Fees), the Lawyers' Return and the costs and expenses incurred and to be incurred in connection with this arbitration, including but not limited to the fees and expenses of the Tribunal and the ICC. [1674] According to Claimant, the Tribunal should bear in mind that Respondents (i) refused to tender their share of the advance on costs of the arbitration, (ii) made no effort to reduce costs, including by increasing the number of participants to the Hearing and (iii) rendered the proceedings overly complex by lengthy and repetitive pleadings, baseless allegations and motions to strike or to limit the introduction of proper evidence.[1675]

1415. Finally, Claimant argues that under Swiss law, a party can claim default interest on sums that are due, at a rate of 5% per annum unless agreed otherwise. A claim against the counterparty for compensation for a party' costs of the arbitration becomes due by the decision of the arbitral tribunal.[1676]

1416. In its letter dated 20 January 2020 regarding the issue of which Ministry is a party to the present proceedings, Claimant requested that Respondents be ordered to bear all costs caused in connection with this issue and compensate Claimant in the amount of CAD $7,965.00 and CHF 13,702.00.[1677]

8.2. <u>Respondents' position</u>

1417. Respondents argue that the reasonable costs that they sustained in this arbitration amount to EUR 1,886,365.79 detailed as follows:

- EUR 1,400,000.00 corresponding to Respondents' external legal counsel fees, 1,200,000.00 of which have already been paid

- EUR 46,130.76 corresponding to the hearing costs, including travel expenses of legal counsel

- EUR 385,000.00 corresponding to expert costs

- EUR 22,570.00 corresponding to travel expenses of Respondents/State Advocates

- EUR 32,665.03 corresponding to translator costs[1678]

[1674] Claimant's Statement of Costs, para. 25, p. 4.
[1675] Claimant's Statement of Costs, para. 26, p. 4.
[1676] Claimant's Statement of Costs, para. 27, p.4, referring to **CL-77** – DTF 130 III 591, 596-598, consid. 3.
[1677] Claimant's letter to the Arbitral Tribunal and Respondents dated 20 January 2020.
[1678] Respondents' Statement of Costs, paras. 4-5, pp. 3-4. The Tribunal notes that Respondents wrote that their translator costs amounted to EUR 32.665.03, but assumes that the correct amount is EUR 32,665.03, which is consistent with the total amount of EUR 1,886,365.79 claimed by Respondents.

1418. Respondents request that Claimant bears the entire costs sustained by Respondents, and thus be ordered to pay each of the three Respondents the amount of EUR 628,788.59, corresponding to a third of Respondents' aggregate costs.[1679]

1419. Respondents argue that it is a well-established principle that the costs of the arbitration are generally divided in proportion to the parties' winning and losing, pursuant to the "*costs follow the event*" approach.[1680]

1420. Respondents also contend that Claimant has to bear 22.4% of all reasonable costs irrespective of the final outcome. Claimant "*withdrew*" its claim for an amount of USD 25,434,000 when it went from requesting USD 113,373,000 in its Statement of Claim to requesting USD 87,939,000 in its Reply, which represents 22.4% of Claimant's initial claim.[1681]

1421. According to Respondents, "*the cost allocation in case of a withdrawal of claim is such that the withdrawing Claimant has to bear all costs attributable to the claim withdrawn – or the respective share if a claim is only withdrawn partially – as it was entirely unsuccessful with the claim withdrawn (*costs follow the event*)*".[1682]

1422. Respondents consider that Claimant also has to bear all costs attributable to the remaining claims because (i) Claimant has failed to duly allocate its remaining claims to the individual Respondents,[1683] (ii) Claimant's remaining claims lack both jurisdiction and merits,[1684] and (iii) the costs would have to be allocated according to the proportion of winning and losing by *each individual* Respondent, pursuant to explanations detailed in Respondents' Post-Hearing Brief.[1685]

1423. Respondents also request that Claimant's cost compensation claims be dismissed because the Tribunal lacks jurisdiction or the claims are to be dismissed for lack of merits.[1686]

1424. Finally, in the alternative, Respondents request the Tribunal to net all cost compensation claims that each individual Respondent may be awarded against Claimant with any cost compensation claim or other claim that Claimant may be awarded against the respective Respondent in this arbitration.[1687]

1425. In response to Claimant's motion that Respondents should compensate Claimant for the fees incurred in relation to the issue of which Ministry is a party to the present

[1679] Respondents' Statement of Costs, para. 6, p. 4.
[1680] Respondents' Statement of Costs, paras. 7-8, pp. 4-5, referring to **RL-49** – *Wirth* in Basler Kommentar, Internationales Schiedsrecht, Art. 189 PILA, para 65.
[1681] Respondents' Statement of Costs, paras. 10-14, pp. 5-6.
[1682] Respondents' Statement of Costs, para. 15, p. 6.
[1683] Respondents' Statement of Costs, paras. 16-21, pp. 6-7.
[1684] Respondents' Statement of Costs, para. 22, p. 8.
[1685] Respondents' Statement of Costs, para. 24, pp. 8-9.
[1686] Respondents' Statement of Costs, para. 25, p. 9.
[1687] Respondents' Statement of Costs, paras. 26-28, pp. 9-10.

proceedings, Respondents contend that, although Claimant fails with most of its motions, each Party should bear its own costs as both Parties have a reason to request the change of the designation of the First Respondent to "The Ministry of Infrastructure of Energy".[1688]

8.3. Decision of the Tribunal

1426. Item e) of the arbitration agreements contained in Articles 25.3 of the License Agreements provides that: "*The Party that loses an arbitration decision shall pay all expenses incurred in connection with such arbitration, including, but not limited to, the fees and expenses of the arbitrator(s). All such costs and expenditures shall not be considered as Petroleum Costs and shall not be recoverable under this License Agreement*".[1689]

1427. Applying these criteria, the Tribunal noted that, on the one hand, out of the three main claims submitted by Claimant, only one was granted by the Tribunal, whereas the other two were dismissed in their entirety.

1428. On the other hand, Respondents' allegations of illegality in awarding the License Agreements and the Petroleum Agreements were entirely dismissed, as well as some of the other jurisdictional objections.

1429. On this basis, the Tribunal has come to the conclusion that separate decisions need to be made as regards the costs of the arbitration on the one hand and the legal costs on the other hand.

1430. As regards the costs of the arbitration, the Tribunal applies the principle "*costs follow the event*". On that basis, the Tribunal considers that Claimant should bear 60% of the costs of the arbitration, whereas Respondents should bear 40% of such costs. In making this decision, the Tribunal also takes into account the fact that Claimant was compelled to pay the entire amount of the advance on costs to the ICC Court (USD 785,000), due to Respondents' refusal to pay for their share. Therefore, Respondents should reimburse to Claimant 40% of the costs of the arbitration as fixed by the ICC Court on 30 April 2020, *i.e* 40% of USD 731,900, or USD 292,760. Given that Claimant requested interest of 5% per annum on all the costs that it requested, Respondents' reimbursement shall bear interest at the rate of 5% from the date of rendering of this Award until full payment is made.

1431. All expenses incurred for the Hearing which are common to the Parties should also be borne in the same proportion, *i.e.* 60% by Claimant and 40% by Respondents. When stating that it paid all the necessary expenses for the conduct of the Hearing, Claimant did not distinguish the expenses incurred for the Hearing room and the Tribunal from the expenses incurred for its counsel and/or other representative of Claimant's who

[1688] Respondents' letter to the Arbitral Tribunal and Claimant dated 27 January 2020.
[1689] **C-2**, **C-3** and **C-4** – License Agreements, Article 25.3(e), p. 64.

attended the Hearing.[1690] Against this background, the Tribunal finds it reasonable to consider that 2/3rd of the total amount claimed by Claimant in that respect (EUR 54,193.80) were common to the Parties because incurred for the Hearing room and for the Tribunal, and should be subject to the 60/40 proportion decided above (*i.e.* EUR 36,129.20 will be subject to the 60/40 proportion). The remaining expenses (*i.e.* EUR 18,064.60) can be attributed to room rentals for Claimant's counsel and experts, break-out rooms and meals for Claimant's counsel, and should be borne by Claimant. Therefore, Respondents should reimburse to Claimant 40% of the expenses incurred by Claimant for the Hearing room and the Tribunal, *i.e.* 40% of EUR 36,129.20, amounting to EUR 14,451.68. Given that Claimant requested interest of 5% per annum on all the costs that it requested, Respondents' reimbursement shall bear interest at the rate of 5% from the date of this Award until full payment is made.

1432. As for the stenographers' costs, since Claimant only stated that "[its] *share of the costs charged by the stenographers*" amounted to GBP 8,802.41,[1691] and Respondents did not mention these costs at all in their Statement of Costs, the Tribunal rules that each Party should bear its own costs in that respect.

1433. As regards the Parties' legal costs and disbursements, the Tribunal also notes that, on the basis of Article 37(5) of the ICC Rules, when making a decision as to costs, the Tribunal may take into account also such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

1434. In this regard, the Tribunal considers that both Parties acted in a way that did not always contribute to an expeditious and cost-effective conduct of the proceedings. For instance, Respondents submitted very long and largely repetitive submissions throughout the arbitration and did not notify everyone involved of the change of Ministry as First Respondent, which led to additional exchanges of submissions at a late stage of the proceedings. As for Claimant, it submitted several motions to strike parts of Respondents' submissions or the Tribunal's questions to the Parties. This led to additional exchanges of submissions and compelled the Tribunal to issue several procedural orders throughout the proceedings.

1435. Considering that both Parties only prevailed in part and considering the respective conduct of the Parties, the Tribunal rules that each Party shall bear its own legal fees and disbursements. Claimant's alleged general and administrative expenditures incurred "*since the loss dates*",[1692] shall also be borne by Claimant.

[1690] Claimant's Statement of Costs, para. 22, p. 4.
[1691] Claimant's Statement of Costs, para. 23, p. 4.
[1692] Claimants' Post-Hearing Brief, para. 300, pp. 60-61.

9. DECISIONS OF THE TRIBUNAL

1436. For the reasons set forth above, the Tribunal:

(i) Rules that Respondent 1 in this arbitration is the Ministry of Infrastructure and Energy of the Republic of Albania (as the legal successor of the Ministry of Energy and Industry under the License Agreements);

(ii) Rules that it has jurisdiction to hear the claims against the MIE, AKBN and Albpetrol that fall within the scope of the Cakran License Agreement, the Gorisht License Agreement and the Ballsh License Agreement;

(iii) Finds that the MIE and AKBN breached their obligations to implement fiscal stabilization measures under Article 3.1(c) of the Cakran License Agreement, the Gorisht License Agreement and the Ballsh License Agreement;

(iv) Consequently, orders the MIE and AKBN to pay to Claimant the amount of USD 12,577,852.1 as monetary damages for the breach of their obligations under Article 3.1(c) of the Cakran License Agreement, the Gorisht License Agreement and the Ballsh License Agreement;

(v) Dismisses the remainder of Claimant's requests for an award of monetary damages for Respondents' various breaches of the Cakran License Agreement and the Gorisht License Agreement;

(vi) Dismisses Claimant's request for monetary damages under the Ballsh License Agreeement relating to Respondents' alleged failure to hand-over the Ballsh Oilfield;

(vii) Rules that Claimant should bear 60% of the costs of the arbitration and that Respondents should bear 40% of such costs, including the expenses incurred for the Hearing which are common to the Parties. Respondents' reimbursement to Claimant shall bear interest at the rate of 5% from the date of this Award until full payment is made;

(viii) Consequently, orders Respondents to pay to Claimant the amounts of USD 292,760 and EUR 14,451.68, with interest at the rate of 5% running from the date of this Award until full payment is made;

(ix) Rules that each Party shall bear its own legal fees and disbursements;

(x) Consequently, dismisses Claimant's request for monetary damages for the present value of G&A expenditures incurred "*since the loss dates*".

Place of Arbitration: Zurich (Switzerland)

Date: 06 July 2020

The Arbitral Tribunal

Ms. Loretta Malintoppi

Dr. Sabine Konrad

Prof. Christophe Seraglini
(Chairman)

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