

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**ANGLO-ADRIATIC GROUP LIMITED**  
**Claimant**

**v.**

**REPUBLIC OF ALBANIA**  
**Respondent**

(ICSID Case No. ARB/17/6)

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**AWARD**

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***Members of the Tribunal***

Prof. Juan Fernández-Armesto, President of the Tribunal

Dr. Georg von Segesser, Arbitrator

Prof. Brigitte Stern, Arbitrator

***Secretary of the Tribunal***

Ms. Ella Rosenberg

***Administrative Assistant***

Dr. Luis Fernando Rodríguez

*Date of dispatch to the Parties: February 7, 2019*

## **Representation of the Parties**

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**ABBREVIATIONS AND ACRONYMS**

<b>AAG</b>	Anglo-Adriatic Group Limited, a limited liability company incorporated and operating under the laws of the British Virgin Islands with its legal seat in the British Virgin Islands (Claimant)
<b>AAIF</b>	Anglo Adriatika Investment Fund S.H.A.
<b>ALL</b>	Albanian Lek
<b>Arbitration Rules</b>	ICSID Rules of Procedure for Arbitration Proceedings (2006)
<b>BVI</b>	British Virgin Islands
<b>LFI</b>	Law No. 7764, of November 2, 1993, on Foreign Investments (C-38 and RL-001)
<b>LIFd</b>	Law No. 7979, of July 26, 1995, on Investment Funds (RL-018)
<b>C-[#]</b>	Claimant's Exhibit
<b>Claimant</b>	Anglo-Adriatic Group Limited, a limited liability company incorporated and operating under the laws of the British Virgin Islands with its legal seat in the British Virgin Islands (AAG)
<b>Cl. CM</b>	Claimant's Counter-Memorial on Objections to Jurisdiction, dated May 28, 2018
<b>Cl. Mem.</b>	Claimant's Memorial on the Merits, dated December 1, 2017
<b>Cl. Rej.</b>	Claimant's Rejoinder on Objections to Jurisdiction, dated June 25, 2018
<b>CPHB</b>	Claimant's Post Hearing Brief, dated August 31, 2018
<b>CSC</b>	Claimant's Statement of Costs, dated September 3, 2018
<b>CL-[#]</b>	Claimant's Legal Authority

<b>Foreign Shareholders</b>	Mr. Declan J. Ganley, Mr. Stephan A. Murphy, Mr. Don N. De Marino, and Mr. Michael Beck
<b>Foreign Shares</b>	Shares in the AAIF subscribed by four non-Albanian shareholders: Messrs. Ganley, Murphy, De Marino and Beck (Foreign Shareholders)
<b>Founding Shareholders</b>	Mr. Declan J. Ganley, Mr. Stephan A. Murphy, Mr. Don N. De Marino, Mr. Michael Beck, and Mr. Pirro Vasil Kushi
<b>Hearing</b>	Hearing on jurisdiction, held in Paris on July 17, 18, and 19, 2018
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
<b>ICSID or the Centre</b>	International Centre for Settlement of Investment Disputes
<b>Judicial Registration Order</b>	Verdict of the Tirana district court regarding the incorporation of the AAIF (C-53)
<b>ORfB</b>	Claimant's Observations on Request for Bifurcation, dated February 16, 2018
<b>Parties</b>	Claimant and Respondent in this arbitration
<b>R-[#]</b>	Respondent's Exhibit
<b>Respondent</b>	The Republic of Albania
<b>RfA</b>	Claimant's Request for Arbitration, dated December 20, 2016
<b>RfB</b>	Respondent's Request for Bifurcation, dated January 9, 2018
<b>R. Mem.</b>	Respondent's Memorial on Objections to Jurisdiction, dated April 17, 2018
<b>R. Reply</b>	Respondent's Reply on Objections to Jurisdiction, dated June 11, 2018
<b>RPHB</b>	Respondent's Post Hearing Brief, dated August 31, 2018

<b>RSC</b>	Respondent's Statement of Costs, dated August 31, 2018
<b>RL-[#]</b>	Respondent's Legal Authority
<b>Transcript</b>	Transcript of the Hearing (page number:line(s))
<b>Tribunal</b>	Arbitral tribunal constituted on July 21, 2017
<b>Trust Deeds</b>	Trust agreement, dated November 2, 1996, between the Claimant and Mr. Declan Ganley (C-58); Trust agreement, dated November 2, 1996, between the Claimant and Mr. Don De Marino (C-59); Trust agreement, dated October 16, 1996, between the Claimant and Mr. Michael Beck (C-60); and Trust agreement, dated October 1, 1996, between the Claimant and Mr. Stephen Murphy (C-61)
<b>USD</b>	United States Dollar

**LIST OF CASES**

<b><i>Alasdair Ross</i></b>	<i>Alasdair Ross Anderson et al v. Republic of Costa Rica</i> (ICSID Case No ARB(AF)/07/3) Award, May 19, 2010
<b><i>Burlington Resources Inc.</i></b>	<i>Burlington Resources Inc. v. Republic of Ecuador</i> (ICSID Case No. ARB/08/5) Decision on Jurisdiction, June 2, 2010. (RL-036)
<b><i>Churchill Mining</i></b>	<i>Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia</i> (ICSID Case No. ARB/12/14 and 12/40) Award, December 6, 2016
<b><i>Churchill Mining Jurisdiction</i></b>	<i>Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia</i> (ICSID Case No. ARB/12/14 and 12/40) Decision on Jurisdiction, February 24, 2014. (RL-003)
<b><i>Agua del Aconquija</i></b>	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> (ICSID Case No. ARB/97/3) Decision on Jurisdiction, November 14, 2005
<b><i>Enron Creditors</i></b>	<i>Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic</i> (ICSID Case No. ARB/01/3) Award, May 22, 2007
<b><i>KT Asia</i></b>	<i>KT Asia Investment Group B.V. v. Republic of Kazakhstan</i> (ICSID Case No. ARB/09/8) Award, October 17, 2013. (RL-071)
<b><i>Gustav F W</i></b>	<i>Gustav F W Hamester GmbH &amp; Co KG v. Republic of Ghana</i> (ICSID Case No ARB/07/24) Award, June 10, 2010
<b><i>Libananco</i></b>	<i>Libananco Holdings Co. Limited v. Republic of Turkey</i> (ICSID Case No. ARB/06/8) Decision on Preliminary Issues, June 23, 2008. (CL-06)
<b><i>Mamidoil Jetoil</i></b>	<i>Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania</i> (ICSID Case No ARB/11/24) Award, March 30, 2015

<b><i>Plama Consortium</i></b>	<i>Plama Consortium Limited v. Republic of Bulgaria</i> (ICSID Case No ARB/03/24) Award, August 27, 2008. (RL-016)
<b><i>Philip Morris Asia Limited</i></b>	<i>Philip Morris Asia Limited v. The Commonwealth of Australia</i> (UNCITRAL, PCA Case No. 2012-12) Award on Jurisdiction and Admissibility, December 17, 2015. (RL-075)
<b><i>Phoenix Action Ltd.</i></b>	<i>Phoenix Action Ltd v. Czech Republic</i> (ICSID Case No ARB/06/5) Award, April 15, 2009. (RL-005)
<b><i>Quiborax</i></b>	<i>Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia</i> (ICSID Case No. ARB/06/2) Decision on Jurisdiction, September 27, 2012. (RL-055)

## **I. INTRODUCTION**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes [“**ICSID**” or the “**Centre**”] on the basis of Law 7764 on foreign investment of November 2, 1993 [“**LFI**”]<sup>1</sup> promulgated by the Republic of Albania, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965 [the “**ICSID Convention**”].
2. Claimant is Anglo-Adriatic Group Limited, a limited liability company incorporated and operating under the laws of the British Virgin Islands with its legal seat in the British Virgin Islands [“**AAG**” or the “**Claimant**”]. The registered office of AAG is located at 49 Main Street, P.O. Box 186, Road Town Tortola, British Virgin Islands<sup>2</sup>.
3. Respondent is the Republic of Albania, a sovereign State [“**Albania**” or “**Respondent**”].
4. Claimant and Respondent are collectively referred to as the “**Parties**”.
5. The dispute relates to privatization vouchers issued by the Republic of Albania, and the collection of those vouchers by the Anglo Adriatika Investment Fund S.H.A. [“**AAIF**”]. Claimant’s alleged investment in Albania is the AAIF. Claimant avers that Respondent’s refusal to allow the AAIF to participate in the privatization process breached Albania’s undertakings assumed in the LFI.
6. Albania’s agreement to arbitrate foreign investment disputes was formalized in Art. 8 LFI, which provides as follows<sup>3</sup>:

“Article No. 8. Dispute settlement.

1. If a dispute arises between a foreign investor and an Albanian private party or an Albanian state enterprise or company, which has not been settled through an agreement, the foreign investor may choose to settle the dispute according to any kind of previously agreed upon and applied procedures. If there is no procedure foreseen for the settlement of disputes, then the foreign investor has the right to submit the dispute for resolution to a competent court or arbitrator of the Republic of Albania, according to its laws.

2. If a dispute arises between a foreign investor and the Albanian public administration, which has not been settled through an agreement, the foreign investor may submit the dispute for resolution to a competent court or arbitrator of the Republic of Albania, according to its laws. If the dispute relates to expropriation, compensation for expropriation or discrimination, as well as to transfers as provided in article 7 of this law, the foreign investor may submit the

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<sup>1</sup> C-38 and RL-001.

<sup>2</sup> RfA, para. 5 and C-1.

<sup>3</sup> C-38 (certified translation). Another translation has been submitted by Respondent as RL-001. The accuracy of some aspects of Respondent’s translation has been questioned by Claimant (Cl. Rej., para. 94). The issue is irrelevant to the effect of the analysis carried out in this Award.

dispute for resolution to the International Center [sic] for Settlement of Investment Disputes (“Center” [sic]), established by the Convention for the settlement of investment disputes between the states and citizens of other states, approved in Washington, on 18 March 1965.

3. Every decision of international arbitration according to this article is final and irrevocable for the parties in dispute. The Republic of Albania undertakes to apply without delay the provisions of these decisions and assure their implementation within its territory”.

## **II. PROCEDURAL HISTORY**

### **1. SUBMISSION OF THE RfA**

7. On December 29, 2016, ICSID received a request for arbitration of the same date from AAG against Albania [the “RfA”].
8. By letter of January 3, 2017, ICSID sent a first set of questions to AAG. AAG submitted its responses on February 8, 2017. By letter of February 13, 2017, ICSID sent a second set of questions to AAG. By letter of February 16, 2017, AAG provided its answers.
9. On February 17, 2017, the Secretary-General of ICSID registered the RfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

### **2. CONSTITUTION OF THE TRIBUNAL**

10. By letter of February 28, 2017, Claimant proposed a method of constitution for the Tribunal. By letter of April 14, 2017, Respondent provided its comments on Claimant’s proposed method and a counter-proposal. By letter of April 24, 2017, Claimant commented on Respondent’s April 14, 2017 letter. By letter of May 12, 2017, Respondent provided further modifications to Claimant’s proposed method.
11. By Claimant’s letter of May 16, 2017 and Respondent’s letter of May 17, 2017, the Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators in consultation with the Parties.
12. The Tribunal is composed of Prof. Juan Fernández-Armesto, a national of Spain, President, appointed by his co-arbitrators; Dr. Georg von Segesser, a national of Switzerland, appointed by Claimant; and Prof. Brigitte Stern, a national of France, appointed by Respondent.
13. On July 21, 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings [the “**Arbitration Rules**”], notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Ella Rosenberg, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

### **3. FIRST SESSION AND PROCEDURAL ORDER NO. 1**

14. By letter of July 28, 2017, Claimant requested that the first session be held outside of the 60-day time period due to counsel’s schedule, should Albania agree. By email of the same date, Respondent also requested that the first session be postponed until the

end of September as counsel for Respondent was also not available within 60 days of the constitution of the Tribunal.

15. By letter of July 31, 2017, Claimant requested the Tribunal to fix a time and date for the first session during the first half of October 2017.
16. By letter of August 14, 2017, the Tribunal asked the Parties to confirm their availability for a first session to be held on either October 16 or 27, 2017. By Claimant's letter and Respondent's email of August 18, 2017, the Parties confirmed their availability for October 16, 2017.
17. By letter of September 14, 2017, ICSID invited the Parties to comment on the appointment of Dr. Luis Fernando Rodríguez as the Assistant to the Tribunal. The Parties were provided with Dr. Rodríguez's *curriculum vitae* and signed declaration of independence and impartiality.
18. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on October 16, 2017 by teleconference.
19. Following the first session, on November 2, 2017, the Tribunal issued Procedural Order No. 1 recording the Parties' agreement on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, that the place of proceeding would be Paris, France, and that Dr. Rodríguez would serve as Assistant to the Tribunal. Procedural Order No. 1 also sets out the agreed schedule for the proceedings.

#### **4. MEMORIAL ON THE MERITS**

20. In accordance with Procedural Order No. 1, on December 1, 2017, Claimant filed its Memorial on the Merits ["**Cl. Mem.**"] with accompanying documentation.

#### **5. BIFURCATION OF THE PROCEEDINGS AND SCHEDULING OF THE HEARING**

21. By email of December 29, 2017, Respondent requested an extension from January 2, 2018 to January 16, 2018 to file its Request for Bifurcation.
22. By email of January 2, 2018, the Tribunal granted Respondent until January 9, 2018, to file its Request for Bifurcation.
23. On January 9, 2018, Respondent filed a Request for Bifurcation ["**RfB**"] with accompanying documentation.
24. On February 16, 2018, Claimant filed its Observations on Respondent's Request for Bifurcation ["**ORfB**"] with accompanying documentation.
25. On March 8, 2018, the Tribunal issued its Decision on Bifurcation in which it decided to bifurcate the proceedings based on three objections raised by Respondent. The proceeding on the merits was thereby suspended.

26. On March 9, 2018, one day after issuing its Decision on Bifurcation, the Tribunal informed the Parties that it could make itself available for a jurisdictional hearing in Paris on July 19 and 20, 2018. The Parties were invited to confirm, by March 13, 2018, whether they would be available on such dates.
27. On March 13, 2018, Claimant informed the Tribunal that it was available on July 19 but not on July 20 and asked the Tribunal to reschedule the hearing for July 18 and 19, 2018.
28. On March 16, 2018, Albania replied that it would provide its availability for July 18, 19 and 20, the following week.
29. On March 28, 2018, Albania notified the Tribunal that it had engaged new external counsel and provided contact details.
30. On March 29, 2018, Albania's new external counsel submitted it would not be able to prepare Respondent's memorial on jurisdiction within the current calendar and stated its intention to negotiate new deadlines with the opposing counsel.
31. On April 2, 2018, the Tribunal informed the Parties that it would be available for a hearing on jurisdiction in Paris on July 19 or 20 (and possibly on July 18 in the afternoon, if required). The message stated: "[g]iven the difficulties of finding dates where all members are available, the parties [are] kindly invited to schedule the procedure in such a way that these hearing dates can be preserved".
32. On April 4, 2018, the Parties submitted they had reached no agreement regarding the amendment of the calendar. Respondent's new counsel asked the Tribunal to move the deadline for the memorial on jurisdiction from April 9 to April 30, due to their recent introduction to the case and the need for extra time to familiarize themselves with the file. Claimant refused to make any amendments to the calendar.
33. On April 5, 2018, the Tribunal invited the Parties to reach an agreement before April 9, 2018 on the exact dates for the hearing among those already proposed: July 18 in the afternoon, July 19 and July 20, 2018.
34. On April 6, 2018, the Tribunal issued an updated version of the calendar, extending the deadline for the submission of the memorial on jurisdiction from April 9 to April 17, 2018, and extending accordingly Claimant's deadline for submitting its counter-memorial.
35. On April 9, 2018, both Claimant and Respondent confirmed their availability to hold a jurisdictional hearing in Paris on July 17, 18, and 19, 2018.

**6. PLEADINGS ON JURISDICTION**

36. On April 17, 2018, Respondent filed its Memorial on Objections to Jurisdiction [**"R. Mem."**] with accompanying documentation.
37. On April 30, 2018, Respondent filed an Application for Security for Costs.

38. By email of May 2, 2018, the Tribunal invited Claimant to respond to the Application for Security for Costs by May 16, 2018.
39. On May 16, 2018, Claimant filed its Response on Respondent's Application for Security for Costs.
40. On May 17, 2018, Respondent filed a request to submit new evidence into the record.
41. On May 24, 2018, Claimant asked the Tribunal to reject Respondent's request of May 17, 2018 to introduce the New Document or, in the alternative, to decide that Claimant is entitled to respond to such submission and submit further evidence proving that Claimant has been a validly incorporated company in the British Virgin Islands and active ever since January 17, 1996.
42. On May 28, 2018, Claimant filed its Counter-Memorial on Objections to Jurisdiction ["**Cl. CM**"] with accompanying documentation.
43. On June 5, 2018, the Tribunal issued its Decision on Security for Costs. With respect to Respondent's request to submit new evidence into the record the Tribunal decided as follows:

"13. The Tribunal does not see any obstacle that would prevent Albania from submitting the New Document together with its upcoming Reply, as well as including its own assessment of the evidence in that pleading. [...]"

14. Therefore, Albania's Reply should be an appropriate and timely place for Respondent to introduce the New Document into the record and discuss its probative value".

44. The Tribunal also decided to dismiss the Application for Security for Costs and "direct[ed] Respondent to resubmit and discuss the merits of its Application at the Jurisdictional Hearing, if it so wishes."
45. On June 11, 2018, Respondent filed its Reply on Objections to Jurisdiction ["**R. Reply**"] with accompanying documentation.
46. On June 25, 2018, Claimant filed its Rejoinder on Objections to Jurisdiction ["**Cl. Rej.**"] with accompanying documentation.

**7. PRE-HEARING ARRANGEMENTS**

47. By email of June 27, 2018, the Centre circulated to the Parties a draft Procedural Order concerning the organization of the hearing and invited them to agree on as many items as possible in advance of the pre-hearing conference.
48. By letter of June 28, 2018, Respondent stated that it intended to call the following witnesses for cross-examination: Mr. Pirro Kushi, Mr. Declan Ganley, Mr. Gary Hunter, Mr. Don de Marino, and Mr. Patrick Flynn. By letter of the same date, Claimant requested to examine Mr. Daniel Barton and Mr. Conor Given.
49. By email of June 29, 2018, Respondent confirmed that Mr. Barton was available to testify; however, it suggested that there had been a misunderstanding about Mr. Given's role as he was not an expert in this case.

50. By email of June 29, 2018, Claimant confirmed that it no longer wished to call Mr. Given. Additionally, it noted that Mr. Flynn and Mr. Kushi would not be available to testify in Paris.
51. By letter of June 29, 2018, Claimant requested the Tribunal's permission to enter the witness statement of Mr. Peter Goldscheider into the record.
52. By email of June 29, 2018, ICSID informed the Parties that, unless they objected, the President would conduct the pre-hearing conference on behalf of the Tribunal.
53. By letter of June 30, 2018, Respondent requested that the Tribunal (i) do everything in its power to ensure that Mr. Kushi could be cross-examined, (ii) strike Mr. Flynn's letters from the record, and (iii) not allow the submission of Mr. Goldscheider's witness statement.
54. By letter of July 2, 2018, Claimant asked for permission to enter the expert opinion of Mr. William Kanaan into the record, and to examine an additional witness, Mr. Ken Fields.
55. By letter of July 2, 2018, Respondent requested that the Tribunal (i) order the authentication of the trust deeds submitted as exhibits C-58 through C-61, and the ongoing funding agreement submitted as exhibit C-66; (ii) "order Claimant to confirm that it ha[d] undertaken all reasonable efforts to find any original, signed hard copies of the Objected Exhibits"; and (iii) order Claimant to produce the hard drives, with a chain of custody, on which the exhibits were stored.
56. By further letter of July 2, 2018, Respondent responded to Claimant's letter of the same date and requested that the Tribunal deny both of Claimant's requests.
57. By email of July 2, 2018, the Parties submitted their comments on the draft Procedural Order.
58. On July 4, 2018, the President held a pre-hearing organizational meeting with the Parties by telephone conference.
59. By email of July 5, 2018, the Tribunal asked Claimant to confirm, by close of business that day, (i) if Mr. Kushi could testify by video conference and (ii) if Mr. Flynn could testify in person at the hearing. By email of the same date, Claimant informed the Tribunal that Mr. Kushi would be available to testify in person in Paris; however, that Mr. Flynn was not available to testify and, in lieu of his testimony, Claimant made available the expert opinion of Mr. Kanaan.
60. By email of July 6, 2018, Respondent asked that Mr. Flynn testify by video conference and rejected Claimant's attempt to enter the expert opinion of Mr. Kanaan into the record. Additionally, Respondent requested that the hard drives mentioned in its letter of July 2, 2018, and discussed during the pre-hearing call on July 4, 2018, be sent to the Tribunal Secretary or to the Assistant to the Tribunal in short order.
61. By email of July 6, 2018, the Tribunal took note of the Parties' emails and asked Claimant to confirm by July 9, 2018 if Mr. Flynn would be able to testify by video conference.

62. On July 9, 2018, the Tribunal issued Procedural Order No. 2 concerning the admissibility of new evidence, rejecting Claimant's request to enter the expert opinion of Mr. Kanaan into the record, and allowing the introduction of Mr. Goldscheider's witness statement, with a July 11, 2018 deadline for Respondent to state whether it intended to call Mr. Goldscheider as a witness.
63. By email of July 9, 2018, Claimant stated that Mr. Flynn would not be available to testify by video conference.
64. By letter of July 11, 2018, Respondent confirmed that it would like to call Mr. Goldscheider as a matter of caution and would inform the Tribunal at the start of the hearing if it was able to proceed with a cross-examination of Mr. Goldscheider.
65. On July 12, 2018, the Tribunal issued Procedural Order No. 3 concerning the organization of the hearing on jurisdiction.

**8. JURISDICTIONAL HEARING**

66. A hearing on jurisdiction was held in Paris from July 17-19, 2018 [the "**Hearing**"]. The following persons were present at the Hearing:

*Tribunal:*

Prof. Juan Fernández-Armesto	President
Prof. Brigitte Stern	Arbitrator
Dr. Georg von Segesser	Arbitrator
Dr. Luis Fernando Rodríguez	Assistant to the Tribunal

*ICSID Secretariat:*

Ms. Ella Rosenberg	Secretary of the Tribunal
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*For Claimant (Counsel):*

Dr. Christoph Kerres	Kerres Rechtsanwalts GmbH
Mr. Felix Oberdorfer	Kerres Rechtsanwalts GmbH
Mr. Tino Enzi	Kerres Rechtsanwalts GmbH

*For Respondent (Counsel):*

Dr. Boris Kasolowsky	Freshfields Bruckhaus Deringer
Mr. Moritz Keller	Freshfields Bruckhaus Deringer
Ms. Amanda Neil	Freshfields Bruckhaus Deringer
Mr. Eric Leikin	Freshfields Bruckhaus Deringer
Ms. Enisa Halili	Freshfields Bruckhaus Deringer
Ms. Nike Temper	Freshfields Bruckhaus Deringer
Mr. Winslow Mimmagh	Freshfields Bruckhaus Deringer

Mr. Përparim Kalo Kalo & Associates

*Parties:*

Ms. Alma Hicka State Advocate's Office, Republic of  
Albania

Mr. Helidon Jacellari State Advocate's Office, Republic of  
Albania

*Court Reporter:*

Ms. Diana Burden Court Reporter

67. During the Hearing, the following persons testified:

*On behalf of Claimant:*

Mr. Peter Goldscheider

Mr. Declan J Ganley Director of Anglo-Adriatic Group  
Limited

Mr. Donald N DeMarino Director of Anglo-Adriatic Group  
Limited

Mr. Gary Hunter Director of Anglo-Adriatic Group  
Limited

Mr. Pirro Kushi AAIF Founding Shareholder

*On behalf of Respondent:*

Mr. Daniel Barton Alvarez & Marsal

**9. POST-HEARING STEPS**

68. By letters of July 23, 2018, both Parties confirmed that they had no objections to the manner in which the Hearing was conducted.

69. The Parties filed simultaneous post-hearing briefs [“CPHB” and “RPHB”] on August 31, 2018.

70. The Parties filed their statements of costs [“CSC” and “RSC”] on September 3, 2018.

71. The proceeding was closed on February 7, 2019.

### **III. SUMMARY OF RELEVANT FACTS**

72. The following account presents the facts that are relevant to the Tribunal’s ruling.
- 1. THE VOUCHER-BASED PRIVATIZATION IN ALBANIA**
73. After the fall of the Soviet Union, Albania and other countries of Central and Eastern Europe found themselves in a transition from a State-controlled economy to a free-market economy. During this period, many countries in the region adopted plans to privatize State enterprises, based on the principle that public assets should now be distributed to citizens who had contributed to the State’s wealth.
74. Within this context, in the early 1990s the Republic of Albania approved a mass privatization program. The program sought to turn most State-owned companies into private companies rapidly and efficiently, by allowing a great number of buyers to acquire shares.
75. However, Albania’s privatization program faced two serious problems:
- due to the lack of purchasing power and financial knowledge, there was no actual demand among the Albanian population to acquire the public assets, and furthermore,
  - foreign investors had little interest in acquiring State-owned businesses, due to their general state of disrepair and the considerable bureaucracy involved.
76. Albania took two actions to overcome these problems.
77. First, in 1993, Albania passed the LFI (Law No. 7764 of November 2, 1993, on Foreign Investment). The statute, still in force, guarantees foreign investors equality of treatment with local investors, and protection against expropriation and nationalization. Breach by Albania of its commitments enshrined in the LFI authorizes foreign investors to submit their claims to arbitration under the ICSID Convention<sup>4</sup>.
78. Second, in 1995, Albania developed a privatization program based on “privatization vouchers”, which was implemented through Law No. 1030, of February 23, 1995.
79. In order to create a large pool of buyers for State-owned companies, and to disseminate ownership among nationals, Albania issued and distributed bearer bonds – commonly known as “privatization vouchers” – to its population. Most Albanian citizens above 18 years of age were entitled to receive privatization vouchers.
80. The vouchers were issued in two instalments through the Albanian Savings Bank, which acted as an agent for the Government. The first instalment was delivered in the summer

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<sup>4</sup> This law was proclaimed by the Decree No. 687 of the President of the Republic of Albania on November 11, 1993. It has been amended by Law No. 10316, dated September 16, 2010, which has been approved by presidential Decree no. 6703 on October 6, 2010. Articles 1 (definitions) and 8 (State’s consent to arbitration) of Law No. 10316 still have the same wording and content as the previous law.

of 1996 and comprised roughly 20% of the total amount of privatization vouchers that were meant to be distributed. The distribution of the second instalment began in September 1996<sup>5</sup>.

81. The nominal value of the privatization vouchers depended on the contribution of the specific person to the development of State-owned companies. Three main categories of recipients were created, reflecting different age groups within the population. The vouchers were issued to the bearer and freely tradeable. In the absence of a formal market, holders could sell their securities *via* private agreements.
82. The privatization vouchers authorized their holders to acquire shares or assets of the State-owned companies through three channels:
  - By personally bidding for shares issued by the privatized companies;
  - By buying physical assets or entire small companies in public auctions or direct sales; or
  - By assigning the vouchers to an investment fund, which would pool individual stakes and participate jointly in privatization processes.

## **2. THE INCORPORATION OF INVESTMENT FUNDS**

83. Pooling of vouchers held individually by each citizen was a cornerstone of the privatization program as it would have been very inefficient for the State to sell individual shares in State-owned companies to single voucher-holders. The envisaged solution was the incorporation of investment funds of a substantial size, which would in turn be able to acquire significant participations in, or significant assets owned by, State-controlled companies.
84. On July 26, 1995 Albania enacted Law No. 7979, on Investment Funds [**LIFd**]. The statute laid down the legal rules for the creation and activity of investment funds authorized to hold privatization vouchers<sup>6</sup>. Holders of vouchers were granted the possibility to contribute their privatization vouchers to the investment fund in exchange for shares in the fund.
85. To avoid misuse and to minimize financial risks, the LIFd imposed restrictions on the activities of investment funds; e.g., no investment fund could collect privatization vouchers in excess of 10% of the total amount of privatization vouchers issued in the country; investment funds were prohibited from obtaining loans or credits; and each investment fund had to obtain an official license to operate<sup>7</sup>.

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<sup>5</sup> C-10 and C-11.

<sup>6</sup> RL-018. This law has been repealed and replaced by Law No. 10198 (“On Collective Investment Undertakings”), dated December 10, 2009 (C-7).

<sup>7</sup> See Arts. 5, 6 and 13.2 LIFd (RL-018).

86. Only three investment funds were approved by the Albanian Government and given a license to accumulate privatization vouchers. Only one of them, the AAIF actually started operations.

**3. THE CREATION OF THE AAIF**

87. The AAIF is a legal entity established under the laws of the Republic of Albania with its corporate seat in Albania and its registered address at Europapark, Bvd. Deshmont e Kombit, Tirana, Albania.

88. The AAIF was formally registered as an anonymous company on May 6, 1996, by a decision of the Tirana District Court [**“Judicial Registration Order”**]<sup>8</sup>.

89. According to the Judicial Registration Order, the Company’s initial capital was USD 20,000, which was fully deposited with the Savings Bank of Albania. “This capital” – the Judicial Registration Order reads – “has been advanced by cash contributors, which capital is fully listed on the stock exchange: 400 shares, with each share having a nominal value of ALL 5,000”<sup>9</sup>.

90. The Judicial Registration Order also states that the 400 shares, each having equal value, were owned by the following five people [**“Founding Shareholders”**]:

- 80 shares by Mr. Declan J. Ganley;
- 20 shares by Mr. Stephan A. Murphy;
- 20 shares by Mr. Don N. De Marino;
- 80 shares by Mr. Michael Beck;
- 200 shares by Mr. Pirro Vasil Kushi.

91. The Judicial Registration Order also notes that Mr. Pirro Vasil Kushi is

“an Albanian national [...] thus fulfilling the requirement of Article 4(2) of the Albanian Law 7979, dated July 26, 1995, on Investment Funds”.

92. Finally, the Judicial Registration Order orders the registration of the AAIF on the basis that the founders of:

“the Anonymous Company ‘Anglo-Adriatic Investment Fund’ have submitted all necessary documents and, since I [the Judge] find them fulfilled according to the Albanian laws in force”.

93. The Judicial Registration Order thus confirms that the share capital of the AAIF was

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<sup>8</sup> C-53.

<sup>9</sup> C-53.

- 50% [**“Foreign Shares”**] subscribed by four non-Albanian shareholders: Messrs. Ganley, Murphy, De Marino and Beck [**“Foreign Shareholders”**];
- 50% by an Albanian citizen (Mr. Kushi);
- and that the capital of USD 20,000 was contributed in cash by each of the founding shareholders (the four non-Albanian shareholders paying in USD 10,000 and the Albanian shareholder the remaining USD 10,000).

94. The terms of this Judicial Registration Order were confirmed at the Hearing. Three out of the five Founding Shareholders testified at the Hearing (Mr. Declan J. Ganley, Mr. Donald N. DeMarino, and Mr. Pirro Kushi) and confirmed that they paid in for these shares with their own funds<sup>10</sup>.
95. As explained, the AAIF was created to participate in Albania’s privatization process. On May 22, 1996, soon after its creation, the Licensing Supervisory Committee of Investment Funds granted the AAIF a permanent license to collect, hold and utilize privatization vouchers of the Republic of Albania.

#### **4. THE INCORPORATION OF CLAIMANT**

96. A few months before the creation of the AAIF, Claimant, Anglo-Adriatic Group Limited or AAG, had been incorporated as a British Virgin Islands limited liability company, with its legal seat in the British Virgin Islands.
97. AAG was registered on January 17, 1996, with certain investment and merchant banks and certain individuals acting as founding shareholders. Its purpose was the development of investment opportunities offered by the mass privatization program of Albania and other countries in the Adriatic region. The founders of the group include *inter alia* Ganley International Ltd., a London-based investment banking group with major holdings in Eastern Europe and Russia.
98. The following persons – which coincide with the Foreign Shareholders of the AAIF – were appointed as directors of AAG:
- Mr. Declan J. Ganley;
  - Mr. Michael P. Beck;
  - Mr. Donald N. De Marino; and
  - Mr. Stephen A. Murphy.

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<sup>10</sup> Transcript, July 17, 2018, 186:25-188:8, 191:3-192:3; 277:4-10, 280:10-12; July 18, 2018, 277:6-280:12, 349:25-352:5.

99. The authorized capital of the company was USD 500,000 divided into 500,000 shares with a par value of USD 1.00 each. The issued share capital was 139,806 shares of USD 1.00 each<sup>11</sup>.
100. Claimant maintains that its principal business purpose was to hold shares in the AAIF. Claimant further submits that its plan was that at the closing of the privatization voucher collection process, expected by the end of 1998, Claimant would remain as a 40% shareholder of the AAIF<sup>12</sup> and that the remaining 60% of the shares in the AAIF would be held by Albanian investors, who had contributed their privatization vouchers.
101. Claimant avers – and this issue is at the heart of the present dispute – that in October/November 1996 the Foreign Shareholders,

“declared to hold their shares in AAIF in trust for Claimant and thus provided Claimant with beneficial ownership of the shares in AAIF”<sup>13</sup>.

Thus, the Foreign Shareholders became the trustees – and AAG, the beneficiary – of the Foreign Shares in the AAIF, which the Foreign Shareholders had subscribed a few months earlier<sup>14</sup>. To prove this averment, Claimant has submitted four Trust Deeds [the “**Trust Deeds**”<sup>15</sup>], which Claimant alleges prove that it became the beneficial owner of the Foreign Shares in the AAIF.

## **5. THE OPERATION OF THE AAIF**

102. In June 1996, after obtaining its official license, the AAIF started collecting vouchers. It opened collection centers in branches of the Savings Bank of Albania, in Tirana, Durrës, Elbasan, Korce and other cities throughout the country. In return for the vouchers, the AAIF delivered to the Albanian population “membership certificates”, reflecting the shares in the AAIF that the “depositor” would receive once the fund closed.
103. The staff working at the collection centers was employed by the Savings Bank of Albania, which also acted as custodian bank of the privatization vouchers. Other companies, such as Ganley International Ltd. and the American-Albanian Enterprise Fund (set up by the US Government) trained the staff in collecting and processing the vouchers.
104. The AAIF kept collecting privatization vouchers throughout the years 1997, 1998, and 1999. By February 1999, the AAIF had accumulated vouchers for a nominal value of ALL 12,035,418,840 and had issued membership certificates to more than 45,000 Albanian citizens.

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<sup>11</sup> C-1.

<sup>12</sup> RfA, para. 26.

<sup>13</sup> Cl. Rej., para. 56.

<sup>14</sup> Cl. Rej., para. 56. See also, Cl. CM, paras. 35 and 49; and Transcript, July 17, 2018, 71:24-72:6; 73:7-14.

<sup>15</sup> C-58 to C-61.

**6. FURTHER DEVELOPMENTS**

105. Albania conducted the mass privatization program of State-owned companies in several rounds, which took place between the years 1995 and 1997. Albania offered shares of the State-owned company it was privatizing to voucher holders – such as the AAIF – in exchange for privatization vouchers.
106. AAG has brought this arbitration alleging that, despite AAIF’s attempts to participate in the successive privatization processes, the Albanian Government intentionally prevented the AAIF from doing so. According to Claimant, negotiations, discussions, meetings, and proposals between the AAIF and the representatives of Albania have been to no avail as Albania has repeatedly refused the AAIF’s offers to participate in the privatization programs.
107. Claimant further states that, with its conduct, Albania indirectly expropriated the AAIF’s value: even though the privatization vouchers were still valid (and have been – in principle – legally valid until December 31, 2016), Albania rendered them virtually worthless.
108. Claimant adds that, while the Albanian Government has prevented the AAIF from using the vouchers in any privatization process, other foreign investors have acquired large participations in the privatized companies. Such conduct allegedly was discriminatory against Claimant *vis-à-vis* other foreign and domestic investors.

#### **IV. RELIEF SOUGHT**

##### **1. CLAIMANT’S REQUEST FOR RELIEF**

109. In its Counter-Memorial on Objections to Jurisdiction, AAG submitted the following request for relief:

“103. The Claimant respectfully requests the following relief in the form of an Award on Jurisdiction:

(a) to decide that the dispute is within the jurisdiction of ICSID and the competence of this Tribunal;

(b) to dismiss all of the Respondent’s objections on jurisdiction of ICSID and the competence of the Tribunal;

(c) to order that the Respondent has to pay all costs of the proceedings on jurisdiction, including the Tribunal’s fees and expenses and the costs of the Claimants’ legal representation, subject to interest;

and

(d) any such other relief as the Tribunal considers appropriate”.

110. In its Post-Hearing Brief, AAG repeated *verbatim* this prayer for relief<sup>16</sup>.

##### **2. RESPONDENT’S REQUEST FOR RELIEF**

111. Albania presented its Memorial on Objections to Jurisdiction, requesting the following relief from the Tribunal:

“117. In view of the above, Respondent respectfully requests the Tribunal to:

(a) DISMISS all Claimant’s claims in their entirety and with prejudice;

(b) ORDER any such other relief as the Tribunal considers appropriate; and

(c) ORDER Claimant to pay all of the costs and expenses associated with these proceedings, including Respondent’s legal fees, the fees and expenses of the Tribunal and ICSID’s other costs”.

112. Albania ended its Post-Hearing Brief reiterating the prayer for relief transcribed above<sup>17</sup>.

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<sup>16</sup> CPHB, para. 126.

<sup>17</sup> RPHB, para. 68.

## V. PARTIES' POSITIONS

### 1. SUMMARY OF RESPONDENT'S OBJECTIONS

113. Albania raises the following jurisdictional objections:

- Claimant has not established that it is a protected investor (**A.**)
- Claimant has not made a protected investment (**B.**)
- Claimant has not properly commenced this arbitration (**C.**)
- Claimant has committed an abuse of rights by bringing this arbitration (**D.**)

114. The following subsections summarize each of Respondent's objections.

#### A. Claimant has not established that it is a protected investor.

115. Albania argues that Claimant is not a protected investor as it did not exist at the time the dispute arose and thus could not have validly consented to this arbitration<sup>18</sup>.

116. An order from the Eastern Caribbean Supreme Court of the BVI<sup>19</sup> and the records of the Registrar of Corporate Affairs of the BVI<sup>20</sup> show that from October 31, 2011, to June 7, 2017, Claimant was a dissolved entity. On June 7, 2017, a BVI court re-registered Claimant and declared that its earlier dissolution was void, had no effect, and that Claimant "is deemed never to have been dissolved or struck off the register in accordance with the BVI Business Companies Act 2004 section 218(3)<sup>21</sup>".

117. Albania alleges that this fact has two consequences.

118. First, Art. 25 of the ICSID Convention demands that jurisdiction *ratione personae* exist on the date the dispute is submitted to arbitration<sup>22</sup>. Claimant must have legal personality and be validly incorporated under the law of its place of incorporation on the date the dispute is submitted to arbitration<sup>23</sup>.

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<sup>18</sup> RfB, paras. 29–36; R. Mem., paras. 16–34; R. Reply, paras. 65–84; and RPHB, paras. 12–17.

<sup>19</sup> R-025.

<sup>20</sup> R-028.

<sup>21</sup> R-025.

<sup>22</sup> See, e.g. *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, June 18, 2010 ["*Gustav F W*"], para. 95. Albania also cites to the following cases (RPHB, para. 14, fn. 30): *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, May 22, 2007 ["*Enron Creditors*"], paras. 197-198, 396; and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Jurisdiction, November 14, 2005 ["*Agua del Aconquija*"], paras. 60-61.

<sup>23</sup> R. Mem., paras. 21–25.

119. Second, Albanian law provides that only an entity with recognized legal personality is empowered to enter into an arbitration agreement, or accept an outstanding offer to arbitrate. Claimant has not established that it was a “legal person established in accordance with the law of a foreign country” on the date it submitted the RfA, as required by Arts. 1 and 8 LFI<sup>24</sup>.
120. Claimant assumingly consented to submit this dispute to arbitration on December 29, 2016, when it filed its RfA. At this time, Claimant was a dissolved company; therefore, its consent to this arbitration is non-existent and ineffective<sup>25</sup>. The subsequent revocation of Claimant’s dissolution may be effective under BVI law, but not under international law (the nationality requirement of Art. 25 of the ICSID Convention) and Albanian law (Arts. 1 and 8 LFI)<sup>26</sup>.
121. In conclusion, Claimant is not a protected investor and the Tribunal does not have jurisdiction to hear Claimant’s claims<sup>27</sup>.

**B. Claimant has not made a protected investment**

122. Albania argues that the Tribunal lacks jurisdiction because Claimant failed to make a protected investment in Albania under Art. 1 LFI.
123. Claimant alleges that it made a qualifying investment in Albania under Art. 1 LFI, namely:
- Its first investment is its beneficial ownership of 40% of the shares in the AAIF obtained *via* the Trust Deeds (Exhibits C-58 to C-61) entered into with all of the Foreign Shareholders<sup>28</sup>.
  - Its second investment is the USD 5.33 million that Claimant allegedly provided to the AAIF under an Ongoing Funding Agreement (Exhibit C-66).
124. Albania contends that both investments do not qualify as such under Art. 1 LFI.

First investment

125. As for the first investment (AAIF Shares), there is no protected investment for the following reasons:
126. First, Albania questions the authenticity of the evidence submitted by Claimant: the Trust Deeds<sup>29</sup>.

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<sup>24</sup> C-38, Arts. 1 and 8. See R. Mem., paras. 26–34.

<sup>25</sup> R. Reply, para. 74.

<sup>26</sup> R. Reply, paras. 80–84 and RPHB, para. 17.

<sup>27</sup> R. Reply, paras. 78, 80, 81, and 84.

<sup>28</sup> RfA, para. 27; Cl. Rej., paras. 20, 90, and 110; and CPHB, paras. 101 and 117.

<sup>29</sup> RPHB, para. 20.

127. Second, even if they were authentic, the Trust Deeds do not prove, on their face, AAG's ownership of the AAIF Shares, as Claimant itself has admitted<sup>30</sup>.
128. Third, the Trust Deeds cannot provide Claimant with any ownership over the AAIF Shares<sup>31</sup>, because Albanian law does not provide for the concept of a "trust"<sup>32</sup>.
129. Fourth, Claimant provided no consideration under the Trust Deeds in return for receiving beneficial ownership of the AAIF Shares. A claimant who "did not pay for his one share but rather 'received' it" cannot be considered to have made a "contribution"<sup>33</sup>, and in this case, a qualified investment under Art. 1 LFI.
130. Fifth, Claimant's alleged investment through ownership of the AAIF Shares would breach Art. 1(c) LFI, which restricts investment protection only to those investments that are carried out in conformity with the laws of Albania<sup>34</sup>. The alleged transfer of beneficial ownership from the Foreign Shareholders to Claimant was never registered or disclosed to the Albanian authorities, which constitutes a relevant breach of the "LIFd"<sup>35</sup>.

Second investment

131. As for the second investment (the USD 5.33 million that Claimant allegedly provided to the AAIF), Albania rejects that the Tribunal has jurisdiction for the following reasons:
132. First, Albania does not accept the authenticity of the evidence provided, a one-page document titled "Ongoing Funding Agreement" (C-66)<sup>36</sup>.
133. Second, Albania argues that this document does not prove that Claimant actually provided any money to the AAIF<sup>37</sup>.
134. Third, Claimant has not put forward any of its financial records (or those of the AAIF), which would have reflected the existence of the alleged payments<sup>38</sup>.

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<sup>30</sup> RPHB, para. 21, R. Reply, paras. 98–101, and RL-067.

<sup>31</sup> RPHB, paras. 28–29.

<sup>32</sup> RPHB, para. 29, R. Reply, para. 44.

<sup>33</sup> Albania cites to (RPHB, para. 49, fn. 96) *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Decision on Jurisdiction, September 27, 2012 ["*Quiborax*"] (RL-055), para. 232. See also *Phoenix Action Ltd v. Czech Republic* (ICSID Case No ARB/06/5) Award, April 15, 2009 ["*Phoenix Action Ltd.*"] (RL-005), para. 119; and *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8) Award, October 17, 2013 ["*KT Asia*"] (RL-071), paras. 200-203.

<sup>34</sup> C-38, Art 1(c). See also R. Mem., para. 54; R. Reply, para. 111, RPHB, paras. 29–36.

<sup>35</sup> RL-18, RPHB, paras. 29 and 30; R. Mem., para. 61; R. Reply, paras. 117, 123-24; R-030, p 1. RL-018, Art. 16.1 LIFd.

<sup>36</sup> RPHB, para. 38.

<sup>37</sup> RPHB, para. 39.

<sup>38</sup> RPHB, paras. 40 and 41. Transcript, July 17, 2018, 98:6-101:9, 190:1-4.

135. Fourth, witnesses testified at the Hearing that they did not remember whether Claimant provided any loans to the AAIF<sup>39</sup>.
136. Fifth, even assuming that Claimant did provide funding to the AAIF, such funds were used merely to cover development costs<sup>40</sup>. Any costs that Claimant may have incurred for creating the AAIF would not qualify as a protected investment<sup>41</sup>.
137. Sixth, at any rate, any funding would breach the LIFd<sup>42</sup>, which prohibits funds from borrowing money or taking loans of any kind. The funding would have thus constituted an illegal and unprotected investment<sup>43</sup>.
138. In conclusion, in Respondent's view, the Tribunal has no jurisdiction because Claimant has failed to prove the existence of its two alleged investments. In the alternative, Respondent maintains that both of the alleged investments were illegal and fall outside Albania's consent to arbitrate<sup>44</sup>.

**C. Claimant has not properly commenced this arbitration**

139. Albania argues that the Tribunal lacks jurisdiction because Claimant failed to comply with the requirement, under Art. 8(2) LFI, of making a good faith effort to reach an amicable agreement to their dispute before starting an ICSID arbitration<sup>45</sup>.
140. First, the language of Art. 8(2) LFI must be understood to require that foreign investors make a good faith effort to reach an amicable agreement to their dispute prior to submitting it to ICSID<sup>46</sup>. As explained in *Burlington Resources Inc.*, such requirement typically consists of

“inform[ing the State] that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal”<sup>47</sup>.

141. Second, Claimant has failed to provide any evidence that it satisfied this requirement<sup>48</sup>:

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<sup>39</sup> Transcript, July 18, 2018, 269:3-271:11; July 18, 2018, 311:18-24, 312:11-17; July 17, 2018, 155:22-24, 189:16-25; July 18, 2018, 276:17-21, 362:18-23.

<sup>40</sup> R. Mem., para. 78; R. Reply, para. 141.

<sup>41</sup> RPHB, paras. 42-44.

<sup>42</sup> RPHB, paras. 45-46.

<sup>43</sup> RL-018, Art.13.1. See also R. Reply, paras. 144-45.

<sup>44</sup> RPHB, paras. 37-41; R. Mem., paras. 70-80; and R. Reply, paras. 128-146. See *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No ARB/03/24) Award, August 27, 2008 [*“Plama Consortium”*] (RL-016), paras. 139-140.

<sup>45</sup> See RPHB, paras. 52 and 56.

<sup>46</sup> See RPHB, para. 52. See also, RfB, paras. 27 and 28; R. Mem., paras. 81-91; R. Reply, paras. 147-150.

<sup>47</sup> RL-036, para. 338. R. Mem., paras. 93-96 R. Reply, para. 156.

<sup>48</sup> See RPHB, paras. 53-56. See also, RfB 35-38; R. Mem., paras. 92-100; R. Reply, paras. 151-157.

- Claimant has not put forward any documentary evidence that it tried to settle this dispute, save for the testimony of Mr. Peter Goldscheider, who allegedly did so in very short and informal conversations with Albanian public officials<sup>49</sup>.
  - Any formal attempts of settlement were carried out after the arbitration was initiated, which cannot satisfy retroactively the procedural requirement under Art. 8(2) LFI<sup>50</sup>.
  - Even accepting Claimant's allegations, settlement negotiations would be carried out at a time when Claimant was dissolved and non-existing<sup>51</sup>.
142. For all these reasons, Claimant has not established that it properly commenced these arbitration proceedings.

**D. Claimant has committed an abuse of rights by bringing this arbitration.**

143. Albania submits that Claimant has engaged in an abuse of rights by seeking to artificially manufacture jurisdiction in this arbitration<sup>52</sup>.
144. According to the leading cases *Phoenix Action Ltd.*<sup>53</sup> and *Philip Morris Asia Limited*<sup>54</sup>, an abuse of rights typically arises where “an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute”<sup>55</sup>.
145. In light of the evidence submitted, this is what has happened in this case:
- Claimant was dissolved at the time this arbitration was initiated<sup>56</sup>.
  - Claimant has not shown that it has made any investment at all in Albania. In contrast, it is proved that the Albanian Government ordered that the vouchers be returned from the Savings Bank to the Albania vouchers holders<sup>57</sup>.
146. In summary, Claimant has violated the spirit of the ICSID Convention and investment law in general by trying to artificially create jurisdiction. Such attempt constitutes an abuse of rights<sup>58</sup>.

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<sup>49</sup> RPHB, paras. 53–56; R. Reply, para. 154; C-68 (Mr. Goldscheider's witness statement); Transcript, July 18, 2018, 376:9–24 to 378:2–22, 386:14–387:1; 383:1–14.

<sup>50</sup> R. Mem., para. 98–100 and R. Reply, para. 153; RPHB,

<sup>51</sup> R. Mem., paras. 97–99 and R. Reply, para. 155.

<sup>52</sup> See RPHB, paras. 57–67. See also, RfB, paras. 29–36; R. Mem., paras. 101–116; R. Reply, paras. 158–167.

<sup>53</sup> RL-005.

<sup>54</sup> RL-075.

<sup>55</sup> RL-075, para. 539.

<sup>56</sup> R. Reply, paras. 72–84, R-028, and R-025.

<sup>57</sup> RPHB, paras. 66 and 67; C-7, Art. 137; and Transcript, July 18, 2018, 302:5–25.

<sup>58</sup> R. Mem., para. 114.

**2. SUMMARY OF CLAIMANT'S REPLY TO OBJECTIONS**

147. Claimant replies that the Tribunal has jurisdiction over its claims and requests the Tribunal to dismiss all objections raised by Albania<sup>59</sup> for the following reasons:

- Claimant is a qualifying investor (**A.**)
- Claimant has made a protected investment (**B.**)
- Claimant has properly commenced this arbitration (**C.**)
- Claimant has not committed any abuse of rights (**D.**)

148. The following subsections summarize each of Claimant's replies to Respondent's objections.

**A. Claimant is a qualifying investor**

149. Claimant argues that it legally exists and is validly incorporated under the laws of British Virgin Islands and satisfied all of these requirements on the date the parties consented to submit this dispute to arbitration, *i.e.* December 29, 2016. Therefore, according to Claimant, it is a qualifying investor that meets the conditions of Art. 25 of the ICSID Convention as well as the other legal requirements under Albanian law<sup>60</sup>.

150. According to Claimant, the jurisdictional *ratione personae* element is based on the legal existence of a company validated according to the laws of the State of its incorporation. The laws of the BVI acknowledge Claimant's continuous legal personality and valid incorporation from January 17, 1996 to date. The order of Eastern Caribbean Supreme Court (BVI)<sup>61</sup> and the records of the Registrar of Corporate Affairs of the BVI<sup>62</sup> show that Claimant was in legal existence and good standing as of December 29, 2016, pursuant to Section 218B (6) BVI Business Companies Act 2004. Claimant is deemed to have never been dissolved or struck off the register<sup>63</sup>.

151. Claimant contends that Albania is wrong when it asserts that Claimant was not a legal person established in accordance with the law of a foreign country for the purposes of Arts. 1 and 8 of the LFI. Claimant maintains that as of December 29, 2016, it has been in legal existence and good standing<sup>64</sup>.

152. In conclusion, in Claimant's view, with its RfA dated December 29, 2016, Claimant confirmed its legal existence and validly consented to this arbitration. Therefore, the Tribunal has jurisdiction *ratione personae* to hear Claimant's claims.

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<sup>59</sup> CPHB, para. 14.

<sup>60</sup> ORfB, paras. 42 and 43; Cl. CM, paras. 19–31; Cl. Rej., paras. 46–54; and CPHB, paras. 55–65.

<sup>61</sup> R-025.

<sup>62</sup> R-028.

<sup>63</sup> CPHB, paras. 57–59, and 62.

<sup>64</sup> CPHB, para. 64; Cl. Rej., para. 51

**B. Claimant has made a protected investment**

153. Claimant alleges that it made a qualifying investment in Albania under Art. 1 LFI, namely:

- Its first investment is AAG's beneficial ownership of 40% of the shares in the AAIF (and therefore the vouchers held by the AAIF) obtained *via* the Trust Deeds (Exhibits C-58 to C-61) entered into with all of the Founding Shareholders except Mr. Pirro Kushi<sup>65</sup>.
- Its second investment is the USD 5.33 million that Claimant provided to the AAIF under an Ongoing Funding Agreement (C-66).

First investment

154. As for the first investment, AAG claims to have made a qualifying investment in Albania under Art. 1 LFI because all the Foreign Shareholders held the shares on trust for AAG<sup>66</sup>. AAG makes the following arguments:

155. First, regarding the authenticity of the Trust Deeds, the witnesses confirmed at the Hearing that they had indeed signed the respective Trust Deeds<sup>67</sup>.

156. Second, although AAG admits there was a mishap in the drafting of the Trust Deeds, this mistake is legally irrelevant. The written trust agreements have to be interpreted in accordance with the intention of the parties involved<sup>68</sup>, which was to establish a trust relationship. The Foreign Shareholders had intended to hold their shares in trust for AAG, which was meant to be the beneficiary of the trust<sup>69</sup>.

157. Third, Claimant has never violated the principles of legality and good faith<sup>70</sup>:

- AAG's ownership *via* Trust Deeds does not constitute a fact that should be entered in the official registry<sup>71</sup>. Upon conclusion of the Trust Deeds, the legal title in the shares in the AAIF remained with each of the Founding Shareholders: since no transfer occurred, there was no obligation to disclose Claimant's beneficial ownership in its AAIF Shares<sup>72</sup>.

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<sup>65</sup> RfA, para. 27; Cl. Rej., paras. 20, 90, and 110; and CPHB, paras. 101 and 117.

<sup>66</sup> Cl. CM, paras. 35, 49; Transcript, July 17, 2018, 71:24-72:6; 73:7-14.

<sup>67</sup> Transcript, July 17, 2018, 169:21; 170:14; July 18, 2018, 357:24-25.

<sup>68</sup> CPHB, para. 69.

<sup>69</sup> CPHB, para. 69.

<sup>70</sup> Cl. Rej., paras. 65 *et seq.* and CPHB, paras. 75-79.

<sup>71</sup> Cl. Rej., para. 63; CPHB, para. 71.

<sup>72</sup> CPHB, para. 72.

- In the alternative, the obligation to register the share transfer pursuant to Art. 6.4(a) LIFd were obligations of the AAIF, not Claimant's<sup>73</sup>.
- At any rate, Albania was aware of Claimant's ownership of shares<sup>74</sup>.

Second investment

158. Claimant made a second qualifying investment in Albania under Art. 1 LFI. From 1994 to 2000 Claimant provided USD 5.33 million in loans to the AAIF<sup>75</sup>. Such funding constitutes a protected investment<sup>76</sup>:
159. First, AAG made substantial investments in the territory of Albania by funding AAIF's operating expenses, such as:
- establishment of the voucher collection centers,
  - advertisements related to the collection process,
  - employment of Albanian staff, and
  - payments to third parties, which provided the premises for the collection centers<sup>77</sup>.
160. Second, Claimant has submitted the Ongoing Funding Agreement (C-66) and a calculation of current value of Claimant's frustrated operating expenses (C-35). Both documents show that operating expenses amounting to USD 5.33 million have been paid by Claimant to the AAIF. In addition, witnesses at the Hearing testified consistently that Claimant contributed operation expenses in the AAIF<sup>78</sup>. Both Claimant and the AAIF kept some form of balance sheets or other financial records<sup>79</sup>. The fact that Respondent's expert could not find evidence for the actual payment of the operating costs does not mean that they did not exist at the time<sup>80</sup>.
161. Third, the operating expenses were paid on the basis of the Ongoing Funding Agreement, but without the obligation of full repayment. Thus, the operating expenses constitute a right arising out of a contract and therefore a protected investment in accordance with Art. 1 LFI<sup>81</sup>.

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<sup>73</sup> RL-18, Article 6.4(a), last sentence: "The investment funds, shortly thereafter registers such transfer within the next 10 days." CPHB, paras. 77-79, and Cl. Rej., paras. 69-78, Cl. CM, paras. 55 and 61.

<sup>74</sup> Cl. Rej., para. 64; CPHB, para. 71.

<sup>75</sup> RfA, paras. 140 and 220; Cl. Mem., paras. 77 and 169; Cl. CM, paras. 64-68; Cl. Rej., paras. 74-90.

<sup>76</sup> CPHB, paras. 80-101 and Cl. Rej., paras. 74 *et seq.*

<sup>77</sup> CPHB, para. 98.

<sup>78</sup> CPHB, para. 85; RfA, para. 140 and Cl. Rej., para. 82.

<sup>79</sup> Transcript, July 17, 2018, 99:21-100:5, 100:18-101:7, 190:5-25.

<sup>80</sup> Barton Report, 2.2.5 and Transcript, July 19, 2018, 404:13 *et seq.*

<sup>81</sup> R-1 and C-66. CPHB, para. 94 and Cl. CM, paras. 7 and 67.

162. Fourth, in any case, assuming that the operating costs constitute a loan, the law currently in force (Law No. 10198 on Collective Investment Undertakings<sup>82</sup>) does not contain the old prohibition to take loans<sup>83</sup>.
163. For all these reasons, the Tribunal has jurisdiction because AAG made two valid investments under Art. 1 LFI.

**C. Claimant has properly commenced this arbitration.**

164. Claimant submits that this arbitration has been validly commenced, as there is no mandatory precondition under Art. 8(2) LFI that investors must try to reach a settlement before submitting the case to the ICSID<sup>84</sup>.
165. First, nothing in the language of Art. 8(2) LFI serves as basis to establish a mandatory duty or precondition to try to reach a settlement before bringing an arbitration against Albania<sup>85</sup>. The statute clearly states that a foreign investor may submit any unsettled dispute to ICSID. There is no hint of a preliminary duty to carry out settlement negotiations<sup>86</sup>.
166. Second, Claimant has in any case proven that it tried to reach an amicable settlement before starting this arbitration<sup>87</sup>:
- Claimant was not dissolved at the time of the pre-arbitration negotiations and was therefore able to be represented by agents<sup>88</sup>.
  - In fact, Mr. Gentian Sule and Mr. Peter Goldscheider acted as Claimant's valid representatives in the attempts to settle the dispute<sup>89</sup>. They tried several times to reach an amicable solution with Albania during the years leading to the commencement of this arbitration<sup>90</sup> as Mr. Peter Goldscheider's testimony at the Hearing makes clear<sup>91</sup>. They held some meetings with Albanian public officials, to whom they explained the pending dispute and the merits of Claimant's complaints<sup>92</sup>.

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<sup>82</sup> C-7, Law No. 10198 of the Republic of Albania "On Collective Investment Undertakings", Art 137.2.

<sup>83</sup> C-7, Art.137 and RL-018, Art. 13.1.

<sup>84</sup> CPHB, para. 102.

<sup>85</sup> See Cl. CM, para. 72. See also ORfB, paras. 29–34; Cl. CM, paras. 69–72; Cl. Rej., paras. 91–95; and CPHB, para. 102.

<sup>86</sup> ORfB, para. 34.

<sup>87</sup> See RfA, paras. 226–229; ORfB, paras. 35–38; Cl. CM, paras. 73–87; Cl. Rej., paras. 96–105; and CPHB, paras. 103–113.

<sup>88</sup> CPHB, para. 110; Cl. Rej., para. 101.

<sup>89</sup> Cl. CM, para. 87 and Cl. Rej., para. 100.

<sup>90</sup> CPHB, para. 112; Cl. Rej., paras. 102 to 104.

<sup>91</sup> Transcript, July 18, 2018, 372:17 *et seq.*; 376:11-12; and 383:1 *et seq.*

<sup>92</sup> Cl. CM, para. 83. For a detailed account of the attempts, please refer to Cl. CM, paras. 74–84.

- Albania however chose to dismiss or ignore their several requests for official settlement talks<sup>93</sup>.

167. In conclusion, Claimant validly commenced this arbitration<sup>94</sup>.

**D. Claimant has not committed any abuse of rights**

168. Claimant says that it has not created jurisdiction artificially<sup>95</sup>. Nor has Claimant ever performed any act or omission constituting an abuse of rights<sup>96</sup>.

169. First, the facts in this arbitration are different from the facts in *Phoenix Action Ltd.*, whose conclusions are not applicable to this case<sup>97</sup>. The tribunal in *Phoenix* dismissed the claim because the investment was not made for the purpose of engaging in economic activity but to submit a pre-existing dispute to ICSID. In this arbitration, however, Claimant has shown that the investment was made for the purpose of engaging in economic activities<sup>98</sup>.

170. Second, Claimant did not carry out any corporate restructuring and has never hidden the fact that it did not directly hold the shares in the AAIF<sup>99</sup>. Besides, the special purpose vehicle and the trust relationships involved in this arbitration are not unusual in international investment transactions and do not amount to any legal violation<sup>100</sup>. As explained in *Libananco*,

“The Respondent bases its request on the claim that the Claimant [...] is a shell company without assets of its own. [...] [F]ar from this being an unusual exception, it is in practice closer to the norm that the entity appearing as an ICSID Claimant is an investment vehicle created or adapted specially for the purpose of the investment transaction that has in the meanwhile become the subject of the dispute”<sup>101</sup>.

171. Finally, Claimant has never breached Albanian law, withheld information about its investment or acted *mala fide*. On the contrary, Claimant has always complied with legal and regulatory obligations under Albanian law and the ICSID Convention<sup>102</sup>. Claimant wishes to enforce its right to obtain damages due to Albania’s expropriation of its investment<sup>103</sup>. This arbitration is the last option for Claimant to enforce its rightful claim<sup>104</sup>.

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<sup>93</sup> CPHB, para. 107 and Cl. Rej., para. 104.

<sup>94</sup> Cl. Rej., para. 105.

<sup>95</sup> Cl. Rej., para. 108.

<sup>96</sup> See CPHB, para. 115. See also CPHB, paras. 114–120; Cl. CM, paras. 88–98; and Cl. Rej., paras. 106–114.

<sup>97</sup> Cl. Rej., para. 108.

<sup>98</sup> Cl. CM, para. 94.

<sup>99</sup> Cl. Rej., para. 110; CPHB, para. 117.

<sup>100</sup> Cl. CM, para. 97.

<sup>101</sup> CL-6, paras. 58 and 59.

<sup>102</sup> CPHB, paras. 115 and 116.

<sup>103</sup> Cl. Rej., para. 11

<sup>104</sup> CPHB, para. 118.

## VI. DISCUSSION

172. Albania alleges that the Tribunal lacks jurisdiction on the following four grounds:
- (i) Claimant has not established that it is a protected investor;
  - (ii) Claimant has not made a protected investment;
  - (iii) Claimant has not properly commenced this arbitration; and
  - (iv) Claimant has committed an abuse of rights by bringing this arbitration.
173. Claimant alleges that the Tribunal has jurisdiction to hear its claims because:
- (i) Claimant is a qualifying investor
  - (ii) Claimant has made a protected investment;
  - (iii) Claimant has properly commenced this arbitration;
  - (iv) Claimant has not committed any abuse of rights.
174. In this section the Tribunal considers the second objection only. This second objection deals with Claimant's allegation that it made a qualifying investment in Albania under Art. 1 LFI. Claimant argues that it holds two protected investments in Albania:
- The beneficial ownership of 50% of the shares in the AAIF, acquired *via* the Trust Deeds entered into with the Foreign Shareholders<sup>105</sup>; and
  - USD 5,334,133, which Claimant allegedly provided to the AAIF under an Ongoing Funding Agreement.
175. Albania's position is that Claimant has failed to prove that either of these investments were ever made. In the alternative, Albania maintains that neither constitutes a protected investment, because the investments were not carried out in accordance with Albanian law<sup>106</sup>.
176. In the following subsections, the Tribunal first explains the relevant legal rules and the applicable law **(1.)** and then examines the two alleged investments: Claimant's beneficial ownership of the Foreign Shares in the AAIF **(2.)** and the funding to the AAIF allegedly made by Claimant **(3.)**. After examining the arguments and the evidence submitted, the Tribunal will conclude that under Art. 1 LFI Claimant has not proven ownership of any protected investment in Albania, and consequently that the Centre lacks jurisdiction and the Tribunal competence to adjudicate this dispute **(4.)**.
177. The Tribunal's findings as to the second objection render the remainder of Respondent's objections – valid existence of the investor, commencement of the arbitration and abuse of rights – moot and, as a result, the Tribunal will not address them.

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<sup>105</sup> RfA, para. 27; Cl. Rej., paras. 20, 90, and 110; and CPHB, paras. 101 and 117.

<sup>106</sup> RPHB, para. 19.

1. **RELEVANT LEGAL RULES**

178. According to Art. 25(1) ICSID Convention, the jurisdiction of the Centre extends to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre:

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

179. Claimant is a company incorporated and operating under the laws of the British Virgin Islands. Its written consent was explicitly included in para. 47 of its Notice of Arbitration, filed with ICSID on December 20, 2016.

180. The consent of the Republic of Albania is formalized in domestic law, and more specifically in the LFI (*pro memoria*: the Law on Foreign Investment, explained in paras. 6 and 77 above).

181. Art. 8.2 LFI provides that foreign investors may submit their claims against Albania for compensation for expropriation or discrimination to ICSID arbitration, in accordance with the ICSID Convention. The relevant provision provides:

**“Article No. 8. Dispute settlement.**

1. If a dispute arises between a foreign investor and an Albanian private party or an Albanian state enterprise or company, which has not been settled through an agreement, the foreign investor may choose to settle the dispute according to any kind of previously agreed upon and applied procedures. If there is no procedure foreseen for the settlement of disputes, then the foreign investor has the right to submit the dispute for resolution to a competent court or arbitrator of the Republic of Albania, according to its laws.

2. **If a dispute arises between a foreign investor and the Albanian public administration**, which has not been settled through an agreement, the foreign investor may submit the dispute for resolution to a competent court or arbitrator of the Republic of Albania, according to its laws. **If the dispute relates to expropriation, compensation for expropriation or discrimination, as well as to transfers as provided in article 7 of this law, the foreign investor may submit the dispute for resolution to the International Center for Settlement of Investment Disputes (“Center”), established by the Convention for the settlement of investment disputes between the states and citizens of other states, approved in Washington, on 18 March 1965”.** [Emphasis added]

182. Art. 1 LFI also provides the statutory definitions of “foreign investor” and “foreign investment”:

- According to Art. 1(2) LFI, the term “foreign investor” means every physical person that is a citizen of a foreign country, and every legal entity founded according to the laws of a foreign country that has carried out investments in Albania;
- The same provision requires that foreign investors must carry out an investment in the territory of the Republic of Albania in conformity with its laws;
- Further, Art. 1(3) LFI defines the term “foreign investment” as any kind of investment in the territory of Albania, performed directly or indirectly by a foreign investor, and then provides a list of examples, which includes shares in and loans to companies.

183. The language of Art. 1 LFI reads as follows:

**“Article No. 1. General provisions.**

For the purpose of this law, “territory” means the territory under the sovereignty of the Republic of Albania, including territorial waters, maritime zones and continental shelf, over which the Republic of Albania, in accordance with international norms, exercises its legal and sovereign rights.

**“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; or
- 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.

**“Foreign investment”** means any kind of investment in the territory of the Republic of Albania, performed directly or indirectly by a foreign investor that consists of:

- a) movable or immovable, tangible or intangible assets, or any other kind of ownership;
- b) a company, rights that derive from any kind of participation in a company, shares, etc;
- c) loans, monetary obligations or obligations in an activity of an economic value and related to an investment;

c) intellectual property, including literature and artistic, scientific and technological products, audio recording, inventions, industrial designs, schemes of integrated circuits, know how, trademarks, designs of trademarks and trade names;

d) every right recognized by law or contracts and every license or permission issued in accordance with the laws.

**“Dispute over a foreign investment”** means every disagreement or presumption caused by a foreign investment or related to it”. [Emphasis added]

#### Other applicable laws

184. Apart from the LFI, the LIFd (*pro memoria*, the Law No. 7979 on Investment Funds, of July 26, 1995, explained in para. 84 above) is relevant to this case<sup>107</sup>. The LIFd was in force from the mid-90s until the adoption of the Law No. 10198 on Collective Investment Undertakings of December 10, 2009<sup>108</sup>. The LIFd used to govern the establishment, activity, and public supervision of investment funds<sup>109</sup>.
185. Art. 6.4 LIFd further provided that all rights in fund shares had to be held by registered shareholders<sup>110</sup>. The law also required that the transfer of any shares had to be registered with the Albanian authorities within ten days<sup>111</sup>:

#### **“IV. SHARE CAPITAL IN THE INVESTMENT FUND.**

[...]

**6.4. All the shares in an investment fund must be registered** and are freely [sic] transferable.

**a) When an investment fund is not registered in a licensed stock exchange of the securities, the person transferring the share** and the one receiving it shall conclude an agreement to evidence the transfer, a copy of which is delivered to the investment fund. **The investment funds, shortly thereafter registers such transfer within the next 10 days** [sic].

b) When an investment fund is registered on a licensed stock exchange, the transfer is carried out in accordance with the rules and procedures provided in the stock exchange”. [Emphasis added]

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<sup>107</sup> RL-018.

<sup>108</sup> C-7, Law No. 10198 of the Republic of Albania “On Collective Investment Undertakings”.

<sup>109</sup> Art. 1 of the LIFd (RL-018).

<sup>110</sup> RL-18, RPHB, para. 29: “2.2. ‘Share’ is the determined share of ownership in the investment fund capital. The shareholder has the right to proportionally benefit his share in the profits of the company and to participate in the management of the company in accordance with the incorporation agreement, which also determines the manner of the transfer of the shares (transfer of ownership)”.

<sup>111</sup> RL-018.

186. Under Art. 16.1 LIFd, the identity of the shareholders had to be reported every quarter:

**“16.1. The investment fund shall, not later than 60 days from the end of each quarterly period, publish in a nationally known newspaper and submit to the regulatory authority the financial balance, which shall contain:**

- A list of the investment containing the issue, the number and the type of shares at the end of a quarterly period.

- [...]

**- The identity and the percentage owned by 10 of the largest shareholders of the investment fund.**

- [...]”. [Emphasis added]

187. Finally, Art. 13.1 LIFd prevented investment funds from carrying out certain financial operations, *inter alia*, “to borrow money or to take loans of any kind”:

**“13.1. An investment fund is not entitled to perform the following actions:**

- To invest more than 10 percent of its net assets in the shares of a sole entity.

- To invest in shares issued by other investment funds.

- To invest in any entity owning more than 5 percent of fund’s shares.

- To accept to sell shares that it doesn’t own.

**- To borrow money or take loans of any kind.**

- To grant guarantees or promises of any kind.

- To have ownership or debt interests to its directors and its depositor, its accounting expert”. [Emphasis added]

## **2. FIRST ALLEGED INVESTMENT: CLAIMANT’S OWNERSHIP OF SHARES IN THE AAIF**

188. AAG claims to have made a protected investment in Albania under Art. 1 LFI, arguing that the Foreign Shareholders transferred beneficial ownership of the Foreign Shares (equivalent to 50% of AAIF’s share capital) to AAG and held the Foreign Shares in trust for the benefit of AAG<sup>112</sup>.

189. To prove this investment arrangement, Claimant has provided four Trust Deeds dated October/November 1996. Each Trust Deed presents similar language, provisions and content. In each Trust Deed Claimant appears both as the settlor and the beneficiary.

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<sup>112</sup> Cl. CM, paras. 35 and 49; Cl. Rej., para. 56. See also Transcript, July 17, 2018, 71:24-72:6; 73:7-14.

Only the identity of the trustee changes: each Trust Deed has one Foreign Shareholder as trustee<sup>113</sup>.

190. The *corpus* of the trust is described in each Trust Deed as a number of shares in the AAIF (80 shares held by Mr. Declan J. Ganley in trust for AAG<sup>114</sup>; 20 shares held by Mr. Don De Marino<sup>115</sup>; 80 shares held by Mr. Michael P. Beck<sup>116</sup>; and 20 shares held by Mr. Stephen Murphy<sup>117</sup>), which have been defined above as the Foreign Shares (see section III.3 above).
191. In the next subsections, the Tribunal summarizes Albania's position (**A.**) and Claimant's position (**B.**), and then concludes that Claimant has not made a qualifying investment under Arts. 1 and 8 LFI (**C.**).

**A. Albania's position**

192. Albania objects to the authenticity, validity, and legal effects of the alleged trust arrangements, on the following grounds.
193. First, Albania questions the authenticity of the Trust Deeds<sup>118</sup>.
194. Second, the Trust Deeds, on their face, do not prove AAG's ownership of the AAIF Shares for the following reasons:
- Albania admits that under English trust law it is possible for the settlor to also serve as the beneficiary<sup>119</sup>.
  - However, in order to create a valid trust, the settlor (as the creator of the trust) must have title to the property it is purporting to place into the trust: one cannot give away what one does not have (*nemo dat quod non habet*)<sup>120</sup>.
  - In this case, the trusts' settlors are not the Foreign Shareholders – as one would have expected – but AAG; the Trust Deeds do not prove how AAG came to be the owner of the AAIF Shares; nor does any other document in the record.
  - Claimant itself admitted the flaws of the Trust Deeds and accepted at the Hearing that “the settlor has been wrongly defined”<sup>121</sup>; counsel further explained:

“It is true that Anglo Adriatic Group Ltd, the Claimant, is mentioned as the settlor in such agreement. This might have been due to an error of then counsel of Declan

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<sup>113</sup> C-58 to C-61.

<sup>114</sup> C-58.

<sup>115</sup> C-59.

<sup>116</sup> C-60.

<sup>117</sup> C-61.

<sup>118</sup> RPHB, para. 20.

<sup>119</sup> RPHB, para. 21.

<sup>120</sup> RPHB, para. 21, R. Reply, paras. 98–101, and RL-067.

<sup>121</sup> Transcript, July 17, 2018, 72:7-18.

Ganley, Don De Marino, Stephen Murphy, Michael Beck and the Claimant. We simply do not know how that slip-up was produced or what led to such slip-up”<sup>122</sup>.

195. Third, as a matter of Albanian law, the Trust Deeds do not provide Claimant with any ownership over the AAIF Shares<sup>123</sup>, because

- the Albanian Civil Code does not provide for the concept of a “trust”, a notion that is foreign to Albanian law<sup>124</sup> and because
- Albania is not a party to the Convention of July 1, 1985, on the Law Applicable to Trusts and on their Recognition; thus, there is no automatic recognition or enforcement of foreign trusts under Albanian law<sup>125</sup>.

196. Fourth, only investments made in accordance with Albanian law can enjoy the legal protection granted under Art. 1 LFI<sup>126</sup>. Disputes arising out of an illegal investment fall outside the scope of Albania’s consent to arbitrate<sup>127</sup>. Claimant’s alleged investment in the AAIF Shares is not legal for the following reasons:

- Art. 1(c) LFI restricts investment protection only to investments that are “carried out [...] in conformity with” the laws of Albania<sup>128</sup>.
- Arts. 2.2 and 6.4 LIFd provided that all rights in the shares of a fund must be held by the registered shareholders of these shares<sup>129</sup>; the law further required that the

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<sup>122</sup> Transcript, July 17, 2018, 105:8-14.

<sup>123</sup> RPHB, paras. 28–29.

<sup>124</sup> RPHB, para. 29, R. Reply, para. 44.

<sup>125</sup> RPHB, para. 29.

<sup>126</sup> RPHB, paras. 29–36, fn. 56, citing to *Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania* (ICSID Case No ARB/11/24) Award, March 30, 2015 [*“Mamidoil Jetoil”*], para. 359 (“States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments [and] cannot be expected to have agreed to extend that mechanism to investments that violate their laws”); *Gustav F W*, para. 123.

<sup>127</sup> See *Plama Consortium* (RL-016), paras. 139-140 (Where the focus of the tribunal’s analysis is the *investment* rather than the *investor*: “the ECT cannot apply to investments that are made contrary to law” and “the investment in this case violates not only Bulgarian law ...” (emphasis added)).

<sup>128</sup> C-38, Art 1(c). See also R. Mem., para. 54; R. Reply, para. 111, RPHB, para. 30. “‘Foreign investor’ means: [...] 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” (emphasis added).

<sup>129</sup> RL-18, RPHB, para. 29. “2.2. ‘Share’ is the determined share of ownership in the investment fund capital. The shareholder has the right to proportionally benefit his share in the profits of the company and to participate in the management of the company in accordance with the incorporation agreement, which also determines the manner of the transfer of the shares (transfer of ownership).”

“6.4 All the shares in an investment fund must be registered and are feely [sic] transferable.

a) When an investment fund is not registered in a licensed stock exchange of the securities, the person transferring the share and the one receiving it shall conclude an agreement to evidence the transfer, a copy of

transfer of any shares in the AAIF had to be registered with the Albanian authorities within 10 days; the identity of the shareholders had to be reported on an ongoing basis every quarter (Arts. 6.4(a) and 16.1 LIFd<sup>130</sup>).

- Despite these provisions, the alleged transfer of beneficial ownership from the Foreign Shareholders to Claimant was never registered or disclosed to the Albanian authorities, in violation of Albanian law<sup>131</sup>.

197. Fifth, even if the Trust Deeds were correctly made and ownership was transferred to Claimant, the fact remains that Claimant provided no consideration under the Trust Deeds in return for receiving beneficial ownership of shares in the AAIF. As noted in the *Quiborax* case, a claimant who “did not pay for his one share but rather ‘received’ it” cannot be considered to have made a “contribution”<sup>132</sup>.

## **B. Claimant’s position**

198. Claimant replies that the Trust Deeds are authentic, enforceable and serve as basis to establish Claimant’s beneficial ownership of the AAIF Shares, for the following reasons<sup>133</sup>.

199. First, Respondent has failed to raise any serious doubts about the authenticity of the Trust Deeds<sup>134</sup>. To the contrary:

- at the Hearing, the witnesses confirmed that they had signed the Trust Deeds. Since the signing took place 22 years ago, it is understandable that the witnesses could not fully recollect the exact location and circumstances<sup>135</sup>.
- The fact that the Trust Deeds are now only available in digital form does not make them suspicious. Mr. Gary Hunter – as the person responsible for keeping the files of AAG and the AAIF in Albania – testified at the Hearing that he was not able to save all the paper documentation during his emergency evacuation from the country, following the clash of the civil war in 1997<sup>136</sup>.

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which is delivered to the investment fund. The investment funds, shortly thereafter registers [sic] such transfer within the next 10 days.

b) When an investment fund is registered on a licensed stock exchange, the transfer is carried out in accordance with the rules and procedures provided in the stock exchange”.

<sup>130</sup> RL-018.

<sup>131</sup> RPHB, para. 30; R. Mem., para. 61; R. Reply, paras. 117, 123-24; R-030, p 1.

<sup>132</sup> *Quiborax* (RL-55), para. 232. Albania also cites (RPHB, para. 49, fn. 96) to *Phoenix Action Ltd.* (RL-005), para. 119; *KT Asia* (RL-071), paras. 200-203.

<sup>133</sup> CPHB, paras. 42–52 and 66–79.

<sup>134</sup> CPHB, paras. 42–52 and Exhs. C-58 to C-61.

<sup>135</sup> Transcript, July 17, 2018, 169:21; 170:14; 357:24-25.

<sup>136</sup> Transcript, July 17, 2018, 155:10 *et seq.*; 156:21 *et seq.*; and 157:8 *et seq.*; 171:17 *et seq.*; 158:1 *et seq.*; and 168:15 *et seq.*

200. Second, under English law, the Foreign Shareholders may hold their shares in the AAIF in trust for Claimant and provide Claimant with beneficial ownership of the AAIF Shares<sup>137</sup>. Admittedly, there was a mishap in the drafting of the Trust Deeds. Counsel for the Foreign Shareholders at the time misstated the “settlor” in the instruments. But this mistake is legally irrelevant. The written trust agreements have to be interpreted in accordance with the intention of the parties involved<sup>138</sup>. It has always been the clear intention of the parties to establish a trust relationship, in which the Foreign Shareholders hold their shares in trust for the benefit of Claimant<sup>139</sup>. At the Hearing, Mr. Declan Ganley, Mr. Gary Hunter and Mr. Don DeMarino all confirmed that they held (and still hold) their shares in trust for AAG<sup>140</sup>. Therefore, the Trust Deeds are valid and enforceable<sup>141</sup>.
201. [*Albania replies as follows*<sup>142</sup>:
- *The language of executed trusts is governed by strict rules of construction and the statement that a defective trust deed can be saved by reference to the alleged subjective intent of the parties is not correct under English law.*
  - *There is no testimony from Mr. Ganley or any of the other signatories to the Trust Deeds supporting AAG’s speculation as to what they understood or intended.*
  - *None of the witnesses provided any information as to the creation of any oral trust, whose legality is doubtful and unproven.]*
202. Third, Claimant has never violated the principles of legality and good faith<sup>143</sup>:
- Claimant’s beneficial ownership *via* the Trust Deeds does not constitute a fact that should be entered in the registry<sup>144</sup>. Upon conclusion of the Trust Deeds, the legal title in the shares in the AAIF remained with each Founding Shareholder and no transfer occurred. Thus, neither Claimant, nor Declan Ganley or the AAIF would have been obliged under any provision of Albanian law to disclose Claimant’s beneficial ownership of the shares in the AAIF. Accordingly, neither Claimant nor the AAIF violated any publication provision under the LIFd<sup>145</sup>.
  - Even if Claimant’s interest in the Shares should have been entered in the trade registry, the obligation to register the share transfer pursuant to Art. 6.4(a) LIFd lay

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<sup>137</sup> CPHB, para. 66, Cl. Rej., paras. 56 and 57.

<sup>138</sup> CPHB, para. 69.

<sup>139</sup> Cl. Rej., para. 56. See also, Cl. CM, paras. 35 and 49; and Transcript, July 17, 2018, 71:24-72:6; 73:7-14.

<sup>140</sup> CPHB, para. 69.

<sup>141</sup> CPHB, para. 69.

<sup>142</sup> RPHB, paras. 22–27.

<sup>143</sup> Cl. Rej., para. 65 *et seq.* and CPHB, paras. 75–79.

<sup>144</sup> Cl. Rej., para. 63; CPHB, para. 71.

<sup>145</sup> CPHB, para. 72.

with the AAIF alone<sup>146</sup>. Claimant cannot be held liable for the compliance of the AAIF with the relevant Albanian laws and regulations<sup>147</sup>.

- At any rate, Albania cannot pretend that it was not aware of Claimant's ownership of shares<sup>148</sup>.

203. [Albania replies that this defense is not valid, mainly for the following reasons<sup>149</sup>:

- What actually matters is that the investment was not carried out in accordance with Albanian law. It is irrelevant who had to fulfill the legal requirements<sup>150</sup>.
- Previous tribunals have recognized that investors have the direct obligation to carry out "due diligence", which includes "assur[ing] themselves that their investments comply with the law". Hence, Claimant's failure to make sure its investment complied with the applicable Albanian law constitutes a bar to the Tribunal's jurisdiction<sup>151</sup>.]

204. In conclusion, Claimant alleges that it has not violated any principle of legality and good faith. Its ownership in the shares in the AAIF does constitute a protected investment.

### C. Tribunal's analysis

205. AAG claims to have made a qualifying investment in Albania under Art. 1 LFI, alleging that the Founding Shareholders held the AAIF Foreign Shares in trust for AAG. Albania disagrees.

206. The Tribunal sides with Albania for the following reasons.

207. For the Tribunal to have jurisdiction, Arts. 1 and 8 LFI require the fulfillment of three requirements: existence of a protected investment (**a.**); existence of a protected investor, who acts as claimant in the arbitration (**b.**); and that the claimant is the owner or titleholder of the protected investment (**c.**).

208. In assessing these jurisdictional requirements, the burden of proof lies with Claimant. As pointed out in *Phoenix*,

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<sup>146</sup> RL-18, Article 6.4(a), last sentence: "The investment funds, shortly thereafter registers [sic] such transfer within the next 10 days."

<sup>147</sup> CPHB, paras. 77–79, and Cl. Rej., paras. 69–78, Cl. CM, paras. 55 and 61,

<sup>148</sup> Cl. Rej., para. 64; CPHB, para. 71.

<sup>149</sup> RPHB, paras. 32–36.

<sup>150</sup> RPHB, para. 32.

<sup>151</sup> RPHB, para. 33, citing to *Alasdair Ross Anderson et al v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3) Award, May 19, 2010 ["*Alasdair Ross*"], para. 58; and *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40) Award, December 6, 2016 ["*Churchill Mining*"], para. 506 ("The scope of the due diligence [...] includes ensuring that a proposed investment complies with local laws").

“[I]f jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage”<sup>152</sup>.

Albania has also correctly noted that, in any ICSID arbitration,

“[a]t the jurisdictional stage, the Claimant must establish [...] that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements<sup>153</sup>”.

209. ICSID Arbitration Rule 34(1) grants the Tribunal wide discretion in assessing the evidence:

“The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value”.

210. Thus, after considering the evidence submitted in this case, the Tribunal concludes that AAG has not proved the third requirement: that Claimant is the owner or titleholder of the protected investment.

211. The following subheadings discuss each of the requirements.

**a. Foreign investment**

212. The first requirement under Art. 1 LFI is the existence of a “foreign investment”, as defined by this provision. “Foreign investment” legally means

“any kind of investment in the territory of the Republic of Albania, performed directly or indirectly by a foreign investor”.

213. The statute lists a number of assets and economic operations that qualify as an “investment”, among them, shares. The relevant language provides:

“b) a company, rights that derive from any kind of participation in a company, shares, etc.”.

214. The existence of the AAIF and its Foreign Shares has been proven through the submission of a Judicial Registration Order, issued by the Tirana District Court on May 6, 1996. The Order formally registers the AAIF as an anonymous company<sup>154</sup>.

215. The AAIF’s initial capital was USD 20,000, fully paid-in and deposited with the Savings Bank of Albania. The Judicial Registration Order states that the capital was divided into 400 shares, of equal value, and owned by the Founding Shareholders, which included four Foreign Shareholders plus Mr. Kushi, an Albanian national:

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<sup>152</sup> R. Mem., para. 12, citing to *Phoenix Action Ltd.* (RL-005), para. 61.

<sup>153</sup> R. Mem., para. 10, citing to *Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40) Decision on Jurisdiction, February 24, 2014 [“*Churchill Mining Jurisdiction*”] (RL-003), para. 96.

<sup>154</sup> C-53.

- 80 shares by Mr. Declan J. Ganley;
  - 20 shares by Mr. Stephan A. Murphy;
  - 20 shares by Mr. Don N. De Marino;
  - 80 shares by Mr. Michael Beck;
  - 200 shares by Mr. Pirro Vasil Kushi.
216. When the Foreign Shareholders subscribed to the Foreign Shares, they also paid the requisite capital contribution. These payments were made in cash. The capital contribution was divided in the following manner among the Foreign Shareholders:
- USD 4,000 by Mr. Declan J. Ganley;
  - USD 1,000 by Mr. Stephan A. Murphy;
  - USD 1,000 by Mr. Don N. De Marino;
  - USD 4,000 by Mr. Michael Beck.
217. The validity and accuracy of the Judicial Registration Order are not in dispute, and the Tribunal is therefore satisfied that this requirement has been met: a foreign investment exists in accordance with the definition of Art. 1 LFI. And this foreign investment consists in the Foreign Shares, the 200 shares in the AAIF owned by the Foreign Investors, which the Foreign Shareholders subscribed in exchange for a capital contribution of USD 10,000.
- b. Foreign investor**
218. The second requirement set out by Art. 1 LFI consists of the existence of a “foreign investor”.
219. Pursuant to the definition contained in Art. 1 LFI, a “foreign investor” is
- “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”.
220. The evidence in the record shows that Claimant in this case, AAG, is indeed a legal person constituted in accordance with the laws of a foreign country. To this effect, Claimant has presented a Certificate of Good Standing, dated June 9, 2017, showing that AAG is a limited liability company incorporated and operating under the laws of

the British Virgin Islands with its legal seat in the British Virgin Islands and was deemed to exist at all relevant times<sup>155</sup>.

221. Therefore, the Tribunal is satisfied that Claimant qualifies as a protected investor under Art. 1 LFI<sup>156</sup>.

**c. Claimant's ownership of the investment**

222. There is a third requirement that must be met: the protected investment must be owned (or title must be held), not by any qualifying foreign investor, but by the foreign investor who is acting as claimant in the arbitration.
223. In the Tribunal's opinion, this third requirement is not satisfied in the present case.
224. The Judicial Registration Order proves that the Foreign Shareholders, by subscribing and paying for the shares, validly acquired a protected investment, 50% of the shareholding in the AAIF. But the Foreign Shareholders are not acting as claimants in this procedure. The entity which appears as Claimant is AAG, and in the Tribunal's view AAG has failed to prove that it validly acquired, from the Foreign Shareholders, ownership of (or any other title over) the protected investment.

Evidence marshalled by Claimant

225. AAG argues that the Foreign Shareholders transferred, through declarations of trust, beneficial ownership of the AAIF Foreign Shares to AAG, with the result that the Foreign Shareholders now hold these shares in trust for Claimant<sup>157</sup>.
226. The common law institution of "trust" is, generally speaking, a legal relationship created by a "settlor" by which assets (known as "*res*" or "*corpus*") are placed in the ownership of a "trustee" for the benefit of a "beneficiary". In the concise definition of Black's Law Dictionary, a trust is

"a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)"<sup>158</sup>.

227. A key characteristic of a trust is that it permits the separation of legal ownership and beneficial interest: the trustee becomes the owner of the *corpus*, and the beneficiary or beneficiaries are entitled to expect that the trustees will manage the trust property for

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<sup>155</sup> RfA, para. 5 and C-1 and C-57.

<sup>156</sup> AAG remained in dissolution status from October 31, 2011, until June 1, 2017, when the Eastern Caribbean Supreme Court of the BVI ordered its "restoration and re-registration" (R-25 and C-67). The Order is clear that AAG is deemed to have never been dissolved or struck off the Registry of Corporate Affairs. The Order reads: "1. The dissolution of Anglo Adriatic Group Limited (the Company) on October 31, 2011 is void and of no effect pursuant to para. 57 of Schedule 2 of the BVI Business Companies, 2007. [...] 4. The Company is deemed never to have been dissolved or struck off the register in accordance with the BVI Business Companies Act 2004 section 218(3)".

<sup>157</sup> Cl. Rej., para. 56 and Cl. CM, paras. 35 and 49.

<sup>158</sup> Black's Law Dictionary, 9<sup>th</sup> edition (2009), p. 1647.

their benefit. To create an *inter vivos* trust, the settlor typically has to execute a deed (known as “trust deed”), which formalizes the transfer of the property from settlor to trustee and identifies the beneficiary<sup>159</sup>.

228. In this case, Claimant has provided as evidence four Trust Deeds<sup>160</sup>, which are all based on the same standard text. In each of the four Trust Deeds the *corpus* consists of the Foreign Shares of the AAIF, and in each of the Trust Deeds AAG appears both as the settlor and well as the beneficiary. The main difference between the four Trust Deeds is the identity of the trustee: each Trust Deed shows one Foreign Shareholder as the trustee. The *corpus* in each of the Trust Deeds is precisely the number of Foreign Shares in the AAIF which the Foreign Shareholder subscribed and paid in.
229. Additionally, AAG has submitted four one-page letters from Mr. Patrick G. Flynn, an English solicitor, who states that he
- has reviewed each Trust Deed and
  - confirms that the governing law of the Trust Deeds is that of England and Wales and that under the laws of England and Wales, the Trust Deeds are legally valid and enforceable<sup>161</sup>.

#### The Tribunal’s analysis

230. The Tribunal is not persuaded that this evidence proves *quod demonstrandum erat*.
231. To validly create a trust, the settlor, who must be the owner of the property, must transfer ownership to the trustee, who will hold the *corpus* for the benefit of a third party. In the present case, the owners of the AAIF shares were the Foreign Shareholders, and thus the only persons entitled to act as settlors.
232. But this is not the reality which the Trust Deeds represent.
233. In the four Trust Deeds, it is Claimant (not the Foreign Shareholders) who acts as settlor. The Trust Deeds, on their face, prove the transfer of ownership from settlor (AAG) to the trustees (the Foreign Shareholders) for the benefit of the beneficiary (again AAG). This is the opposite of what Claimant is trying to prove: i.e. the transfer of ownership from the Foreign Shareholders to AAG.
234. The necessary conclusion is that the Trust Deeds do not support Claimant’s case that the Foreign Shareholders transferred beneficial ownership over the Foreign Shares to AAG.

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<sup>159</sup> See, e.g. RL-66 and RL-67.

<sup>160</sup> Trust agreement, dated November 2, 1996, between Claimant and Mr. Declan Ganley (C-58); Trust agreement, dated November 2, 1996, between Claimant and Mr. Don De Marino (C-59); Trust agreement, dated October 16, 1996, between Claimant and Mr. Michael Beck (C-60); and Trust agreement, dated October 1, 1996, between Claimant and Mr. Stephen Murphy (C-61).

<sup>161</sup> See C-62 to C-65.

235. Claimant's explanation for this mishap is that Counsel to AAG and to the Foreign Shareholders allegedly committed a mistake when preparing the Trust Deeds: the settlors should have been the Foreign Shareholders (and not AAG, as the Trust Deeds state by mistake), because the actual intent of the parties was to establish a trust relationship in which the Foreign Shareholders, through a self-declaration of trust, placed their AAIF shares in their own trust, for the benefit of AAG (beneficiary of the trust)<sup>162</sup>.
236. The Tribunal remains unconvinced.
237. First, there is no evidence that proves that counsel to AAG and the Foreign Shareholders indeed committed a mistake when drafting the Trust Deeds.
238. To the contrary, the only additional evidence marshalled by Claimant are four legal opinions prepared by a legal expert, confirming that the four Trust Deeds are legally valid and enforceable<sup>163</sup>. There is no indication in these legal opinions that counsel committed a mistake when formalizing the Trust Deeds. And there is no other evidence which supports this conclusion.
239. Second, Arts. 2.2 and 6.4 LIFd provided that all rights in the shares of a fund must be held by the registered shareholders of these shares; the law further required that the transfer of any shares in the AAIF should be registered with the Albanian authorities within 10 days and that the identity of the shareholders had to be reported on an ongoing basis every quarter (Arts. 6.4(a) and 16.1 LIFd).
240. There is no evidence in the record that either the AAIF or AAG ever informed the Albanian authorities that the Foreign Shareholders had transferred ownership of the AAIF Foreign Shares to AAG, or that AAG asked for registration as a new shareholder. The absence of such information and the inexistence of registration – both of which are required under Albanian law – undermines the credibility of Claimant's argument that AAG was the beneficial owner of the shares since 1996.
241. Claimant has also failed to offer any evidence showing that the Albanian authorities were aware that the beneficial owner of the Foreign Shares was AAG – and not the Foreign Shareholders.
242. Third, even if it is accepted *arguendo*
- that counsel indeed committed a mistake when drafting the Trust Deeds,
  - that the real settlors and trustees of the Trust Deeds were the Foreign Shareholders and that the beneficiary was AAG,
  - and that the omission of information and registration was a mere oversight,

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<sup>162</sup> CPHB, para. 69.

<sup>163</sup> C-58 to C-61.

there would still be no evidence proving that AAG had paid the appropriate consideration to the Foreign Shareholders in exchange for the transfer of the AAIF shares.

243. The Foreign Shareholders have testified that they paid a total of USD 10,000 as capital contribution for the subscription of the Foreign Shares, and that these funds were effectively paid in cash to the AAIF. When the Foreign Shareholders allegedly transferred the shares to AAG, an equivalent consideration should have been paid by AAG.
244. AAG has failed to provide any evidence that such payments were actually made.
245. This failure is especially striking, because it should have been easy for AAG, a corporation with a duty to keep accounts, to prove the existence of such payments (e.g. by submitting its accounting books or certificates from the bank which handled the payments). The Tribunal agrees with Albania that the record does not show Claimant paying any

“consideration under the Alleged Trust Deeds in return for (allegedly) receiving beneficial ownership of shares in AAIF<sup>164</sup>.

246. Several investment tribunals have concluded that investors who had not paid any consideration, or only a nominal price, were not entitled to investment protection. In *KT Asia*, a case where the investor had not made any payment as consideration for the investment, the tribunal reached the following conclusion, which coincides with the findings of this Tribunal:

“In conclusion, the Tribunal considers that *KT Asia* has made no contribution with respect to its alleged investment, nor is there any evidence that it had the intention or the ability to do so in the future. As a consequence, the Claimant has not demonstrated the existence of an investment under Article 25(1) of the ICSID Convention and under the BIT. This suffices to rule out jurisdiction over the present dispute”<sup>165</sup>.

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247. In conclusion, the evidence in the record shows that the Foreign Shareholders duly acquired the AAIF Foreign Shares and paid in the appropriate consideration. Claimant has however failed to prove that the Foreign Shareholders validly transferred ownership (or other title) over the Foreign Shares to AAG, or that AAG paid any consideration to the Foreign Shareholders in exchange for such Foreign Shares. Since Claimant has failed to prove that it is the owner (or other titleholder) of the Foreign Shares, the necessary conclusion is that Claimant has no standing to bring claims under Arts. 1 and 8 LFI with regard to the AAIF Foreign Shares.

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<sup>164</sup> RPHB, para. 49.

<sup>165</sup> *KT Asia* (RL-071), para. 206; see also *Quiborax* (RL-055), para. 232. See also *Phoenix Action Ltd* (RL-005), para. 119.

**3. SECOND ALLEGED INVESTMENT: CLAIMANT’S FUNDING TO THE AAIF**

248. Claimant contends that it made a second qualifying investment in Albania under Art. 1 LFI between 1994 and 2000 when AAG allegedly provided the AAIF with USD 5,334,133 in loans, which were meant to cover its operating expenses<sup>166</sup>.
249. To prove the existence of these loans, Claimant has introduced a document titled “Ongoing Funding Agreement”, dated July 3, 1996 [the “**Ongoing Funding Agreement**”]<sup>167</sup>.
250. In the next subsections the Tribunal summarizes Albania’s position (**A.**) and Claimant’s position (**B.**), and then concludes that Claimant has not made a qualifying investment under Arts. 1 and 8 LFI (**C.**).

**A. Albania’s position**

251. Albania opposes this claim and avers that Claimant has not proved that it actually provided any money to the AAIF, for the following reasons.
252. First, Albania does not accept the authenticity of the Ongoing Funding Agreement<sup>168</sup>.
253. Second, Albania argues that, at any rate, the Ongoing Funding Agreement does not prove the provision of any money by Claimant to the AAIF, as it merely refers to the possibility of supplying money in the future “as and when funding is available”<sup>169</sup>.
254. Third, Claimant has not put forward any of its financial records (or those of the AAIF), which would have reflected the existence of the alleged payments, had they been made; not even at the request of the Tribunal during the Hearing<sup>170</sup>.
255. Fourth, Mr. Kushi, who was the “country manager” of the AAIF<sup>171</sup>, testified at the Hearing that he did not remember receiving any loans from Claimant<sup>172</sup>. Several witnesses of Claimant’s testified that, to the extent the AAIF received external funding, this came from Ganley International Limited (GIL) – not from Claimant<sup>173</sup>.
256. Fifth, even assuming that Claimant did provide funding to the AAIF, this would not constitute a protected investment because, on Claimant’s own description, such funds were used merely to cover development costs<sup>174</sup>. The only types of operating expenses identified by Claimant’s witnesses at the Hearing were developmental in nature<sup>175</sup>, such

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<sup>166</sup> RfA, paras. 140 and 220; Cl. Mem., paras. 77 and 169; Cl. CM, paras. 64–68; Cl. Rej., paras. 74–90.

<sup>167</sup> C-66.

<sup>168</sup> RPHB, para. 38.

<sup>169</sup> RPHB, para. 39.

<sup>170</sup> RPHB, paras. 40 and 41. Transcript, July 17, 2018, 98:6-101:9, 190:1-4.

<sup>171</sup> Transcript, July 18, 2018, 269:3-271:11.

<sup>172</sup> Transcript, July 18, 2018, 311:18-24, 312:11-17.

<sup>173</sup> Transcript, July 17, 2018, 155:22-24, 189:16-25; July 18, 2018, 276:17-21, 362:18-23.

<sup>174</sup> R. Mem., para. 78; R. Reply, para. 141.

<sup>175</sup> Transcript, July 17, 2018, 189:1-25. Transcript, July 17, 2018, 213:18-214:9. Transcript, July 17, 2018, 208:1-215:9; July 18, 2018, 309:12-17.

as money for the collection of the vouchers and the pursuit of privatization opportunities as pre-investment activities, designed to enable a subsequent investment in a major privatized asset. Any costs that Claimant may have incurred during this process do not amount to a protected investment<sup>176</sup>.

257. Sixth, assuming that Claimant were able to establish that it did provide funding, the investment would be illegal and in breach of the LIFd<sup>177</sup>. AAG claims that the USD 5,334,113 were provided “as a fully repayable loan”<sup>178</sup>. However, under Art. 13.1 LIFd, funds were not entitled to borrow money or take loans of any kind. Therefore the loans allegedly provided by Claimant would make its alleged investment illegal and, therefore, would not qualify as a protected investment under the LFI<sup>179</sup>.
258. In conclusion, there is no evidence of any funding from Claimant to the AAIF, which would not otherwise constitute an illegal and unprotected investment. Claimant has failed to satisfy its burden of proof<sup>180</sup>.

**B. Claimant’s position**

259. AAG submits that it paid the AAIF USD 5,334,113, and that such funding constitutes a protected investment<sup>181</sup>.
260. First, Claimant did make substantial investments in the territory of Albania, not only by owning shares in the AAIF, but also by funding the AAIF’s operating expenses such as:
- the establishment of the voucher collection centers,
  - the advertising of the collection process,
  - the employment of the Albanian collection staff, and
  - payments to the third parties who provided the premises for the collection centers<sup>182</sup>.
261. Second, Claimant has submitted the Ongoing Funding Agreement and a document titled “Calculation of Operating Cost. Operating costs of AAIF during the years 1994 through and including 2000” (C-35), which show that operating expenses amounting to USD 5,334,113 have been paid by Claimant to the AAIF. Also, Mr. Hunter and Mr. Ganley

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<sup>176</sup> RPHB, paras. 42–44.

<sup>177</sup> RPHB, paras. 45–46.

<sup>178</sup> Cl. CM, para. 68 and Cl. Rej., para. 86.

<sup>179</sup> RL-018, Art.13.1. See also R. Reply, paras. 144 and 145.

<sup>180</sup> RPHB, paras. 37–41; R. Mem., paras. 70–80; and R. Reply, paras. 128–146.

<sup>181</sup> CPHB, paras. 80–101 and Cl. Rej., paras. 74 *et seq.*

<sup>182</sup> CPHB, para. 98.

testified consistently at the Hearing that Claimant contributed to cover the operation expenses of the AAIF<sup>183</sup>.

262. Third, both Claimant and the AAIF kept some form of balance sheets or other financial records<sup>184</sup>. The fact that Albania's expert could not find evidence for the actual payment of the operating costs does not mean that such amount was not paid. In fact, Albania's expert admitted that AAG has no obligation to prepare or file company account with the Registrar of Corporate Affairs of the British Virgin Islands<sup>185</sup>.
263. Fourth, the operating expenses were paid on the basis of the Ongoing Funding Agreement, but without the obligation of full repayment. Thus, the operating expenses constitute a right arising out of a contract and therefore a protected investment in accordance with Art. 1 LFI<sup>186</sup>. The funding of the operating costs pursuant to the Ongoing Funding Agreement<sup>187</sup> constitutes both a loan and right arising out of a contract<sup>188</sup>.
264. Fifth, in any case, assuming that the operating costs constitute a loan within the meaning of Art. 13.1 LIFd<sup>189</sup>, such statutory provision would not be applicable. The LIFd was repealed by Law No. 10198, of December 10, 2009, on Collective Investment Undertakings<sup>190</sup>, which does not contain a prohibition of taking loans<sup>191</sup>.
265. [*Albania replies that the Law was in force when the Ongoing Funding Agreement was made (on 30 June 1996) and during the entire period during which Claimant alleges to have provided funding in the form of loans: from 1996 to 2000*<sup>192</sup>.]

### C. Tribunal's analysis

266. AAG claims to have made a second qualifying investment in Albania under Art. 1 LFI: from 1994 to 2000 Claimant allegedly provided USD 5.33 million to the AAIF to cover its operating expenses<sup>193</sup>. Albania replies that AAG has not proved having provided any money to the AAIF.

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<sup>183</sup> CPHB, para. 85; RfA, para. 140; and Cl. Rej., para. 82.

<sup>184</sup> Transcript, July 17, 2018, 99:21-100:5, 100:18-101:7, 190:5-25.

<sup>185</sup> Barton Report, 2.2.5 and Transcript, July 19, 2018, 404:13 *et seq.*

<sup>186</sup> R-1.

<sup>187</sup> C-66.

<sup>188</sup> CPHB, para. 94 and Cl. CM, paras. 7 and 67.

<sup>189</sup> RL-018. "13.1 An investment fund is not entitled to perform the following actions:

- To invest more than 10 percent of its net assets in the shares of a sole entity.
- To invest in shares issued by other investment funds.
- To invest in any entity owning more than 5 percent of fund's shares.
- To accept to sell shares that it doesn't own.
- To borrow money or take loans of any kind.
- To grant guarantees or promises of any kind.
- To have ownership or debt interests to its directors and its depositor, its accounting expert".

<sup>190</sup> C-7, Law No. 10198 of the Republic of Albania "On Collective Investment Undertakings", Art. 137.2.

<sup>191</sup> C-7, Art.137.

<sup>192</sup> R. Mem., para. 11.

<sup>193</sup> RfA, paras. 140 and 220; Cl. Mem., paras. 77 and 169; Cl. CM, paras. 64-68; Cl. Rej., paras. 74-90.

267. The Tribunal sides with Albania for the following reasons.
268. As explained in the previous section (*see* section VI.2.C), for the Tribunal to have jurisdiction, Arts. 1 and 8 LFI require the fulfilment of three requirements: existence of a protected investment; existence of a protected investor; and that the protected investor is the titleholder or owner of the protected investment.
269. Had Claimant made loans to the AAIF for over USD 5.33 million, such contributions would qualify as a “foreign investment” under the LFI. Loans are indeed included in the categories of protected investments under Art. 1(3)(c) LFI:

“loans, monetary obligations or obligations in an activity of an economic value and related to an investment”.

270. In this case, however, and after examining the evidence, the Tribunal concludes that Claimant has not proved the first requirement, *i.e.*, the existence of a protected investment.
271. After reviewing the record, the Tribunal has not found any convincing evidence that Claimant has actually carried out such funding.

**a. Assessment of the evidence submitted**

272. Claimant has submitted two pieces of evidence to allegedly show the payment from Claimant to the AAIF: the Ongoing Funding Agreement<sup>194</sup> and a document titled “Calculation of Operating Cost. Operating costs of AAIF during the years 1994 through and including 2000”<sup>195</sup>.

Ongoing Funding Agreement

273. As for the Ongoing Funding Agreement, the Tribunal agrees with Albania that this document does not prove the provision of any money by Claimant to the AAIF.
274. The very short document, drafted in the form of a letter, merely refers to the possibility of supplying money in the future “as and when funding is available”<sup>196</sup>. The document is signed by Declan J. Ganley, “for and on behalf of Anglo Adriatic Group Ltd” and by a Director (“Fully Agreed and Accepted by Anglo Adriatic Investment Fund SA”) whose signature is not legible.
275. It reads as follows:

“Dear Sirs.

Re: Ongoing Funding Agreement

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<sup>194</sup> C-66.

<sup>195</sup> C-35. Claimant’s table of exhibits describes the document as “Calculation of current value of Claimant’s frustrated operating expenses”.

<sup>196</sup> RPHB, para. 38.

Further to our various discussions Anglo Adriatic Group Ltd. hereby agrees to supply funding to Anglo Adriatic Investment Fund SA. both in country and on behalf of Anglo Adriatic Investment Fund SA. international activities, on an ongoing basis and, as and when funding is available. The loans are fully repayable on demand.

Anglo Adriatic Group Ltd. and Anglo Adriatic Investment Fund SA both agree that these funds will be treated as loans from Anglo Adriatic Group Ltd to Anglo Adriatic Investment Fund SA.

Presuming your acceptance and agreement to this, please complete the section below and return an original copy”<sup>197</sup>.

Other evidence

276. As for the document titled “Calculation of Operating Cost. Operating costs of AAIF during the years 1994 through and including 2000”, it is simply a one-page spreadsheet which starts with the cumulative operating expenses figure of USD 5,334,113, and then shows the increase in the present value of this amount from 2000 to 2015, based on the application of compound annual interest at a rate of 5% per year.
277. The document has one fundamental weakness: it assumes *quod demonstrandum erat*. It accepts as a starting point (without providing any support) that the principal of the loan amounted to USD 5,334,113, and then calculates the interest which would have accrued between 2000 and 2015. As Albania correctly observes, the document contains no explanation or documentary support as to what operating costs were actually incurred by the AAIF, when such costs were incurred by the AAIF, or how or when such costs were “covered” by Claimant<sup>198</sup>.
278. Apart from this evidence, AAG has not marshalled any other proof.
279. This is all the more surprising, because it should be easy for a company to provide convincing evidence of the fact that it granted a loan of more than USD 5 million to a certain borrower. Good business practice requires that loans for such amounts be properly formalized. Moreover, the transfer of funds can be easily proven through the introduction of bank certificates or accounting statements. Finally, in this case, both the lender and the borrower are companies which must draw up and approve annual accounts, reflecting their assets and liabilities. It is especially telling that Claimant has failed to produce either its own annual accounts or those of the AAIF.
280. The Tribunal concludes that Claimant has failed to prove that AAG provided any loan to the AAIF.

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<sup>197</sup> C-66.

<sup>198</sup> R. Mem., para. 71.

**b. Additional argument: illegality**

281. Furthermore, even if it is assumed *ad arguendum* that Claimant did facilitate a loan to the AAIF, such investment would not qualify as a protected foreign investment under the LFI, since it would have been made in breach of Albanian law.

282. As explained above, Art. 1 LFI requires that foreign investors carry out an investment in the territory of the Republic of Albania in conformity with its laws. The language of the statute reads as follows:

“Foreign investor” means: . . . 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”. [Emphasis added]

283. Albania argues that the loan would be illegal because the LIFd (the statute in force at the time the investment was made) expressly barred investment funds from borrowing money or taking loans of any kind. The relevant provision (Art. 13.1 LIFd) reads as follows:

“13.1. An investment fund is not entitled to perform the following actions:

[...]

- **To borrow money or take loans of any kind**”. [Emphasis added]

284. The Tribunal concurs.

285. If AAG had indeed provided any type of financing to the AAIF, such asset would never qualify as a protected investment, because the investment would have been made in breach of Art. 13.1 LIFd.

286. The Tribunal’s conclusion is based on the following reasons.

287. First, only investments made in accordance with Albanian law can enjoy the protection granted under the LFI, as Art. 1 LFI makes clear. The subject-matter of a dispute arising out of an illegal investment falls outside the scope of Albania’s consent to arbitrate. Investment tribunals have come to analogous conclusions in similar contexts<sup>199</sup>.

288. Second, this loss of protection is all the more clear where there is a relevant public purpose, which justifies the proportionality between the breach and the sanction of depriving an investor from international protection.

289. In this case, the duty that the investor assumingly breached was Art. 13.1 LIFd, which prohibited investment funds from borrowing money or taking loans. This was only one

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<sup>199</sup> See, e.g., Albania’s citations (RPHB, para. 32, fn. 56) to *Mamidoil Jetoil*, para. 359, (“States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments [and] cannot be expected to have agreed to extend that mechanism to investments that violate their laws”); and *Gustav F W*, para. 123.

of many other restrictions that the Albanian legislative imposed on the operation of investment funds. As explained earlier, funds could only operate after obtaining an administrative license, and their activity was subject to a number of requirements and restrictions. Article 13 LIFd listed a few of them:

“ARTICLE 13.

13.1 An investment fund is not entitled to perform the following actions:

- To invest more than 10 percent of its net assets in the shares of a sole entity.
- To invest in shares issued by other investment funds.
- To invest in any entity owning more than 5 percent of fund’s shares.
- To accept to sell shares that it doesn’t own.
- **To borrow money or take loans of any kind.**
- To grant guarantees or promises of any kind.
- To have ownership or debt interests to its directors and its depositor, its accounting expert.

13.2 An investment fund is not entitled to perform also these actions:

- To own other assets, except the Albanian currency, privatization vouchers, shares in joint stock companies.
- To invest in any company that is not engaged in commercial activity in Albania.
- To trade or possess privatization vouchers in other ways, except the exchange of shares issued as a result of privatization or transformation of state-owned enterprises.
- To grant credits or loans.
- To enter into agreements that are not related to the investment activity.
- To accept privatization vouchers in exchange of its shares, if the total nominal value of the vouchers received by the investment fund and its branches would be greater than 10 percent of the total nominal value of all privatization vouchers issued in Albania until that time.
- To engage in other commercial activities, other than investments, reinvestments and trading of shares.
- To carry out investments under the laws in force, except those stipulated in this law”. [Emphasis added]

290. The language of the provision is clear: funds were not allowed, among other things, to borrow money or receive loans, regardless of how such operations were structured. Read in its context, the prohibition aimed at reducing insolvency risks. Funds authorized to borrow money could eventually become unable to repay the amounts received, leading to insolvency and to financial detriment to the participants. A prohibition of any type of leverage significantly reduces the financial risk born by investors.
291. In addition to reducing financial risks, the prohibition in this case pursued an additional – and significant – public interest. Since investment funds were entitled to directly approach Albanian citizens and exchange their privatization vouchers against participations in the fund, it was reasonable for the legislative to create a safe and strict legal regime, protecting the general public from being deprived of their investments.
292. Summing up this argument, the prohibition on funds to incur indebtedness pursued a compelling public purpose, which any investor was expected to know and observe. In this context, it follows that – should AAG have provided any type of financing to the AAIF – such asset would never qualify as a protected investment under Art. 1 LFI.

\* \* \*

293. In conclusion, Art. 13.1 LIFd prohibited funds from receiving any type of loans or borrowing money. AAG allegedly lent more than USD 5 million to the AAIF. Claimant has failed to prove the existence of such loan. Furthermore, even if such loan had actually been provided, it could never achieve the status of protected investment under the LFI. The prohibition contained in Art. 13.1 LIFd would in any case render the investment illegal, excluding the asset from the scope of protection granted by the LFI.

#### **4. FINAL CONCLUSION**

294. The Tribunal has concluded that the evidence in the record proves that the subscription of the Foreign Shares only resulted in the Foreign Shareholders, not Claimant, making an investment in Albania. Claimant has failed to prove that it is the owner of (or otherwise holds title in) the Foreign Shares.
295. Claimant has also failed to prove that it provided a loan in an amount of USD 5.33 million to the AAIF. In any case, Albanian law prohibited funds from obtaining loans or borrowing money, and any loan granted by AAG to the AAIF would have run afoul of such prohibition, rendering the investment without protection under the LIF.
296. For these reasons, the Tribunal finds that Claimant has not made a protected investment under Arts. 1 and 8 LFI. The corollary is that the Centre lacks jurisdiction and the Tribunal, competence *ratione materiae* to adjudicate this dispute. Because the Tribunal concludes that there is no investment under the LFI, there is no need for the Tribunal to further address the issue of whether there is an investment for the purpose of the ICSID Convention.

## **VII. COSTS**

### **1. CLAIMANT’S COSTS SUBMISSIONS**

297. In its Statement of Costs, as well as in its final prayer for relief<sup>200</sup>, Claimant argues that Respondent should bear the total arbitration costs incurred by Claimant, including legal fees and expenses, totaling USD 961,635.15, broken down as follows:

<b>Claimant’s advances to ICSID</b>	
ICSID Fees	USD 25,000
ICSID First Advance Payments (paid)	USD 125,000
ICSID Second Advance Payment (paid)	USD 125,000
Subtotal Amount	USD 275,000
<b>Claimant’s legal representation</b>	
Costs of legal representation invoiced	USD 597,652.68
Costs of legal representation to be billed	USD 42,792.69
Expenditures	USD 35,696.15
Subtotal Amount	USD 676,141.52
<b>Expenses for travelling and lodging for Claimant’s witnesses</b>	
Travel Costs of Declan J Ganley, Donald N De Marino, Gary Hunter, Peter Goldscheider, Gentian Sula	USD 5,132.89
Expenses of Lodging and Food of Declan J Ganley, Donald N De Marino, Gary Hunter, Peter Goldscheider, Gentian Sula	USD 5,360,74
Subtotal Amount	USD 10,493.63
<b>TOTAL AMOUNT</b>	<b>USD 961,635.15</b>

<sup>200</sup> CPHB, para. 126.

298. Claimant further requests compounded interest over this amount, assessed at a “reasonable commercial rate”, applicable from the date of the award to the date of payment<sup>201</sup>.

**2. RESPONDENT’S COSTS SUBMISSIONS**

299. In its final prayer for relief, Respondent submits that Claimant should bear all of the costs and expenses associated with these proceedings, including Respondent’s legal fees, the fees and expenses of the Tribunal and ICSID’s other costs, totaling USD 250,000 and EUR 1,020,000<sup>202</sup>, broken down as follows:

Respondent’s advances to ICSID	
ICSID First Advance Payments (paid)	USD 125,000
ICSID Second Advance Payment (paid)	USD 125,000
Subtotal Amount	USD 250,000
Respondent’s legal representation	
Costs of legal representation (paid)	EUR 974,612.65
Disbursements	EUR 25,387.35
Subtotal Amount	EUR 1,000,000
Respondent’s expert fees & disbursements	
Expert fees (unpaid)	EUR 15,540.12
Disbursements	EUR 4,459.88
Subtotal Amount	EUR 20,000
<b>TOTAL AMOUNT</b>	<b>USD 250,000 + EUR 1,020,000</b>

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<sup>201</sup> CSC, para. 4.

<sup>202</sup> RSC, para. 2.

**3. ARBITRATION COSTS**

300. The costs of the arbitration, including the fees and expenses of the Tribunal, and the expenses of the Tribunal’s Assistant, ICSID’s administrative fees and direct expenses [“**Arbitration Costs**”], amount to:

Arbitrators’ fees and expenses	
Juan Fernández-Armesto	\$105,271.33
Brigitte Stern	\$43,410.32
Georg von Segesser	\$47,004.37
Administrative Assistant to the Tribunal’s expenses	\$2,125.53
ICSID’s administrative fees	\$74,000.00
Direct expenses	\$36,224.95
<b>Total</b>	<b><u>\$308,036.50</u></b>

**4. TRIBUNAL’S DECISION ON COSTS**

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

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

302. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney’s fees and other costs, between the Parties as it deems appropriate.
303. The Tribunal has decided that it has no jurisdiction over the claims submitted by Claimant. The arbitration therefore clearly had a successful party: Respondent.
304. But there are factors which justify Claimant’s decision to initiate this procedure.
305. The basic facts took place about twenty years ago, in the context of an emerging country finding its way into the free-market economy. This process developed in a context of social, legal, and political instability, which eventually led to a terrible civil war. The destruction that followed and the passing of time may have resulted in the loss of valuable evidence.
306. As a consequence, Claimant and its counsel were repeatedly forced throughout the proceedings to correct previous statements, and to rectify factual inaccuracies. Although this happened several times, the Tribunal sees no bad faith or recklessness, but simply the difficulty to prove events which happened many years ago in a war-ravaged country.

307. More importantly, the Tribunal has not detected any element of perjury or frivolity in Claimant's arguments or the testimony of its witnesses. Although Claimant's claims have been dismissed, its position was not plainly unreasonable.
308. Considering all these circumstances, the Tribunal decides that the Arbitration Costs shall be borne by Claimant, while each Party shall bear its own legal costs and expenses.
309. The Arbitration Costs have been paid out of the advances made by the Parties in equal parts. Accordingly, the Tribunal orders Claimant to reimburse Respondent the amounts advanced by Respondent. Any remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID, i.e., in equal parts.
310. Respondent has not sought any interest on these amounts, and therefore none is granted<sup>203</sup>.


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<sup>203</sup> R. Mem., para. 117 and RPHB, para. 68.

**VIII. AWARD**

311. For the foregoing reasons, the Tribunal unanimously decides as follows:

- (1) Declares that the Centre lacks jurisdiction and the Tribunal competence to adjudicate the claims submitted by Anglo-Adriatic Group Limited;
- (2) Decides that Anglo-Adriatic Group Limited shall bear the totality of the Arbitration Costs and orders Anglo-Adriatic Group Limited to pay the Republic of Albania the amounts advanced by it.
- (3) Decides that each Party shall bear its own legal costs and expenses; and
- (4) Dismisses all other prayers for relief.



4 February 2019

1 February 2019

29 January 2019