INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Hydro S.r.l. & Others

v

Republic of Albania

(ICSID Case No. ARB/15/28)

DECISION ON CLAIMANTS' REQUEST FOR A PARTIAL AWARD AND RESPONDENT'S APPLICATION FOR REVOCATION OR MODIFICATION OF THE ORDER ON PROVISIONAL MEASURES

1 SEPTEMBER 2016

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

Secretary of the Tribunal
Mr Francisco Abriani

Assistant to the Tribunal
Dr Albert Dinelli

CONTENTS

PART I: INTRODUCTION AND SUMMARY OF DECISION

Introduction

1.1 On 3 March 2016, the Tribunal issued its Order on Provisional Measures (the "**Tribunal's Order**" or the "**Order**"). In the Order, the Tribunal made the following recommendations at Part V:

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

1.2 Shortly after the Tribunal's Order was issued, on 10 March 2016, the Claimants wrote to the Respondent requesting confirmation that they had complied, or were going to comply with, the Tribunal's Order. The Claimants also proposed the suspension of criminal proceedings and "the consequential return of the Companies and their assets and bank accounts" in order to satisfy paragraph 5.2 of the Tribunal's Order. They sought an answer by 17 March 2016. The Respondent's counsel replied indicating that they would take instructions.

1.3 Eight days thereafter, on 18 March 2016, the Claimants again wrote to the Respondent noting that they had received no response. The Respondent's counsel replied shortly thereafter, stating "our clients are still considering the Order of the Tribunal of 3 March

2016 and the terms of your letter". The Claimants replied that "Albania's lack of engagement is simply not sufficient", and reiterated its request that the Respondent provide it with assurances that it would immediately comply with the Tribunal's Order.

1.4 On 21 March 2016, both the Claimants and the Respondent wrote to the Tribunal.

1.5 In its letter dated 21 March 2016, the Claimants complained of what it said was "Albania's lack of engagement and its refusal to comply with the Tribunal's Order". The Claimants requested, as a matter of urgency, a telephone conference with the Tribunal. The Claimants further stated that they "reserve[d] the right to seek appropriate measures from the Tribunal pursuant to paragraph 5.3 of the Order if the matter is not promptly resolved".

1.6 In its letter of 21 March 2016, the Respondent said that it intended to make an application to the Tribunal pursuant to Rule 39(3) of the ICSID Arbitration Rules to "revoke or alternatively modify the terms of" the Tribunal's Order. It stated that the Respondent "fully reserves its rights in respect of compliance with the Order pending any decision in respect of such application".

1.7 On 22 March 2016, the Tribunal wrote to the Parties and stated that it did not consider a telephone conference necessary as neither Party had sought a specific order from the Tribunal, but it would consider an appropriate procedure for dealing with any such application if one were to be made.

1.8 On 25 March 2016, the Claimants made an Application for a Partial Award, or alternatively an Order, the contents of which are explained below (the "**Claimants' Application**"). The Tribunal invited the Respondent to reply, and it did so by submitting an Application to Revoke or Modify the Order on Provisional Measures (the "**Respondent's Application**") on 5 April 2016.

1.9 It is these two applications with which the Tribunal is presently vested.

1.10 On 18 April 2016, the Claimants submitted their Reply to the Respondent's Application (the "**Claimants' Reply**").

1.11 On 10 May 2016, the Respondent submitted its Reply to the Claimants' Reply (the "**Respondent's Rejoinder**").

1.12 In the Respondent's Rejoinder, the Respondent requested that the Tribunal list the present application for an oral hearing, submitting:

> "[Albania] views it as imperative for the fair disposition of this matter that there be an oral hearing."[1]

1.13 Further, the Respondent explained:

> "The matter is complex and the present application is to be made against the background of ongoing developments before the English courts. An oral hearing is therefore the only fair way in which the distorted picture (of facts and law) that the Claimants appear to be so intent on sowing in correspondence can adequately be corrected; and will be the most efficient way of informing the Tribunal of the most up-to-date position."2

1.14 On 13 May 2016, the Tribunal wrote to the Parties informing them that it had determined to hold a short hearing to deal with both the Claimants' Application and Respondent's Application by teleconference.

1.15 On 23 May 2016, the Respondent wrote to the Tribunal requesting that the hearing should be held in person (rather than by teleconference) and should be listed for a day. The Respondent cited the following reasons as to why the hearing should be held in person: (i) the importance of the issues at stake; (ii) the scale and complexity of those issues; and (iii) fundamental considerations of procedural fairness. The Respondent explained in detail why an in-person hearing was needed. The Tribunal invited the Claimants to reply, which they did on 26 May 2016. The Claimants rejected the need for an in-person hearing, and submitted that the Respondent's request was "nothing more than another attempt to further delay compliance with the Tribunal's Order".[3]

1.16 On 1 June 2016, the Tribunal wrote to the Parties informing them that it would hold an in-person hearing on 15 June 2016 in London. The Tribunal noted that Messrs Glick and Poncet would be present in London, but that the President of the Tribunal would attend via video-link.

1.17 The hearing occurred, as anticipated, on 15 June 2016.

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1 Respondent's Rejoinder, para 16.

2 *Ibid.*

3 Claimants' letter of 26 May 2016, para 3.

1.18 On 16 June 2016, the Tribunal wrote to the Parties inviting them to provide brief post-hearing submissions on issues that remained outstanding from the hearing.

1.19 On 27 June 2016, the Respondent wrote to the Tribunal seeking an extension of a day to submit its post-hearing submissions. That was granted by the Tribunal, and a further day was granted to the Claimants to submit its reply post-hearing submissions.

1.20 The Respondent provided its post-hearing submissions on 29 June 2016, and the Claimants responded on 8 July 2016.

1.21 Later, on the same day (8 July 2016), the Tribunal was provided with the judgment of District Judge Tempia of the Westminster Magistrates' Court deciding not to allow the extradition of Mr Francesco Becchetti and Mr Mauro De Renzis from the United Kingdom (the "**UK**") to Albania (the "**Judgment**").

1.22 On 11 July 2016, the Tribunal invited the Parties to submit simultaneous submissions regarding that Judgment by 18 July 2016. The Claimants did so, but the Respondent did not.

1.23 The Respondent requested leave to respond to the Claimants' submissions, which the Tribunal granted, but only in respect of responding to the Claimants' letter, not to the Judgment itself.

1.24 Also on 18 July 2016, the Claimants wrote to the Tribunal informing it that they had received notification that the Respondent would not appeal the Judgment.

1.25 On 22 July 2016, the Respondent submitted a letter which did, in fact, address the Judgment, rather than confining its comments to the Claimants' letter of 18 July 2016. The Tribunal requested an explanation for why the Respondent had filed these comments not only late, but without leave.

1.26 On 23 July 2016, the Respondent wrote that it was genuinely confused by what it was and was not granted leave to make submissions on by the Tribunal. The Respondent's counsel stated that it could not file those submissions simultaneously with the Claimants on 18 July because instructions were being sought from Albania.

1.27 The Tribunal wrote to the Parties on 24 July 2016 and stated that whilst it did not believe that its instruction to the Respondent was in any way unclear, it had decided to admit the Respondent's letter of 22 July 2016.

1.28 At this juncture, it is important for the Tribunal to again emphasise that no submissions are to be filed in this proceeding without the leave of the Tribunal. The example referred to in the preceding paragraphs is not the first occasion that this has occurred. Needless to say, this proceeding is a very complex one, and one that is of critical importance to the Parties. In order to ensure its efficient disposition, it is necessary for there to be appropriate procedural rules put in place, and with which compliance is necessary. No further submissions should be submitted in this proceeding unless they are filed and served pursuant to procedural directions or leave of the Tribunal. Of course, the Tribunal will ensure procedural fairness is granted to all Parties, and any application for leave will be considered on the merits. It is not of any assistance to the Tribunal to receive unsolicited submissions from the Parties.

1.29 From that point, the Tribunal did not accept any further submissions form the Parties, given that both Parties had been given more than ample opportunity to make submissions throughout the course of these two applications.

1.30 (Further correspondence was exchanged in relation to Interpol red notices, but the content of that correspondence does not impact on the resolution of the two applications the subject of this decision.)

Summary of Decision

1.31 For the reasons that follow, the Tribunal has determined that the Tribunal's Order should be revoked, but only on the basis that it is no longer required in its present form. Instead, the Tribunal recommends that the Republic of Albania:

(a) take no steps in the proceedings identified as Criminal Proceeding No. 1564 to recommence extradition proceedings in the UK against Messrs Becchetti and Mr De Renzis until the issuance of a Final Award in this proceeding; and

(b) take all actions necessary to maintain the suspension of the extradition proceedings (Case Numbers 1502751601 (for Mr Becchetti) and 1502752144 (for De Renzis))

currently stayed, and not to take any steps to resume those proceedings, until the issuance of a Final Award in this proceeding.

1.32 As is plain from the reasoning in the Tribunal's Order, the principal reason for making the recommendations the subject of paragraph 5.1(a) and 5.1(b) was the potential inability of Messrs Becchetti and De Renzis to fully participate in the arbitration if they were incarcerated. But that principal objective for the Tribunal's recommendations has now been secured. It matters not that it was secured by the Respondent's attempt to adjourn the extradition proceedings *sine die*, or what has now transpired, namely the suspension by order of Judge Tempia. The English courts have stayed the extradition of Messrs Becchetti and De Renzis and that stay should be maintained.

1.33 In relation to the preservation of the seized assets, the contents of the various frozen bank accounts and the current shareholdings in those companies (collectively, the "**Assets**"), the Tribunal has determined that no further recommendation should be made. It is unnecessary to do so in circumstances where, by the Claimants' Memorial of 13 May 2016 (the "**Claimants' Memorial**"), which was filed while the applications the subject of this decision were pending, it has become apparent that the Claimants no longer seek the return of the Assets. While the precise factual situation is somewhat unclear, the Tribunal is not required, nor would it be appropriate, to decide whether the Assets have, in fact been destroyed or expropriated. Ultimately, if the Claimants succeed in this arbitration, the Tribunal is presently of the view that any loss or damage to the Assets can be adequately compensated by an award of damages.

1.34 Finally, the Tribunal rejects any entitlement of the Claimants for a penalty against the Respondent of US$250,000 or otherwise.

1.35 The Tribunal now turns to the Parties' respective submissions.

PART II: THE PARTIES' SUBMISSIONS

The Claimants' Application

2.1 The Claimants submitted their Application on 25 March 2016.

2.2 The Claimants submit that the Respondent has openly defied the authority of the Tribunal by refusing to comply with the Tribunal's Order.[4] The Claimants further contend that it is not for the Respondent to decide when, and if, it will comply with the Tribunal's Order and that "[i]t is indeed beyond dispute that orders of provisional measures issued pursuant to Article 47 of the ICSID Convention create a binding 'legal obligation' on the parties".[5] The Claimants say that the Tribunal's Order is immediately binding, and that the Respondent cannot purport to reserve its rights because it has no rights to reserve. The Claimants further say that Art 47 does not provide for a vehicle for re-consideration of substantive decisions of the Tribunal on provisional measures.[6]

2.3 As a consequence of the Tribunal's Order, the Claimants also contend that the Respondent must return control of the companies that are subject to sequestration orders made by the Albanian prosecutorial authorities and unfreeze those companies' bank accounts.[7] The Claimants say that the Respondent cannot delay this further on the basis that it is "*currently gathering information in relation to the assets*", as the Respondent stated in its letter of 21 March 2016.[8]

2.4 Accordingly, the Claimants request a partial award or an order from the Tribunal addressing the Respondent's refusal to comply with the Tribunal's Order. The Claimants submit that the Tribunal should impose a penalty against the Respondent of US$250,000.00 for each day of non-compliance, and submits that this Tribunal has the power to impose such a penalty.[9]

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4 Claimants' Application, p 1.

5 *Ibid*, p 2, citing *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 (1 July 2003), CL-9, para 4; *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), CL-6, paras 52, 92; *Burlington Resources Inc v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures (29 June 2009), CL-7, para 66.

6 Claimants' Application, p 2.

7 Letter from Quinn Emanuel Urqhart & Sullivan to Gowling WLG dated 10 March 2016. Those companies are said by the Claimants to be 400 KV Sh.p.k, Energji Sh.p.k, Fuqi Sh.p.k, Cable System Sh.p.k and Agonset Sh.p.k.

8 Claimants' Application, p 3.

9 The Claimants relies on *Enron Corporation Ponderosa Assets, LP v Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), CL-20, para 79.

2.5 The Claimants also request further provisional measures be made by the Tribunal regarding the orders made by the Tribunal at paragraph 5.3 of the Order, whereby the Tribunal invited the Parties to confer and agree as to appropriate steps to be taken by Albania to preserve the Assets. The further provisional measures the Claimants now request are as follows:

> (a) "Return control of the companies that are subject to the June 5, 2015 sequestration order, i.e. 400 KV Sh.p.k, Cable System Sh.p.k., Energji Sh.p.k, Fuqi Sh.p.k., and Agonset Sh.p.k. to their shareholders;
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> (b) Lift the measures of preservation issued against the assets of these companies;
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> (c) Unfreeze these companies' bank accounts as well as those of KGE Sh.p.k.; and
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> (d) Suspend the insolvency proceedings commenced against Energji Sh.p.k."[10]

2.6 At this juncture, it should be noted that the Claimants have requested relief in respect of the company "Fuqi Sh.p.k", however this company was never contemplated by the Tribunal's (original) Order.

The Respondent's Application

2.7 The Respondent responded to the Claimants' Application, and submitted its own Application on 5 April 2016.

2.8 The Respondent submits that the Tribunal's Order made "unjustified and disproportionate inroads" upon Albania's sovereignty.[11] The Respondent says that the original relief sought by the Claimants was "intended to derail" long-running criminal prosecutions brought against individuals charged with very serious offences, and that against this background any ICSID Tribunal that was invited to interfere had to do so with the "utmost care".[12] The Respondent says it is appropriate for it to request that the Tribunal reconsider its Order.

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10 Claimants' Application, p 4.

11 Respondent's Application, para 4.

12 *Ibid*, para 5.

2.9 The Respondent says that the Tribunal "plainly" has the power under Rule 39(3) of the ICSID Arbitration Rules to revoke or modify its recommendations in its order "at any time".[13] Further, it says that this power is without restriction.[14] The Respondent relies on the dicta of the Tribunal in *Victor Pey Casado v Republic of Chile*, which said of provisional measures:

> "provisional measures ... can be modified or cancelled at any time by the Tribunal [and] do not benefit from the force of res judicata".[15]

2.10 The Respondent does not dispute the test adopted by the Tribunal in determining whether or not an interference with the exercise of a State's sovereign rights is justified. Rather, it takes issue with the Tribunal's application of that test in the circumstances.[16]

2.11 The Respondent contends that the Tribunal did not clearly identify the nature of the right to procedural integrity, nor provide sufficient reasons as to why the incarceration of Messrs Becchetti and De Renzis would infringe that right.[17] The Respondent concedes that the right to procedural integrity allows the Tribunal to "police its own process, so as to ensure the proper functioning of the dispute settlement procedure and the orderly unfolding of the arbitration process", but the ability of Messrs Becchetti and De Renzis to "effectively manag[e] their businesses" (as stated by the Tribunal at paragraph 3.18 of the Order) is "surely irrelevant".[18]

2.12 Indeed, the Respondent submits that the Tribunal's Order left a number of important questions unanswered, such as which businesses the Tribunal considered would be affected by the potential incarceration of Messrs Becchetti and De Renzis and what role they played in those businesses.[19] Similarly, the Respondent submits that the Tribunal's concerns regarding Messrs Becchetti and De Renzis' "full participation" in the arbitration were not

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13 *Ibid*, para 19.

14 *Ibid.*

15 ICSID Case No ARB/98/2, Decision on Provisional Measures (25 September 2001), CL-12, para 2.

16 Respondent's Application, paras 24 – 27.

17 *Ibid*, paras 28, 30.

18 *Ibid*, paras 32 – 33.

19 *Ibid*, para 35.

properly reasoned.[20] The Respondent submits that the Tribunal justified its recommendation to suspend the criminal proceedings against Becchetti and De Renzis on the basis that the recommendation only "merely postpone[d]" the proceedings, not cancelled them entirely.[21] That is, the Tribunal's approach is to countenance "any ICSID claimant fearing arrest to stop local criminal proceedings … provided he makes sure to ask only for a stay of those proceedings".[22] The Respondent contends that the Tribunal's decision in this respect was "out of step" with the "concept of procedural integrity" adopted in the cases of *Quiborax*[23] and *Lao Holdings*.[24]

2.13 Further, the Respondent contends that the Tribunal's Order did not engage with the question of whether it had jurisdiction to "step-in" and "short-circuit" the investigation which the UK courts were themselves undertaking, namely whether extradition was justified. It followed, so the Respondent contends, that "this Tribunal must have considered that it (rather than the English court) was the appropriate forum for the deliberation and determination of the issues raised by the Claimants".[25]

2.14 Further, the Respondent submits that the duration of the recommendations by the Tribunal is "excessive and disproportionate" and there is no reason for the "restraint imposed by the PMO to last until the Award in this matter".[26]

2.15 Notwithstanding these complaints the Respondent says that it has nevertheless "actively sought to engage with the Tribunal's recommendations".[27] The Respondent says that its Minister of Justice wrote to the UK's Home Office asking that they make an application

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20 *Ibid*, paras 38 – 39. See, esp, para 39 where the Respondent submits that the "Tribunal does not explain what 'full participation' is intended to mean; nor why possible incarceration in Albania 'would' necessarily prevent such 'full participation'; or why a lesser measure was considered inappropriate by the Tribunal". Other criticisms follow on in paras 40 – 44 of the Respondent's Application.

21 *Ibid*, para 44.

22 *Ibid.*

23 *Quiborax SA, Non Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), CL-5; Respondent's Application, para 47.

24 *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No. ARB (AF)/12/6, Ruling on Motion to Amend the Provisional Order (30 May 2014), CL-8; Respondent's Application para 47.

25 Respondent's Application, para 50.

26 *Ibid*, para 52.

27 *Ibid*, para 9.

to the UK courts that the extradition proceedings against Messrs Becchetti and De Renzis be adjourned *sine die*.[28] In this regard, the Respondent said that (at that stage) it fully expected that the adjournment would be granted by the UK courts, and that, accordingly, compliance with paragraph 5.1(b) of the Tribunal's Order would be secured.[29] The Respondent says that even if Messrs Becchetti and De Renzis were to appear before an Albanian Court, Albanian prosecutors would not seek to remand them in custody and would not oppose bail on "reasonable bail conditions".[30] These assurances, according to the Respondent, amount to a "guarantee" that Messrs Becchetti and De Renzis would not be jailed.[31] This should be sufficient to satisfy the Tribunal's Order, according to the Respondent, because anything more (namely, suspension of the criminal proceeding) was not permitted by Albanian criminal procedure.[32]

2.16 Alternatively, in these circumstances, the Respondent contends that it would be open to the Tribunal to find that the steps taken by the Respondent provide a compelling basis for the revocation of the Tribunal's Order. This is because, the Respondent submits, the perceived risk that either Messrs Becchetti or De Renzis would not be able to participate in the arbitration by virtue of their prospective imprisonment disappears,[33] and there is no "separate basis" on which suspension ought to continue to be recommended by the Tribunal.[34]

2.17 As to the Claimants' Application, the Respondent says that, in respect of the criminal proceedings against Messrs Becchetti and De Renzis, if the Tribunal accepts its arguments regarding the revocation or modification of paragraph 5.1 of the Order, then the Claimants' application for relief in the form of a partial award must (at least partially) fall away.[35] Even

28 *Ibid*, para 11.

29 *Ibid*, para 12.

30 *Ibid*, para 13.

31 *Ibid*, para 15.

32 *Ibid*, para 16.

33 *Ibid*, para 18.

34 *Ibid*, para 59.

35 *Ibid*, para 64.

if the Tribunal is not minded to revoke or modify paragraph 5.1 of its Order, the Respondent says there is no proper basis to grant the Claimants the relief they seek.

2.18 First, the Respondent submits that there is no power for the Tribunal to grant a "partial" award under the ICSID Convention or the Arbitration Rules.[36]

2.19 Second, the Respondent says that the Claimants' request for US$250,000.00 per day as a penalty for non-compliance is misconceived. It says that, as a matter of principle, such relief can only be granted when there is loss suffered by the Claimants by virtue of any alleged breach of Art 47 of the ICSID Convention.[37] The Respondent says that the Claimants have provided no evidence of loss and in any event the Tribunal could not make such a finding on an "interim" basis (that is, without a trial).[38] The Respondent submits that the measures it has taken to seek an adjournment of the extradition proceedings *sine die* means that the monetary relief sought is wholly unnecessary.

2.20 As for the relief the subject of paragraph 5.2 of the Order, the Respondent submits that it is continuing to engage with the Claimants on seeking to preserve the Assets.[39] At that time, it was quite apparent from both Parties' submissions that they disagreed on measures required to be taken by the Respondent under that paragraph of the Order, and that they were thus unable to agree in any substantial respect. Nevertheless, the Respondent submits that the exchanges of correspondence that occurred between the Parties' practitioners between 10 March 2016 to 21 March 2016 show that the Respondent was prepared to engage in good faith in negotiations with the Claimants as to the best way to preserve the Assets.[40] As the Tribunal had allowed the Parties 60 days to come to an agreement in this respect, a date which (as at the date of both the Claimants' and the Respondent's Applications), had not yet elapsed, the Claimants' Application was, in this regard, premature.[41] Further, the Respondent pointed to the fact that it was continuing to gather

36 *Ibid*, para 66.

37 *Ibid*, para 71.

38 *Ibid*, para 71.

39 *Ibid*, para 72.

40 *Ibid*, para 83(a).

41 *Ibid*, para 85.

information from the Albanian authority in charge of administering the Assets as to whether or not the Claimants' proposals could be met.[42]

The Claimants' Reply to the Respondent's Application

2.21 On 18 April 2016, the Claimants submitted their Reply to the Respondent's Application, and its comments on the Respondent's Response.

2.22 The Claimants say that the Respondent's Application should be denied on a summary basis, because it has not met the requirements that such an application must meet to succeed.[43]

2.23 First, they say that the Respondent's Application is a challenge of the Tribunal's Order, not a "*bona fide* request for revocation or modification".[44] The Claimants submit that such a challenge is essentially an appeal against the Tribunal's Order, where there is no right to appeal or re-consideration under the ICSID Convention.[45] In this regard, the Claimants rely on various decisions, including the recent decision of an ICSID Tribunal in *ConocoPhillips v Venezuela* on an application for re-consideration.[46] The Claimants submit that the power must be "found to exist" before it can be exercised, which in this case, it cannot.[47] The Claimants submit that Rule 39(3) of the Arbitration Rules does not allow for re-consideration – it only permits revocation or modification when there are changed circumstances that justify amending the relief originally ordered.[48]

2.24 Second, the Claimants say that the Respondent cannot satisfy the requirement discussed above that there must be "changed circumstances".[49] The Claimants submit that Albania's request that the extradition proceedings be adjourned *sine die* in the UK courts does not

42 *Ibid*, para 87.

43 Claimants' Response, p 2.

44 *Ibid*, p 3.

45 *Ibid.*

46 *ConocoPhillips Petrozuata B.V. v Bolivarian Republic of Venezuela,* ICSID Case No ARB/07/30, Decision on the Respondent's Request for Reconsideration (9 February 2016), CL-21.

47 Claimants' Response, p 4.

48 *Ibid.*

49 *Ibid*, p 5.

form a "changed circumstance". It says that the mere postponement of the extradition proceedings with similar bail conditions in place for Messrs Becchetti and De Renzis would still mean that they would be subject to a curfew and unable to leave the UK.[50]

2.25 The Claimants further say that the Respondent's claim that it is unable to withdraw the extradition (as a matter of Albanian law) is extraordinary, describing it as "no more than a belated attempt to pay lip service to the Order while continuing to ignore it".[51] The Claimants point to the fact that not once since the Claimants sought orders suspending the Albanian criminal proceedings against Messrs Becchetti and De Renzis did the Respondent indicate that its domestic criminal laws prevented it from doing so, until now.[52]

2.26 Third, the Claimants say that the promise by the Respondent to impose "reasonable bail conditions" on Messrs Becchetti and De Renzis is of no comfort to the Claimants, contending that "when the Claimants are in Albania the Government can flout the Tribunal's orders, and by the time measures are taken to restrain Albania, the damage to the Claimants' rights will have been done".[53]

2.27 The Claimants also contend that the Respondent's Application should be denied because it has not explained why revocation or modification of the Tribunal's Order is urgent or necessary. The Respondent relies on a passage by the ICSID tribunal in the *Lao Holdings* where it was stated that a revocation "has to be based on changed circumstances, which make it urgent and necessary to adopt a new decision on provisional measures".[54] The Claimants instead say that the circumstances show that it is urgent and necessary to keep in place the existing order, because: (i) Albania has indicated that it may reignite the extradition proceedings if the Tribunal's order is revoked; and (ii) the procedural integrity of the arbitration is still affected by the criminal proceedings and the seizure of the Claimants' investments.[55]

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50 *Ibid*, p 6.

51 *Ibid.*

52 *Ibid.*

53 *Ibid*, p 7.

54 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Order (30 May 2014), CL-8, para 9.

55 Claimants' Reply, p 8.

2.28 Further, in their Reply, the Claimants press their request for a Partial Award or Order. The Claimants say that the requested relief (which was the subject of the Tribunal's Order) continues to be urgent and necessary (as does the relief sought in its new Application), especially where a number of months have passed since the making of the Tribunal's Order with what the Claimants say has been no attempt by the Respondent to comply.[56] The Claimants reject the Respondent's contentions that it cannot withdraw, suspend or stay the criminal proceedings, arrest warrants or extradition requests under Albanian law, and point to different Albanian statutes which would allow such actions to occur on the part of the Respondent.[57] Furthermore, the Claimants reiterate that their request for relief in the form of a monetary penalty against the Respondent for non-compliance is proportionate, and only this kind of penalty will "seemingly compel compliance with this binding Order".[58] The Claimants further reject the Respondent's contention that the Tribunal is unable to render a "Partial Award", because there is nothing in the ICSID Convention preventing it.[59] Finally, the Claimants say that, if the relief it seeks in its Application with respect to the Assets is granted by the Tribunal, it would provide an undertaking not to sell its shareholding in the relevant companies, to move any physical assets outside of Albania, and they would simply manage the relevant companies "in the ordinary course of business".[60]

The Respondent's Rejoinder

2.29 The Respondent submitted its rejoinder on 10 May 2016. In it, the Respondent reiterates and elaborates on many of the points made in its Application.

2.30 At the outset, the Respondent informed the Tribunal that the UK court had refused to adjourn the extradition proceedings of Messrs Becchetti and De Renzis *sine die*.

2.31 Nevertheless, the Respondent submits that, far from the Claimants' assertion that it had ignored the Tribunal's Order, it was the Respondent who was seeking to constructively

56 *Ibid.*

57 *Ibid*, p 9.

58 *Ibid*, p 11.

59 *Ibid*, p 12.

60 *Ibid.*

engage with the Claimants.[61] The Respondent submits that it is the Claimants who have ignored the Tribunal's Order by making an "aggressive, unreasonable and hasty" application for a Partial Award, more than a month before the expiry of the 60-day period prescribed by the Order for the Parties to discuss the protection of the Assets.[62]

2.32 The primary position taken by the Respondent in its Rejoinder is that there is no need for "changed circumstances" (as suggested is required by the Claimant) in order for the Tribunal to exercise its power to revoke or modify the award pursuant to Rule 39(3) of the Arbitration Rules.[63] The Respondent submits that "the Tribunal remains the master of its own process and is able to modify or revoke the PMO in light of further submissions made by the Parties about the reasoning adopted in it or indeed of its own motion".[64] The Respondent says that there is no requirement in the text of Rule 39(3) that there be a change of circumstances;[65] the Tribunal's discretion under Rule 39(3) is "wholly untrammelled" because of the juridical nature of an order for Provisional Measures, which (in contrast to a Final Award) does not carry the force of *res judicata*.[66]

2.33 Further, the Respondent challenges the legal authorities cited by the Claimants in their Response.

2.34 The Respondent says that the Claimants' reliance on the *Lao Holdings* case to import the requirement of "changed circumstances" is flawed because, in that case, the Tribunal proceeded on the basis of an express concession by the respondent State that it had to establish a change of circumstances in order for the provisional measures order to be modified. That is, put another way, neither party disputed that a change of circumstances was actually required.[67]

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61 Respondent's Rejoinder, para 11.

62 *Ibid.*

63 *Ibid*, para 19.

64 *Ibid.*

65 *Ibid*, para 21.

66 *Ibid*, para 20.

67 *Ibid*, para 24.

2.35 The Respondent also challenges the Claimants' reliance on the *ConocoPhillips* case because that case dealt with a request for re-consideration of a final award, not an order for provisional measures.[68] The Respondent submits that there is a clear difference between asking a Tribunal to re-visit a binding and final decision, and a party seeking revocation or modification of an interim order (and the Tribunal must be scrupulous in order not to pre-judge the merits of the case itself).[69]

2.36 Moving beyond the question of whether "changed circumstances" are required, the Respondent submits that there are nevertheless other "legal difficulties" with the Tribunal's reasoning in the Order.

2.37 First, the Respondent submits that it was "difficult to see how" the management of Messrs Becchetti and De Renzis' businesses (or, more accurately, the inability to manage those businesses) imperilled the procedural integrity of the arbitration, or, even assuming it did, how such inability could do so in a manner sufficient to make it absolutely necessary to grant provisional measures.[70]

2.38 Second, insofar as the Tribunal's reasoning for the Order was based on the justification that incarceration of Messrs Becchetti and De Renzis would prevent them from "fully participating" in the arbitration, and imperilling their right to procedural integrity, the Respondent submits that the reasoning was not fully explained in the Order, and therefore cannot be properly justified.[71] Specifically, it points to five criticisms:

(a) The Tribunal did not provide an explanation for the concept of "full participation" in the arbitration, nor make any findings to suggest that full participation was being imperilled.[72]

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68 *Ibid*, para 27. The difference, the Respondent says, between cases such as *ConocoPhillips* and the present is that final awards carried with them the force of *res judicata*.

69 Respondent's Rejoinder, para 28.

70 *Ibid*, para 30(1).

71 *Ibid*, para 30(2).

72 *Ibid*, para 30(2)(a).

(b) The Tribunal stated that provisional measures must be "absolutely necessary" but did not explain why the potential incarceration of Messrs Becchetti and De Renzis made it so.[73]

(c) The Tribunal's reasoning that the criminal allegations against Messrs Becchetti and De Renzis were not divorced from the Claimants' investments and that the criminal proceedings that relate to the arbitration did not provide a valid justification for the Order.[74]

(d) The Tribunal's reasoning that the Order was justified because the interference into Albania's sovereign rights is "temporary" is not a satisfactory justification where the test of provisional measures needing to be "absolutely necessary" is properly to be applied.[75]

(e) The Order did not explain why it was appropriate to "cut across" the extradition proceedings before the UK courts, and before a ruling by that court had been made.[76]

2.39 While the Claimants stated that Albania cannot "re-argue" the arguments ventilated before the Order,[77] the Respondent says that it is not seeking to "re-argue" them, but rather it "has made submissions in response to the reasoning adopted by the Tribunal in the PMO, which Albania obviously only saw for the first time once the PMO was issued".[78]

2.40 The Respondent further says that if, contrary to its primary submissions, the Tribunal is not minded to modify or revoke the Order, then any provisional measure should last only until the end of the final hearing, or, at the latest, the date of post-hearing briefs and not until the date of the Final Award.[79] This submission is premised on the fact that there is nothing about which Messrs Becchetti and De Renzis need to instruct their counsel after

73 *Ibid*, para 30(2)(b).

74 *Ibid*, para 30(2)(c).

75 *Ibid*, para 30(2)(d).

76 *Ibid*, para 30(2)(e).

77 *Ibid*, para 31.

78 *Ibid.*

79 *Ibid*, para 37.

the final hearing. Indeed, the post-hearing submissions do not require their input to analyse legal argument and oral and written evidence has already been submitted.[80]

2.41 Further, the Respondent criticises the Order as being "unprecedented" in nature, and that it carries with it radical and extraordinary implications.[81] For that reason, the Respondent submits that the Tribunal "ought in principle be ready to reflect upon the validity of its reasoning and conclusions", and "it remains incumbent upon the Tribunal to subject its unprecedented recommendations to close and continuing scrutiny".[82]

2.42 The Respondent says that, if the Tribunal is not minded to review the validity of its Order on the basis of the legal difficulties it presented (and which are summarised above), then the Tribunal should modify or revoke the Order owing to changed circumstances.[83]

2.43 That changed circumstance is the decision of the Westminster Magistrates' Court in the UK where the Home Office's application to adjourn the extradition proceedings involving Messrs Becchetti and De Renzis *sine die* was rejected. The Respondent has submitted that it is "clear that the attitude of the English court is that the only way the English proceedings can be 'suspended' is in fact for them to be entirely withdrawn".[84] In that regard, the Respondent says that the withdrawal of the extradition proceedings is not what the Order required, and Albania had attempted in good faith to comply with the Tribunal's order to "suspend" the extradition proceedings by requesting the *sine die* adjournment.[85]

2.44 In this regard, the Respondent again points to the fact that there is no provision of Albanian law that allows the Minister of Justice to withdraw an extradition request once made, and that, the issuance of arrest warrants gives rise to an obligation on the Albanian authorities to execute that arrest warrant.[86] Art 504 of the Albanian Code of Criminal Procedure provides the power for the Albanian Minister of Justice to request the

80 *Ibid.*

81 *Ibid*, para 38.

82 *Ibid*, para 38(1) & (2).

83 *Ibid*, para 40.

84 *Ibid*, para 44.

85 *Ibid*, paras 54, 57.

86 *Ibid*, para 58.

extradition of a person from a foreign state. But the Respondent submits, contrary to what the Claimants said, this does not give the Minister of Justice a discretion to withdraw an extradition request.[87] In essence, the Respondent says that, in the absence of something that prevents the extradition proceedings to continue, as a matter of Albanian or international law, then there is no unfettered discretion for the Minister of Justice to simply withdraw the request.[88] While the Tribunal's Order does give rise to an obligation on Albania under international law, the Respondent submits the ICSID Convention does not prescribe any mechanism for the Order to be recognised or enforced in Albanian law.[89] It follows that the Tribunal's Order cannot affect the validity of the extradition request as a matter of Albanian law, leaving no discretion for the Minister of Justice to withdraw that request.

2.45 In all of these circumstances, and in what the Respondent explains is an attempt to address the concerns of the Tribunal, Albania offers a guarantee that if Messrs Becchetti and De Renzis were extradited to Albania, then Albanian prosecutors would not seek that they be remanded in custody, but instead be released on "reasonable bail conditions".[90] This offer had been made by the Albanian Minister of Justice to the UK Home Office.[91] The effect would be that, upon arriving in Albania, Messrs Becchetti and De Renzis would spend a maximum of three days in custody before being brought before a court, where the prosecutor would ask the Albanian court to impose bail conditions which would allow Messrs Becchetti and De Renzis to be released from custody.[92] The Respondent says that the prosecutor is obliged to follow the guarantee given by the Minister of Justice and "must ask the Court to replace the existing security measures with the reduced security measures of reasonable bail".[93] It follows that there is no risk that the Albanian court would not release Messrs Becchetti and De Renzis on bail, because Art 244(3) of the Albanian *Code*

87 *Ibid*, para 61(3).

88 *Ibid*, para 62.

89 *Ibid*, para 63.

90 *Ibid*, para 41(1).

91 Letter from the Albanian Minister of Justice to the UK Home Office (5 April 2016) (R-0010).

92 Respondent's Rejoinder, para 46.

93 *Ibid.*

of Criminal Procedure provides that "the court cannot assign a remand order more severe than the one applied for by the prosecutor".[94]

2.46 In response to the Claimants' position that the Claimants cannot now rely on the undertaking given by Albania, the Respondent says that when the Claimants originally sought provisional measures, they did not suggest that "Albania could not be trusted to comply with a tribunal's order or undertaking". The Respondent asserts that the Claimants have changed their position and that the Tribunal should consider the credibility of the Claimants' avowed concerns about needing to be able to attend to their businesses in Albania. They add that it is now clear that neither Mr Becchetti nor Mr De Renzis intend to travel to Albania to attend to their investments, so the basis for the provisional order, by the Claimants' own admission, falls away.[95]

2.47 As to what it had previously described as an "inability" to comply with the Tribunal's recommendation to suspend domestic criminal proceedings,[96] the Respondent contends that, under Albanian law, criminal proceedings as a whole cannot be suspended.[97] It points to Art 342 of the *Code of Criminal Procedure* which provides for uninterrupted criminal trials to be one of the main features for the conduct of criminal trials in Albania.[98] While the Respondent concedes that Art 343 of the Code provides for suspension, it only does so when the criminal case is dependent on the resolution of a civil proceeding or administrative dispute.[99] To the contrary, there is no dependency between this arbitration and the criminal proceedings against Messrs Becchetti and De Renzis.[100] The Respondent further says that any intervention by the Government in court processes is forbidden under the Albanian Constitution, so the Albanian Government, as much as it may wish to comply

94 *Ibid*, para 48.

95 *Ibid.*

96 In paragraphs 68 – 81 of its Rejoinder.

97 Respondent's Rejoinder, para 69.

98 *Ibid.*

99 *Ibid*, para 71.

100 *Ibid.*

with the Order, cannot request either the Albanian court, or its prosecutors, to suspend the criminal proceedings.[101]

2.48 Finally, the Respondent notes that although the domestic arrest warrants against Messrs Becchetti and De Renzis were not recommended to be withdrawn or suspended by the Tribunal's Order, the Respondent says that it could not do so under Albanian law.[102] The Respondent says that, pursuant to Art 260(2) of the *Code of Criminal Procedure*, arrest warrants can only be modified or revoked when "security needs are lowered".[103] The Respondent submits that "security needs" have not lowered because Messrs Becchetti and De Renzis are "actively evading the justice of the Albania courts".[104]

2.49 In all of these circumstances, the Respondent says that the "disappearance of any threat of incarceration" justifies the revocation of the Tribunal's Order, and the fact that the domestic criminal proceedings have not been suspended does not justify the continuation of the Order. Those criminal proceedings do not pose a threat to the liberty of Messrs Becchetti and De Renzis.[105]

The Hearing of 15 June 2016

2.50 At the Hearing, the Respondent was invited to make its submissions first, followed by the Claimant. Messrs Toby Landau QC and Siddarth Dhar made submissions on behalf of the Respondent, and Mr Phillipe Pinsolle and Mr Christopher Tahbaz for the Claimants. Messrs Ben Brandon and Julian Knowles QC, respectively counsel for the Respondent and Claimants in the UK extradition proceedings, were also present and assisted the Tribunal on occasion during the hearing.

The Respondent's oral submissions

2.51 The Respondent submitted that the Claimants had attempted to paint the Respondent's Application as acting in bad faith, and "seeking to run away" from the Tribunal's Order,

101 *Ibid.*

102 *Ibid*, para 76.

103 *Ibid*, para 77.

104 *Ibid*, para 78.

105 *Ibid*, para 83.

neither of which were true.[106] Rather, there was no element of bad faith in asking the Tribunal to exercise a power that it has as a matter of the ICSID Rules.[107] The Respondent further submitted that it has in good faith tried to comply with the Tribunal's order.[108] The Respondent rejected any notion by the Claimants that the request for an adjournment of the extradition proceedings was for a "tactical reason" to prolong the bail conditions of Messrs Becchetti and De Renzis.[109] The Respondent further submitted that Albania has not acted in bad faith in failing to suspend the criminal proceedings against Messrs Becchetti and De Renzis in Albania because there have been great efforts to accommodate what the Respondent says is an "unprecedented" and "extraordinary" order in a domestic legal system.[110] The Respondent further pointed out that, while it has tried to accommodate the Tribunal's Order, the continuance, or more accurately, existence, of the criminal proceedings in Albania has posed no difficulty to the Claimants whatsoever (i.e. those proceedings have not stopped them in any way from doing anything in this arbitration).[111] The Respondent also pointed to the fact that the Claimants filed an extensive memorial submission on 13 May 2016 as an example of their ability to engage in the arbitral proceeding.[112]

2.52 On the issue of changed circumstances, the Respondent added a new changed circumstance that would justify (at least in part) the revocation of the Order – according to the Claimants' Memorial of 13 May 2016, all of the Assets in Albania had been fully expropriated.[113] So the Respondent said that, at least in respect of the Order that dealt with the Claimants' businesses, and any concern about running those businesses, that forms a changed circumstance.[114]

106 T6.1-2.

107 T7.9 – 10.

108 For instance, the application to adjourn *sine die* the extradition proceedings, T8.20.

109 T9.19 – T10.4.

110 T12.22 – T13.11.

111 T13.16 – 23.

112 T13.24 – 25.

113 T21.6 – 10.

114 T21.17 – 20.

2.53 The Respondent, at the request of the Tribunal, made submissions regarding the undertaking given by the Albanian Minister for Justice not to seek to remand Messrs Becchetti and De Renzis in custody in Albania, which had been given the UK extradition proceedings. The Respondent confirmed that it was an undertaking given by Albania to the UK, specifically the UK Home Office.[115]

2.54 The Respondent submitted that if the Tribunal did not agree that it should revoke its Order without changed circumstances, and those changed circumstances concerned an undertaking given by the Albanian Minister for Justice not to incarcerate Messrs Becchetti and De Renzis, then it would be open to the Tribunal to outline what it required to "have confidence and comfort" in revoking or modifying the Order.[116]

2.55 When asked to deal with the difficulty that might arise with the ability for Messrs Becchetti and De Renzis to properly prosecute this arbitration if they were sitting in a jail cell in Albania, counsel for the Respondent submitted that "the criminal proceedings going ahead in Albania themselves will have no impact on the ability to prosecute this arbitration on any view".[117] Counsel for the Respondent then pointed out that, despite the pendency and even continuation of those criminal proceedings in Albania, the Claimants had managed to file their Memorial of 13 May without difficulty.[118] In answer to the proposition that Messrs Becchetti and De Renzis are not currently in jail, and thus it is unsurprising that they have been able to properly prosecute their claims in this arbitration to date,[119] counsel submitted that "the criminal proceedings [in Albania] can continue and the extradition proceedings could be stopped. The two may depend on each other, but they are not both necessary".[120] Counsel for the Respondent further explained that "the Tribunal could have made an order which was simply focused upon the extradition proceedings, not the criminal proceedings".[121] On that basis, the Respondent submitted that there was "no justification, in terms of procedural integrity, to stop the domestic criminal proceedings in

115 T26.12 – 16.

116 T29.23 – T30.9.

117 T37.4 – 6.

118 T37.10 – 24.

119 T38.5 – 11.

120 T38.20 – 23.

121 T39.22 – 24.

Albania",[122] and all that was required from the Tribunal was an order suspending the extradition proceedings.[123] In relation to the hypothetical scenario that Messrs Becchetti and De Renzis could go to a third state and Albania could then seek extradition from that third state,[124] counsel explained that "the idea that every extradition process around the world can be suspended on this basis, that there can be an incursion of sovereignty of that extent, is totally unprecedented and takes away all the discretions that are built into the system for each country to consider itself how it proceeds".[125]

2.56 The Respondent's position was that the undertaking Albania was prepared to offer was essentially the same undertaking that was made by the Albanian Minister for Justice in the extradition proceedings.[126] Having been questioned by the Tribunal on this issue, counsel for the Respondent requested an opportunity to provide further written submissions on this particular issue so as to not misconstrue Albanian law.[127]

2.57 As to the Claimants' application, the Respondent submitted that the Tribunal should not make the order sought by the Claimants.[128] The Respondent submitted that, amongst other things, there was no need to grant the application where Albania has been making good faith attempts to implement the Tribunal's Order.[129] The Respondent submitted that the question that had to be asked by the Tribunal when considering whether or not to grant the Claimants' application was "ha[s Albania] acted in bad faith such that [the Tribunal] should warrant now this extraordinary penal order?".[130] The Respondent submitted that in circumstances where Albania has been "trying to work with the Tribunal … this is not a

122 T40.16 – 18.

123 T41.3 – 6.

124 T41.21 – T41.13.

125 T42.18 – 24.

126 T126.10 – 25.

127 T124.25 – T125.8.

128 From T48.17 ff.

129 T50.8 – 17.

130 T54.11 – 13.

situation where it is now appropriate to slap an order or decision on [Albania] to say that [Albania is] in breach, with a day-by-day penalty".[131]

2.58 The Respondent also addressed the Tribunal regarding the orders sought by the Claimants in respect of the Assets. In this regard, the Respondent emphasised that the Tribunal had invited Albania to confer with the Claimants and "seek to agree appropriate measures to be taken by the Republic of Albania" to preserve the Assets.[132] The Respondent said the relief sought by the Claimants in this respect should be dismissed for three reasons.

2.59 First, the Respondent said that the basis of the Claimants' application, which was that the Respondent had not engaged with the Claimants' proposals to "preserve" the Assets, was misconceived.[133] The Respondent referred the Tribunal to correspondence between the Parties which it said demonstrated otherwise.[134] That correspondence, the Respondent submitted, showed that the Respondent's counsel was still receiving instructions as to how to address the Claimants' "precise concerns" regarding the preservation of Assets.[135] The Respondent also submitted that the Claimants' application was premature, because the Tribunal's Order prescribed a 60-day time limit in which the Parties were to confer and agree, which had not expired by the time the Claimants' Application was made.[136]

2.60 Second, the Respondent submitted that Albania had "done everything necessary to comply" with the terms of the Tribunal's directions at paragraphs 5.2 and 5.3 of its Order.[137] The Respondent submitted that "there is no allegation that shareholdings have been diluted; there is no allegation that bank accounts have been dissipated; there is no allegation that assets have been left in a warehouse to rot", and thus, when considering the

131 T54.22 – T55.05.

132 Tribunal's Order, para 5.2.

133 T57.7 – 11.

134 T57.12 – 14.

135 T60.10 – 13.

136 T57.14 – 21.

137 T58.5 – 7, T58.15 – 16.

precise terms of paragraph 5.2 of the Order, it could not be said that Albania has breached that order.[138]

2.61 Third, the Respondent contended that, even if the Tribunal did not accept that the Respondent had complied with paragraphs 5.2 and 5.3 of its Order, then the Claimants have stated in their recently-filed Memorial that those Assets no longer exist,[139] so there could be no urgency supporting the grant of provisional measures to protect them.

The Claimants' oral submissions

2.62 The Claimants submitted that the Respondent's characterisation of the issue before the Tribunal as being a question of whether or not the Respondent had acted in bad faith or good faith was not relevant, and that the question of good faith was not the test to be applied by the Tribunal.[140] Rather, what is required to be examined is compliance with the Tribunal's Order, which is what the Claimants submitted their Application was predicated upon.[141]

2.63 The Claimants submitted during their opening that they were now seeking an indemnification for the Assets, some of which had now been expropriated and could not be returned.[142] When asked to clarify their position regarding the relief sought, the Claimants confirmed that they were seeking full compensation in the merits aspect of this arbitration, but also a penalty against the Respondent for non-compliance with the Tribunal's Order.[143] The Claimants confirmed that the penalty and the award of damages it sought would be "in parallel", so that the penalty would be deducted from the calculation of damages (presumably, so as not to receive double compensation, or a pecuniary penalty, as the case may be).[144]

138 T61.16 – 22.

139 T59.12 – 15.

140 T65.21 – T66.1.

141 *Ibid.*

142 T66.11 – 12.

143 See the exchange at T67.5 – 20.

144 T67.21 – 23.

2.64 The Claimants also addressed the Tribunal on the Respondent's compliance with the suspension of the extradition proceedings. The Claimants submitted that UK Magistrates' Court had not been inclined to grant the Home Office's application to adjourn *sine die* because it did not wish to leave the matter "in limbo".[145] As at the stage of the oral hearing, the Parties informed the Tribunal that the judgment of Judge Tempia as to the extradition application of Messrs Becchetti and De Renzis was expected to be delivered on 8 July 2016.

2.65 Counsel for the Claimants also made submissions regarding two documents relating to the conditions of Albanian prisons that were submitted to the Tribunal, without leave, on 10 June 2016.[146] The Tribunal decided against admitting these documents and, as such, it is unnecessary to dwell on these submissions further.

2.66 The Claimants addressed the Respondent's contention that there was no mechanism under Albanian law by which to suspend the Albanian criminal proceedings, contending that in the extradition proceedings before Judge Tempia, the Claimants had tendered an expert report of an expert in Albanian law which demonstrated that the Albanian Minister for Justice *does* have a discretion to suspend an extradition request.[147] The Tribunal noted that whilst that report was not in evidence in this arbitration, the question of whether or not the Albanian minister can suspend the extradition request was likely to be a question answered by Judge Tempia.[148] Mr Brandon, Albania's counsel in the extradition proceedings, agreed that those were the questions that Judge Tempia would decide, but said that they would not necessarily be decided on 8 July 2016, when judgment from that court was expected.[149]

2.67 The Claimants also made submissions regarding the difficulties they perceived in relation to the undertaking given by the Albanian Minister of Justice to the Home Office (and presumably, any similar undertaking to the Tribunal) not to imprison Messrs Becchetti and De Renzis. In this regard, the Claimants emphasised paragraphs 46 to 48 of the Respondent's Rejoinder, and specifically on the word "ask" (i.e. that the Albanian

145 T72.16 – 21.

146 Those submissions appear at T78.6 – T80.23.

147 T81.13 – 24.

148 T83.2 – 11.

149 T83.14 – 20.

authorities would *ask* the Albanian courts not to imprison Messrs Becchetti and De Renzis).[150] The Claimants further submitted that "reasonable bail conditions" quoted in the Albanian Minister's undertaking was an "abstract concept", and that it is not known what an Albanian court might regard as "reasonable bail conditions".[151] When pressed by the Tribunal as to whether or not the Claimants would ever accept any undertaking given by the Respondent as acceptable, the Claimants submitted that it would not "rule out this possibility".[152]

2.68 The Claimants then turned to the Respondent's Application more generally. They contended that it was nothing more than an interlocutory appeal.[153] An appeal of this nature is not authorised under the ICSID Convention, nor the Arbitration Rules.[154] The Claimants pointed out that "Albania had a full and fair opportunity to participate [in the hearing on provisional measures], where there were hundreds of pages of written submissions, where Albania was represented by its choice of counsel, during a hearing to which it agreed".[155] The Claimants submitted that Albania's dissatisfaction with the Tribunal's reasoning was not a basis to "re-open issues that this Tribunal has fully considered and decided".[156]

2.69 The Claimants conceded that the ICSID Convention and the Rules are each silent as to the circumstances under which an application for revocation or modification can be made, but submitted that, contrary to the Respondent's submission that it is incumbent upon the Tribunal to subject its Order to continuing scrutiny, there must be changed circumstances in order to allow a consideration of revocation or modification.[157]

2.70 Accepting that changed circumstances are required to allow revocation or modification of the Tribunal's Order, the Claimants contended that there were no changed circumstances

150 T85.7 – 17.

151 T88.5 – 9.

152 T91.9 – 12.

153 T93.3 – 7.

154 T93.14 – 16.

155 T94.3 – 7.

156 T95.20 – 22.

157 T96.2 – 7, T97.3 – 5, T98.21 – T99.3.

in this case, nor was it necessary or urgent to modify or revoke the Order.[158] The Claimants submitted that the dual requirement (namely that there be *both* changed circumstances, and that it be urgent and necessary to revoke) was derived from the *Lao Holdings* case.[159] Without the requirement of changed circumstances (that is, "an objective justification"), the Claimants submitted that one would be left with a system of unlimited appeal.[160]

2.71 The Claimants further contended that Albania's assurances of compliance, and in particular, its claim that it had complied with the Tribunal's Order regarding the suspension of the extradition proceedings (or at least, attempted suspending), did not constitute changed circumstances.[161]

2.72 The Claimants also focused the Tribunal's attention to the question of why Albania did not raise its inability to suspend the extradition or criminal proceedings during the earlier Provisional Measures hearing, when it knew it could be faced with such an order.[162] The Claimants submitted that the inference that can be drawn from this is that there is no merit to the argument that Albania is unable to comply with the Order.[163]

2.73 Finally, the Claimants focused on Albania's undertaking not to seek that Messrs Becchetti and De Renzis be remanded in custody if they were to be extradited. The Claimants submitted that the Respondent was not being "genuine and honest" in giving this undertaking, because, on the one hand, it had stated that it was committed not to imprison Messrs Becchetti and De Renzis, but, on the other hand, it is "fighting tooth and nail to get rid of" the Order.[164]

2.74 After the hearing, the Parties were each directed to file post-hearing submissions, to which the Tribunal now turns.

158 T100.22 – T101.2.

159 T101.3 – 12.

160 T103.7 – 10.

161 T105.23, T106.9 – 18.

162 T107.1 – 21.

163 T107.21 – 24.

164 T109.2 – 9.

The Respondent's Post-Hearing Submission of 29 June 2016

2.75 The Respondent submitted its Post Hearing Submission on 29 June 2016, accompanied by (i) correspondence between the Albanian Attorney-General's Office and Albanian Prosecutors; and (ii) an Opinion on Matters of Albanian Law dated 22 July 2016 written by Professor Arben Rakipi, a Professor of Criminal Law at the Tirana Magistrates' School. The admission of those documents into the record was objected to by the Claimants in their Post-Hearing Submission of 8 July 2016.

2.76 In light of this dispute, the Tribunal had to determine whether to admit this opinion. It determined to do so. The Tribunal turns to consider Professor Rakipi's opinion (and that of the Claimants' expert as to Albanian law) at paragraphs 2.95–2.101 below.

2.77 The Respondent then makes submissions on the three relevant questions, namely:

(a) who was to give the undertakings that Messrs Becchetti and De Renzis not be incarcerated and that they be released on bail, and in what form they were to be made to the Tribunal;

(b) how any such undertakings would be made; and

(c) how, once made, the undertakings would be implemented in Albania.[165]

2.78 The Respondent describes the undertakings as "promises", rather than undertakings, explaining that, as a matter of Albanian legal language, it was appropriate to do so.[166] In fact, the terms "undertakings" and "promises" seemed to be used interchangeably in both Parties' submissions, and the Tribunal herein adopts the language used by the Parties depending on the particular submission or point made.

The "promises" made

2.79 The Respondent relies on promises that have already been made in the form of the 5 April 2016 letter from the Minister of Justice to the Home Office[167] and a letter from the

165 Respondent's Post-Hearing Submission, para 2(a) – (c).

166 *Ibid*, footnote 1.

167 R-0010.

Albanian Prosecution Office dated 14 June 2016.[168] Further, it relies on the letter from the Prosecutor General's Office dated 29 June 2016,[169] which it submits confirms that (i) the Prosecutor and Albanian Court are obliged to comply with the "promise" made by the Albanian Minister of Justice; (ii) Messrs Becchetti and De Renzis would be held in custody for a maximum of three days from their arrival in Albania before they are brought before an Albanian court for "processing"; (iii) Messrs Becchetti and De Renzis will thereafter be released on "reasonable bail conditions"; and (iv), once they have appeared before the Albanian court, their arrest warrants will be satisfied.[170]

How the "promises" are to be implemented in Albania

2.80 The Respondent refers to letters from the State Advocate's Office that confirm, amongst other things, that the Minister for Justice abides by the undertakings made in the 5 April 2016 letter to the Home Office, which are "legitimated by implementation of Article 504/2 of the Code of Criminal Procedure".[171] The Respondent further submits that as a matter of international law, those promises remain binding on Albania because:

(a) the letter is signed by the Minister of Justice himself, and he is the authorised representative of the Republic of Albania; and

(b) the letter by the Minister plainly evinces an intention to be bound by its terms.[172]

2.81 The Respondent points to the decision of the International Court of Justice in the *Nuclear Tests Case*, whereby the Court stated:

> "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking…"[173]

2.82 The Respondent concedes that its previous reliance on Art 504(2) of the Albanian *Criminal Procedural Code* to suggest that the Minister for Justice's promise in the letter to the Home

168 R-0020.

169 R-0020.

170 Respondent's Post Hearing Submission, para 6 (a) – (d).

171 *Ibid*, paras 10 – 12.

172 *Ibid*, para 13(a)-(b).

173 *Australia v France*, Judgment dated 20 December 1974, I.C.J. Reports 1974, CL-029, p 267.

Office was binding is now "a matter of some uncertainty under Albanian law".[174] However the Respondent relies on the opinion of Professor Rakipi, its Albanian law expert, that "the Minister is bound where he has made promises as to how the Defendants will be treated if extradited" despite the situation not being "expressly envisaged in the law".[175]

2.83 The Respondent submits that the Minister for Justice considers himself bound by the promises made in the extradition proceedings, but could make those same promises or undertakings to the Tribunal because they do not relate to the "framework of the extradition proceedings" and Albanian law does not provide for any valid undertakings to be made outside the extradition proceedings.[176]

2.84 As a reason why this Tribunal should be satisfied that the Minister will keep his word, the Respondent submits that by not doing so would have "very severe repercussions" for Albania in these proceedings, and also for its bilateral relationship with the UK.[177]

2.85 Turning to how the "promises" made by the Minister of Justice are binding on Albanian prosecutors and courts, the Respondent relies on Art 51(2) of Law 10193[178] and Art 504(2) of the *Code of Criminal Procedure*,[179] which, in combination, mean that the Minister's confirmation or acceptance of the promises previously made to the Home Office is binding upon both prosecutors and courts.[180]

The Claimants' Post-Hearing Submission of 8 July 2016

2.86 On 8 July 2016, the Claimants submitted their response to the Respondent's Post Hearing Submission (the "**Claimants' Post-Hearing Submission**"). This was submitted on the same day that the Judgment was handed down. The Claimants' Post-Hearing Submission

174 Respondent's Post Hearing Submission, para 16.

175 *Ibid*, para 17.

176 *Ibid*, para 18.

177 *Ibid*, para 19.

178 Which essentially provides that Albanian domestic courts are obliged to respect conditions previously promised in an extradition.

179 Which provides that the Minister of Justice is competent to decide upon the conditions imposed by the "foreign country to provide extradition", when they do not run against principles of Albanian law.

180 Respondent's Post-Hearing Submission, para 27. The Respondent also relies on the Opinion of Professor Rakipi in this respect.

was accompanied by an opinion by Mr Arben Qeleshi which largely addressed the opinion of Professor Arben Rakipi. That, too, was admitted into evidence. The Tribunal separately summarises Mr Qeleshi's opinion (together with Professor Rakipi's opinion) at paragraphs 2.95–2.101 below.

2.87 The Claimants emphasise that the Respondent would not (or could not, as the case may be) give an undertaking to this Tribunal directly and instead rely on the previous undertaking given by the Minister of Justice.[181] The Claimants point out the Respondent admits that Art 504(2) of the *Code of Criminal Procedure* would not apply to the undertakings given by the Minister, because that part of the Code only applies "where an undertaking has been given at the request of a foreign State as a condition for extradition".[182] The Claimants explain that, under Art 504(2), an undertaking could only be given by the Minister if requested by the UK authorities, and, as no such request was made, an "undertaking" was not given (at least for the purposes of Art 504(2)).[183] The Claimants say that this is significant because "Albania has been forced to concede yet again that its prior statements with respect to Albanian law are simply untrue".[184]

2.88 The Claimants submit that the "promises" given by Albania to the UK authorities (given that they cannot be characterised as undertakings and are not described by the Respondent as such) do not bind Albania, Albanian courts, or Albanian prosecutors.[185] The Claimants reject the claim that the promises are binding as a matter of international law, because "Albania's Minister of Justice evinces no intention to be bound by his April 5 letter".[186] The Claimants also point to the apparent contradiction between the Respondent maintaining that the promises have a binding effect under Albanian law (by virtue of their binding nature under international law), but that the Tribunal's Order does not enjoy a similar binding effect under Albanian law.[187]

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181 Claimants' Post-Hearing Submission, p 2.

182 *Ibid*, p 3 – the Claimants quote the transcript at T86.01 – T87.25.

183 Claimants' Post-Hearing Submission, p 4.

184 *Ibid.*

185 *Ibid.*

186 *Ibid*, p 5.

187 *Ibid.*

2.89 The Claimants submit that the Respondent's promises do not bind the Albanian courts and its prosecutors.[188] The Claimants point to two matters in support. First, they say that (as the Minister has admitted) Art 504(2) does not provide a legal basis for the binding nature of the undertaking under Albanian law. Second, the Claimants say that Albania's reliance on Law 10193[189] is equally flawed. In this regard, the Claimants rely on the opinion of Mr Qeleshi (which is summarised below), specifically because neither Law 10193 nor Art 504(2) of the *Code on Criminal Procedure* provide a basis for the "promises" to be binding under Albanian law.[190]

2.90 The Claimants further submit that the promises made by the Albanian Minister are not binding before the English courts. The Claimants submit that the issue of bail in Albania (and, presumably, any promises made regarding bail) is irrelevant to the extradition process in the UK.[191] The Claimants submit that under the *Extradition Act 2003* (UK), the presiding judge must send an application for extradition to the UK Secretary of State, who is obliged to order extradition unless certain narrow circumstances exist (none of which are applicable in this case).[192] The Claimants contend that neither the Judge nor the Secretary of State will be concerned with the question of bail in Albania after Messrs Becchetti and De Renzis are extradited.[193]

2.91 The Claimants also contend that Albania's promise that Messrs Becchetti and De Renzis will be allowed to travel freely to and from Albania once they are released on bail is illusory. The Claimants draw the Tribunal's attention to the fact that the guarantee of free travel to and from Albania is not covered by any promise or undertaking by the Albanian Minister of Justice – rather, it was only made by way of submission in the Respondent's submission of 10 May 2016, and the Respondent does not explain why this representation is binding.[194] Further, the Claimants contend that Albania does not explain how it would withdraw international arrest warrants and an Interpol "Red Notice" against Messrs Becchetti and

188 *Ibid*, p 6.

189 Referred to above in para 2.85.

190 Claimants' Post Hearing Submission, p 6.

191 *Ibid*, p 7.

192 *Ibid.*

193 *Ibid*, p 8.

194 *Ibid*, p 9.

De Renzis.[195] The Claimants pose the question why Albania would continue to seek the extradition of Messrs Becchetti and De Renzis only to release them again, and says that such a position "flies in the face of the very purposes of extradition, which is to force a defendant to return to a State in which he is to be tried in order to stand trial".[196] The Claimants contend that even if Messrs Becchetti and De Renzis were granted bail, they would be obliged to appear in Albania at "Albania's volition", due to the operation of Art 353 of the *Code of Criminal Procedure*.[197]

2.92 The Claimants also press the argument that the Respondent has failed to address any of the Tribunal's queries contained in its letter of 16 June 2016 following the oral hearing in this matter. In particular, the Claimants stress that the Respondent has given no undertaking to the Tribunal (especially given that the Tribunal's letter of 16 June 2016 specifically asked: "who will make the undertaking(s) and in what form will it be made to the Tribunal").[198] The Claimants say that the reasons proffered by the Respondent as to why it cannot make the undertakings directly to the Tribunal are flawed. First, the Claimants say that given the Respondent has effectively admitted that the undertaking made by the Minister to the Home Office in his letter of 5 April 2016 was not made pursuant to Art 504(2) of the *Code on Criminal Procedure*, then it could not bear a relationship to the extradition proceedings.[199] The Claimants ask: given that those undertakings bear no "legal" relationship to the extradition proceedings, why can the Minister of Justice make the undertakings to the Westminster Magistrates' Court, but not the Tribunal?[200] Second, the Claimants submit that, if the Minister of Justice cannot provide the undertakings to the Tribunal (as the Respondent claims the Minister cannot), then why are Albanian officials other than the Minister of Justice unable to make such an undertaking?[201]

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195 *Ibid*, a "Red Notice" is described on the Interpol website as follows: *"In the case of Red Notices, the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision. INTERPOL's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and extradition or similar lawful action."* See www.interpol.int/INTERPOL-expertise/Notices.

196 *Ibid.*

197 *Ibid*, p 10.

198 *Ibid.*

199 *Ibid*, p. 11.

200 *Ibid.*

201 *Ibid.*

2.93 The Claimants also point out that the "reasonable bail conditions" promised by the Respondent have not been fully explained to them and remain an "abstract concept".[202] The Claimants say that the Tribunal should draw "the necessary conclusions" – namely, an adverse inference – from Albania's silence on this point.[203]

2.94 Finally, the Claimants contend that Albania has not adequately addressed how the promises made by the Minister to the Home Office would be implemented. The Claimants attack the Respondent's submission that the promise would be binding on it as a matter of international law because such a contention is "disingenuous in light of Albania's position that the Tribunal's Order on Provisional Measures is binding upon it, but that it nevertheless cannot be implemented under its own law".[204] Specifically, the Claimants submit that the Respondent fails to explain why the Minister's promises must be implemented immediately by its governmental organs, but not the Tribunal's Order.

The Opinions of Professor Arben Rakipi and Mr Arben Qeleshi

2.95 As already noted, Professor Arben Rakipi has been put forward as an expert on Albanian law by the Respondent, while Mr Arben Qeleshi has been put forward by the Claimants.

2.96 Professor Rakipi is a Professor of Criminal Law at the Tirana Magistrates School, and was a former Judge of different courts in Albania. His opinion was sought by counsel for the Respondent for the purposes of this arbitration. His report is structured in such a way as to address various questions posed of him by counsel from the Respondent.

2.97 Mr Qeleshi's experience includes, but is not limited to, working as a Prosecutor for the Attorney General's office, and serving as a Magistrate for seven years. Mr Qeleshi was asked to address the same questions put to Professor Rakipi, and also to address the answers provided by Professor Rakipi.

2.98 *Question 1:* Professor Rakipi was asked whether or not the Minister for Justice would be obliged to comply with an undertaking given by him to the English extradition courts *if*

202 *Ibid.*

203 *Ibid*, p 12.

204 *Ibid.*

the extradition court did not impose on Albania those conditions given in the undertaking.[205]

(a) Professor Rakipi states that the present situation is not envisaged by Albanian law, but that the provisions of "articles 42, 51, 52 etc.", presumably of Law 10193, apply as to "order the procedural authority to respect the undertaking".[206]

(b) Professor Rakipi also made reference to Albania's "international obligations" … "due to its membership of the Council of Europe Extradition Convention" (which the Tribunal takes to mean the European Convention on Extradition), and states:

> "In this case we apply the constitutional concept of the direct application of international agreements, which take precedence over national laws (Article 122 of the Constitution). Our present case should also be assessed in this spirit. I think that in the event that the Minister of Justice has issued an undertaking, regardless of its form and content, he should adhere to it".
>
> […]
>
> Consequently, the exercise of competence in meeting international obligations on his part, has been done at this point, and any revocation or withdrawal from the undertaking issued cannot be understood, nor can it be permitted, I would say. From this viewpoint, the Minister has fulfilled his will and the internal court authority must proceed according to this express will".[207]

(c) Mr Qeleshi, on the other hand, says that if a person is to be extradited to Albania, but the foreign extraditing court does not impose any conditions or undertakings to be respected by Albania, there shall be no obligation on the part of the Albanian court to abide by any undertakings made.[208] Mr Qeleshi rejects the contention that the situation of Messrs Becchetti and De Renzis' extradition is not envisaged by Albanian law, instead concluding that Art 504(2) of the *Code on Criminal Procedure* is applicable, and should be understood as follows:

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205 Professor Rakipi's Opinion, p 1.

206 *Ibid.*

207 *Ibid*, p 2.

208 Mr Qeleshi's Opinion, p 1

> "First, in the case of extradition from abroad, the only authority competent to impose conditions or undertakings/guarantees is the foreign extradition court (in this case the English Court).
>
> […]
>
> Secondly, pursuant to Article 504 paragraph 2 of the Criminal Procedure Code, the foreign court has discretion whether to set/place or not conditions or undertakings on the extradition of the wanted person […] This provision uses the term 'eventually' to underline that the foreign court could have imposed conditions or undertakings when it accepted the extradition, but it could also have not imposed any conditions or undertakings.
>
> Thirdly, when the foreign court which has ordered the extradition has set conditions in its decision, these conditions are not automatically binding on the Albanian state. This is because, the Minister of Justice shall have the power to decide if it accepts, or not, the conditions imposed after verifying that those conditions are not contrary to the main principles of the Albanian rule of law".[209]

(d) Mr Qeleshi also opines that, according to Albanian law, the Minister of Justice's acceptance or denial of extradition conditions will be given after, not before, the foreign court's decision on extradition. The consequence is that if the Minister of Justice provides an undertaking before extradition is allowed by the foreign court, the undertaking does not legally bind the Minister of Justice to comply with it.[210]

2.99 *Question 2:* Professor Rakipi is asked whether the undertaking given by the Minister is binding on an Albanian Court as the *"proceeding authority"* under Art 504 of the *Code on Criminal Procedure*.

(a) Professor Rakipi states that the "undertaking by the Minister of Justice is issued for procedural documents and actions, which means that it is binding on any institution that takes part in a procedural instance or situation" and for this reason "the court and prosecution service are to be understood as the procedural authority without

209 *Ibid*, p 2 (emphasis added).

210 *Ibid.*

distinction".[211] Professor Rakipi bases the answer to this question on Arts 42 and 51 of Law 10193, which he reproduces in his opinion.[212]

(b) Mr Qeleshi stated in response that the Minister of Justice had discretionary power over extraditions and "even if he has made the request for extradition, he may withdraw this request [later]".[213] This assumes importance given the Respondent's submissions about the inability under Albanian law to suspend extradition proceedings. Mr Qeleshi also attacks Professor Rakipi's reliance on Law 10193, and states "such reference is pointless and furthermore it is not related to the question on the binding power on the Albanian court of the Minister's undertaking". He opines that Art 42 regulates the extradition of a person from Albania to a foreign country, not the other way around, as is the case here.[214] Further he states that the reference to Art 52 is similarly irrelevant, because it governs when an undertaking is given to allow a person up for extradition a right of review of a final decision (i.e. a conviction), where that decision was rendered in absentia.[215] That is obviously not the case here.

2.100 *Questions 3 & 4:* Professor Rakipi is asked whether an undertaking given by the Minister of Justice is binding on an Albanian Court as a matter of practice in Albanian criminal procedure. Professor Rakipi is separately asked to confirm the authority for his answers.

(a) He opines in the affirmative, saying that it is binding, and pointing to Art 52 of Law 10193 and also a decision of the Constitutional Court of Albania.[216] It is clear that both the legislative provisions and the case cited by Professor Rakipi relate to persons convicted *in absentia*, but he concludes by stating "I confirm that the Albanian procedural authority has respected the undertakings given by the Minister of Justice".[217] Further, he opines:

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211 Professor Rakipi's Opinion, p 2.

212 *Ibid*, page 2 – 3.

213 Mr Qeleshi's opinion, page 3.

214 *Ibid.*

215 *Ibid*, p 4.

216 *Ibid*, 4, Decision No 21, *Florian Mece,* Constitutional Court of the Republic of Albania (29 April 2010).

217 Professor Rakipi's Opinion, p 4.

> "… the state of proceedings relating to the effect of the undertakings given by the Minister of Justice in the case of extradition requests, has always been resolved in compliance with the undertaking given to review criminal decisions issued in the absence of the convicted persons."[218]

(b) Mr Qeleshi responds by conceding that it is generally true as a matter of practice that Albanian courts respect decisions of the Minister, but he emphasises that that is only the case where final sentences have been rendered in absentia. Mr Qeleshi opines that "Article 51 of Law no. 10193 has not been applied to decisions issuing personal security measures".[219]

2.101 *Conclusions*: It is of assistance to set out both Professor Rakipi and Mr Qeleshi's conclusions out in full:

(a) Professor Rakipi stated:

> "In conclusion, it is worth my re-emphasising that the content of the decisions in question, and our practice in this field – the field of extradition – is well worked out only in cases where the persons whose extradition is sought have been sentenced *in absentia*. The above decisions refer generally to the right of persons to have a second trial, an appeal or a review of decisions handed down in their absence. The undertakings which the Albanian Ministers of Justice have given for such persons also rest upon this basis. Our case is special. But, in the spirit of the content of the law, I think that the effect of the undertaking should be the same for each legal situation. The recognition of the authority of the Minister to issue the relevant undertakings remains because of international agreements, multilateral acts to which Albania is party. Owing to their effect, international acts are applied directly. This is the heart of the matter".[220]

(b) Mr Qeleshi, on the other hand, explains:

> "In conclusion, the Rakipi Memo fails to provide any legal basis for the binding effect upon Albanian courts of the Minister's undertaking in this case.
>
> This is because, as we explained:
>
> 1. Article 42 of Law no. 10193 governs cases of extradition from Albania to a foreign State and is thus not relevant to the

218 *Ibid.*

219 Mr Qeleshi's Opinion, p 4.

220 Professor Rapiki's Opinion, p 5.

> relevant undertaking of the Minister (i.e. not to imprison the defendants on return to Albania for longer than 3 days in an Article 3 compliant prison…).
>
> 2. Pursuant to article 51, paragraph 4 of Law no. 10193, [guarantees] can be given by the Minister and that can have binding effect on Albanian courts … only when an undertaking has been given providing for the right of a review of final sentence on the merit rendered in absentia.
>
> Therefore, based on the above-mentioned provisions, the Minister of Justice has no authority to compel the court regarding the undertaking he has made in this case. This is also confirmed by judicial practice itself, as professor Rakipi himself accepts in his opinion: judicial practice only relates to the binding effect of the Minister's undertaking for a review of final decisions on the merits of the cases conducted in the absence of the convicted/trialled persons."[221]

PART III: FURTHER DEVELOPMENTS IN THE UNITED KINGDOM

The Judgment of District Judge Tempia

3.1 On 8 July 2016, District Judge Tempia of the Westminster Magistrates Court handed down the judgment in *Government of Albania v Francesco Becchetti and Mauro De Renzis*. Judge Tempia's judgment makes reference to the Tribunal's Order and sets out the procedural history of the extradition proceedings before the English courts.[222] It is apparent from the recitation of these matters that the Judge was presented with lengthy and detailed oral and written submissions from both sides.

3.2 In her judgment, Judge Tempia summarised the evidence that was before her. In particular, she had the benefit of a copy of the Tribunal's Order, as well as various documents from this arbitration, and a memorandum entitled "Reasons Why Albania Cannot Withdraw UK Extradition Proceedings" produced by Albania (the "**Reasons Document**").[223] The Reasons Document explained why Albania could not comply with the Tribunal's Order by suspending the extradition and criminal proceedings, for broadly the same reasons

221 Mr Qeleshi's Opinion, p 5.

222 Judgment, paras 3 – 6.

223 *Ibid.*

proffered to this Tribunal.[224] The Judge noted in her judgment that it was unclear who authored the Reasons Document.

3.3 Further, Judge Tempia had before her an opinion from Mr Becchetti's Albanian counsel, who opined that Albania could suspend the criminal and extradition proceedings against Messrs Becchetti and De Renzis. She also had before her an opinion from Mr Qeleshi, albeit a different one to which is presently before the Tribunal.[225] That said, Mr Qeleshi's opinion given in the extradition proceedings seems, from the Judge's summary, to be largely identical with that given to this Tribunal.[226]

3.4 Having summarised the submissions of the parties to that proceeding, Judge Tempia began her reasons by declaring that she found the Tribunal's Order to be one that was validly issued and which is accepted by Albania as binding upon it.[227] The Judge characterised the Reasons Document as the evidence that was relied on by Albania to substantiate their position as to why the arrest warrants and extradition proceedings could not be withdrawn.[228] The Judge did not draw an adverse inference from the fact that the Reasons Document did not state its author, accepting that it was a document from the Albanian Ministry of Justice.[229]

3.5 In dealing with the Reasons Document, however, Judge Tempia preferred the evidence of Mr Qeleshi on these matters. Having noted his impressive background,[230] the Judge accepted Mr Qeleshi's evidence in its entirety. She noted that his report had set out why he was of the opinion that the Reasons Document was incorrect and misleading "in every aspect of law and interpretation" and noted that "its contents have not been either challenged or addressed by the Government".[231]

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224 *Ibid*, para 13.

225 *Ibid*, para 9.

226 *Ibid*, para 14.

227 *Ibid*, para 43.

228 *Ibid*, para 44.

229 *Ibid.*

230 *Ibid*, para 46.

231 *Ibid.*

3.6 Judge Tempia also accepted the submission of Mr Knowles QC (for Messrs Becchetti and De Renzis) that the Tribunal's Order was binding on the extradition court and the extradition proceedings should be suspended.[232]

3.7 As to the question of abuse of process, the Judge set out what was required under English law to find an abuse of process on the part of the requesting authority (i.e., Albania). Relying on the case of *Belbin v The Regional Court of Lille, France*,[233] the Judge noted that the conduct of Albania would only amount to an abuse of process if the *Extradition Act 2003* (UK) was being usurped by bad faith or a deliberate manipulation of the extradition process.[234] Judge Tempia found that there had been an abuse of process on the part of Albania. She stated that the abuse of process had occurred in respect of a specific question put to Albania in an earlier mention of the extradition proceedings before another District Judge, who asked whether Albania could withdraw the warrant, to which Albania had answered in the negative. Judge Tempia said that, that answer had been "conclusively discredited" by the evidence of Mr Qeleshi.[235] Accordingly, Albania's Reasons Document was, she said, "totally misleading".

3.8 Further, the Judge noted that allowing the extradition to proceed would prejudice Messrs Becchetti and De Renzis' ability to participate in the arbitration, and noted that no assurances had been given by the Minister for Justice as what "reasonable bail conditions" might be.[236] In refusing the application to adjourn the proceedings *sine die*, she said that Messrs Becchetti and De Renzis "would remain on bail for an indefinite period of time and subject to bail conditions. This will be an infringement on their liberty for an unspecified amount of time".[237]

3.9 Judge Tempia concluded by stating that whilst she did find that an abuse of process on the part of Albania had been made out, the Albanian Government did not act in bad faith. In

232 *Ibid*, para 49.

233 [2015] EWHC 149 (Admin).

234 Judgment, para 52.

235 *Ibid*, para 53.

236 *Ibid*, para 54.

237 *Ibid*, para 55.

relation to the Reasons Document "I cannot find it has been produced in bad faith but there has been a manipulation and usurpation of the court process".[238]

3.10 In the result, as indicated above, the Judge stayed the proceedings.

The Parties' Responses to the Judgment

3.11 On 11 July 2016, the Tribunal invited both Parties to provide their comments on the Judgment of Judge Tempia.

3.12 Only the Claimants did so (the "**Claimant's Letter of 18 July**"). In that letter, the Claimants contend that the Judgment is relevant to the applications before the Tribunal in three separate respects.[239]

3.13 First, the Claimants say that Judge Tempia's findings that there has been an abuse of process by Albania bolsters the Claimants' submission that Albania's alleged attempts to comply with the Tribunal's Order have been disingenuous.[240] The Claimants point to the Judge's finding that Albania's argument that it is unable to withdraw the arrest warrants against Messrs Becchetti and De Renzis has been "conclusively discredited".[241] The Claimants also emphasise that Judge Tempia had been taken to the provisions of Albanian law which show that the Minister of Justice had the discretion to withdraw those warrants.[242] Further, the Claimants point to the Judge's acceptance that there had been "no assurances" as to what bail conditions might be imposed on Messrs Becchetti and De Renzis.[243]

3.14 Second, the Claimants say that Judge Tempia's finding that there has been an abuse of process confirms that the Tribunal should not modify or revoke its order. That is to say, they say that the Judgment was predicated on the Tribunal's Order, and "if the Order were

238 *Ibid*, para 56.

239 Claimants' Letter of 18 July, p 2.

240 *Ibid.*

241 *Ibid*, also see Judgment para 53.

242 *Ibid.*

243 *Ibid*, p 3.

to be withdrawn, Albania could, and would, apply to re-instate extradition proceedings at any time".[244]

3.15 Third, the Claimants contend that, notwithstanding that the extradition proceedings are now stayed, the procedural integrity of the arbitration remains under threat. This is because Albania has not sought the withdrawal of any Interpol "Red Notices", nor has it suspended criminal proceedings in Albania or withdrawn the arrest warrants. The Claimants contend that this means that if Messrs Becchetti and De Renzis were to travel outside of the UK, they could be extradited from a third country. This, the Claimants contend, will cause the Claimants difficulty when engaging with their Parisian and New York counsel in this arbitration.[245]

3.16 On the same day, in separate correspondence, the Claimants informed the Tribunal that they had been notified by the UK Crown Prosecution Service that there would be no appeal from the Judgment.[246]

3.17 The Respondent sought leave to reply to the Claimants' Letter of 18 July. They had not submitted any submissions in relation to the Judgment when invited to by the Tribunal. The Tribunal allowed a response to the Claimants' Letter, but not to the Judgment itself, on the basis that the Respondent had already been provided an opportunity to do so.[247] Despite not being given leave to do so, the Respondent submitted a letter responsive to the Judgment on 22 July 2016. It is unnecessary to repeat what was said previously about the Tribunal's concerns about the manner in which this submission was made.[248]

3.18 The Respondent submits that, whilst it did not accept much of what the Judge stated in the Judgment, including Judge Tempia's interpretation and comments on Albanian law, the extradition proceedings against Messrs Becchetti and De Renzis have been stayed for

244 *Ibid.*

245 *Ibid.*

246 Claimants' Letter of 18 July 2016; see also Exhibit C-561.

247 Email from ICSID to Counsel, 19 July 2016.

248 See para 1.28 above.

the duration of the ICSID proceedings, and Albania would not be appealing the Judgment.[249]

3.19 The result, the Respondent contends, means that there is no reason for the maintenance of the Tribunal's Order.[250] The Respondent also says that because the threat of incarceration during the proceedings has been removed, there is similarly no reason for the order to suspend the criminal proceedings in Albania to remain.[251] The Respondent says that "the mere continuation of the Albanian criminal proceedings, in which [Messrs Becchetti and De Renzis] are represented and in which they continue to play a full part, does not pose a risk to the procedural integrity of the arbitration".[252]

3.20 Having set out the submissions in considerable detail, it is now necessary to move to the analysis of those submissions.

3.21 In so doing, the Tribunal notes that it has been assisted by the ample written submissions from counsel for the Parties, as well as the submissions made at the oral hearing. For the avoidance of any doubt, the Tribunal hereby confirms that, in reaching its decisions in this Order, it has fully taken into consideration all of the written and oral submissions of the Parties, and the entirety of the evidence that has been presented by the Parties, whether or not expressly referred to below.

PART IV: TRIBUNAL'S ANALYSIS

4.1 It should be noted from the outset that there is a relative dearth of authority and previous decisions of ICSID tribunals in respect of revocation or modification of provisional measures orders pursuant to Rule 39(3) of the ICSID Arbitration Rules. Of the decisions and commentary that does exist, it relates mainly to circumstances where tribunals were faced with changed circumstances that meant that the provisional measures recommended by those tribunals were no longer necessary. The Respondent contends, at least in respect of the extradition proceedings, that the circumstances have changed in this case.

249 Respondent's Letter of 22 July 2016, para 3.

250 *Ibid*, para 6.

251 *Ibid*, para 7.

252 *Ibid*, para 9.

4.2 Against that background, and having regard to the considerable assistance provided by the Parties, the Tribunal has determined to revoke the Tribunal's Order, but to nevertheless replace it with differently-worded recommendations.

4.3 It is convenient to deal with the Respondent's Application to the Tribunal's Order first.

4.4 As to the extradition and criminal proceedings against Mr Becchetti and Mr De Renzis, the Tribunal makes the following comments:

4.5 Despite the criticisms of the Claimants, the Tribunal accepts that, before and after the Claimants lodged their Application, Albania endeavoured to comply with the Tribunal's Order, at least in part. In this regard, the Tribunal notes the (appropriate) conduct on the part of the Respondent.

4.6 First, the Respondent requested that the Home Office lodge an application to adjourn the extradition proceedings proceeding in the UK courts. The Tribunal had, of course, recommended the "suspension", not the "withdrawal", of the proceedings, and had the application to adjourn *sine die* been granted, this would have ensured compliance with the recommendation the subject of the Tribunal's Order.

4.7 Second, as to the suspension of the Albanian domestic criminal proceedings, the Respondent contends that this was not possible under Albanian law. It is unnecessary here to repeat the reasons why this is so. As will become apparent, the Tribunal need not form a concluded view as to whether these reasons are, in fact, valid ones, the effect of which was that the Respondent did, indeed, face no choice as to whether to suspend the Albanian domestic criminal proceedings.

4.8 The primary relief sought by the Respondent is revocation of the Tribunal's Order on the grounds that the recommendations therein were wrongly recommended. As an alternative, the Respondent seeks revocation or modification on the grounds of changed circumstances.

4.9 The Tribunal has no doubt that it possesses the power to revoke its provisional measures. Rule 39(3) of the Arbitration Rules confers such a power. That sub-rule begins by providing that the Tribunal "may also recommend provisional measures on its own initiative or recommend measures other than those specified in the request" but goes on

to make plain that the Tribunal "may at any time modify or revoke its recommendations". While issues may arise as to whether a Tribunal is so empowered where it has delivered its Final Award, and the Tribunal is thus *functus officio*, this is not such a case. Here, the Tribunal remains seised of the proceeding and can, in appropriate circumstances, re-consider its previous orders. To contend otherwise would be contrary to the plain language of Rule 39(3) and the jurisdiction of this Tribunal to resolve the relevant dispute between the Parties which it is seised to resolve.

4.10 But the Claimants' objection goes further. As will be recalled, the Claimants submit that the Tribunal can only revoke or modify its provisional measures if there are "changed circumstances" warranting its intervention and that, here, there are none. That is, the Claimants say that this Tribunal does not have jurisdiction to re-consider the Order solely by way of a *de novo* hearing or re-hearing of the earlier application.

4.11 While the Tribunal has some sympathy with that approach, it is not necessary for it to finally determine whether "changed circumstances" are indeed required. That is so because, on any view, the Judgment on 8 July 2016 provides the necessary "changed circumstance", hinge or jurisdictional basis for the Tribunal to re-consider the Tribunal's Order. That is, there are undoubtedly "changed circumstances" which warrant the modification (but not revocation) of the Order.

4.12 As is plain from the reasoning in the Tribunal's Order, the principal reason for making the recommendations the subject of paragraph 5.1(a) and 5.1(b)[253] was the potential inability of Messrs Becchetti and De Renzis to fully participate in the arbitration if they were incarcerated.

4.13 The Respondent has contended, on occasion in very strong terms, that the Tribunal was wrong to so conclude. But, based on the evidence then before the Tribunal and the further evidence since filed and served on the Applications, the Tribunal is not persuaded that it was then, or is now, wrong to recommend measures to protect the procedural integrity of this arbitration. The Tribunal was, and is, of the view that were Messrs Becchetti and De Renzis to be incarcerated, they would be unable to properly participate in the arbitration. The Tribunal notes the spirited opposition, indeed criticism, levelled by the Respondent

253 The recommendations are extracted in full at para 1.1 above.

concerning its conclusions or more accurately the reasons proffered for its conclusions. However, having considered all the circumstances as known to it, including the pendency of several arbitrations and institution of criminal proceedings following the first arbitration relating to the Claimants' investments, the Tribunal does not resile from the order it made or the reasons for which it made it.

4.14 That said, the principal objective for the Tribunal's recommendations has now been secured. It matters not that it was secured by the Respondent's attempt to adjourn the extradition proceedings *sine die*, or what has now transpired, namely the suspension by order of Judge Tempia.

4.15 It follows that it is unnecessary to consider the efficacy of the promise given by the Albanian Minister of Justice, and it would be inappropriate for the Tribunal to consider this issue further.

4.16 As emphasised in the Tribunal's Order, had Messrs Becchetti and De Renzis been incarcerated in Albania, their ability to participate would undoubtedly have been at least substantially impaired. Given that these two Claimants are now in the UK and are not subject to any restraint imposed, they are fully able to participate in the arbitration. Thus the object of the Tribunal's order is accomplished. There is therefore no need to order any provisional measures which would have the effect of impairing the State's sovereign rights to exercise its police powers, including the investigation, and if warranted, prosecution of criminal offences. It follows that the Tribunal has decided that the previous recommendations should be revoked, and in lieu thereof, the following recommendations be made of the Respondent, namely that it:

(a) take no steps in the proceedings identified as Criminal Proceeding No. 1564 to recommence extradition proceedings in the UK against Messrs Becchetti and Mr De Renzis until the issuance of a Final Award in this proceeding; and

(b) take all actions necessary to maintain the suspension of the extradition proceedings (Case Numbers 1502751601 (for Mr Becchetti) and 1502752144 (for Mr De Renzis)) currently stayed, and not to take any steps to resume those proceedings, until the issuance of a Final Award in this proceeding.

4.17 The Tribunal now moves to paragraph 5.2 of the Tribunal's Order, which, it will be recalled, relates to the recommendation that the Parties *confer* in relation to the preservation of the Assets, being those Assets which the Claimants sought to have returned by its original provisional measures application.

4.18 Before turning to determine whether an order in relation to the Assets should be made, it is necessary to say something about the Claimants' conduct in this regard. As already noted,[254] the Claimants wrote on 10 March 2016 to the Respondent, seeking "the consequential return of the Companies and their assets and bank accounts" in order to satisfy paragraph 5.2 of the Tribunal's Order. To write in these terms was disingenuous, as it was plain that such a request (if it can be so characterised) was not in accordance with the recommendations of the Tribunal. The Tribunal, in its Order, was careful to say that it was not determining whether it would be appropriate to make any order regarding the Assets and merely invited the Parties to confer in relation to the preservation of the Assets.

4.19 What was sought by the Claimants went far beyond, and did not constitute what the Tribunal considered a good faith attempt to "seek to agree appropriate measures … to preserve" the Assets.

4.20 In any case, since the making of the recommendation, the position has changed. In particular, on 13 May 2016, the Claimants filed and served their Memorial, by which it sought, amongst other things, the following relief:[255]

> "B) Ordering Albania to pay monetary damages in an amount that would wipe out all of the consequences of its illegal acts and re-establish the situation that would have existed if those acts had not been committed, in an amount to be determined."

4.21 That is, in the final relief sought, there is no prayer for relief seeking the return of the Assets – only damages.

4.22 Further, the Memorial alleges that Albania has expropriated the Claimants' investments in the Kalivac project "and has also rendered valueless the local companies whose sole

254 See para 1.2 above.

255 See para 681 of the Claimants' Memorial.

business rationale had been the Kalivac Project".[256] Those local companies are Energji, 400 KV and Cable System. As to Agonset, the TV station, the Memorial asserts that "Albania has expropriated Agonset and rendered useless its related companies … Albania has seized the Claimants' registered indirect shareholdings in Agonset and has destroyed any value in the company and its related companies".[257] Although not seeking the return of the shareholding any longer, they also say that "[w]ere Albania to return Agonset to its shareholders, it would be less than 'a shell of the former investment'",[258] suggesting that, hypothetically, such shareholding may be returned to the shareholders. But, in circumstances where no relief to that effect is sought, the only proper conclusion is that the Claimants now accept that they are limited to their remedy in damages. Self-evidently, that is a matter for later determination.

4.23 Before leaving this issue, reference should, however, be made to what was said at the hearing in relation to this issue. Mr Dhar, for the Respondent, explained:[259]

> "The trouble for the Claimants is that [the Claimants' Memorial] demonstrates that, on their own case, the horse has already bolted. The current definitive position as stated by the Claimants is that in relation to each of the relevant Albanian companies – Energji, KGE, 400 KV, Cable System, Agonset – there has been an expropriation. The Memorial is replete with emotive terms such as 'total destruction', 'sabotage', 'destruction', etcetera. […] It makes it plain that on the present case, each of those companies has already been eliminated, and that an expropriation has already taken place".

4.24 In answer to a question from Mr Glick, Mr Dhar further explained,[260] in relation to the prayer for relief at paragraph 681 of the Claimants' Memorial, to which reference has already been made:[261]

> "[I]n our respectful submission [paragraph 681 of the Claimants' Memorial] demonstrates two things: one, […] it demonstrates there is no specific relief anymore; secondly, what it demonstrates is the Claimants are content to reduce their claim […] to damages. It demonstrates that

256 See Memorial, para 572.

257 See Claimants' Memorial, paras 583 and 584.

258 See Claimants' Memorial, para 586.

259 T58.22ff

260 T62.5ff

261 See paragraph 4.20 above.

> damages are, on their case, an adequate remedy for the alleged expropriations. Not only do they claim that, and have dropped the claim for specific relief, they have put in two lengthy expert reports which seek to quantify, to a very specific sum, the alleged expropriations in relation to these companies."

4.25 Mr Tahbaz, for the Claimants, accepted that this was the case, his reference to the issue still being "alive" only capable of being interpreted as being that the issue of damages was still alive in relation to their destruction or expropriation. More fully, he said:[262]

> "With regard to the assets, we are where we are with the assets because Albania has disregarded the concerns that we believe motivated at least that portion of the Provisional Measures Order. In other words, the assets have been destroyed because of Albania's conduct, including most recently – and I believe this is right, but Mr Pinsolle will correct me if I have it wrong – Agonset, the television station, was evicted from its premises in April, I believe because of the non-payment of rent. […] So the concerns that motivated that aspect of the Provisional Measures Order are very much still alive. The fact is the assets have been destroyed, so the case has been adjusted accordingly. It doesn't mean that if Claimants were to receive some of those assets in return, that they couldn't be rehabilitated and re-operated under the appropriate circumstances."

4.26 At this stage, the Tribunal is not required, nor would it be appropriate, to decide whether the Assets have, in fact been destroyed or expropriated. If the Claimants succeed in this arbitration, the Tribunal is presently of the view that any loss or damage to its Assets can be adequately compensated by an award of damages. There is thus now no necessity for paragraphs 5.2 or 5.3 of the Tribunal's Order, nor for them to be replaced by some substitute, and accordingly the Tribunal has decided that they should be revoked.

4.27 As regards paragraph 5.1, should the situation change and the Claimants be prevented from effectively participating in the proceedings for any other reason, an application may be made to the Tribunal for further provisional measures. Liberty to apply is specifically granted.

4.28 It is now necessary to turn to the Claimant's Application, although it has largely been resolved by the resolution of the Respondents' Application.

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262 T99.7ff.

4.29 The Tribunal need not make a Partial Award, as requested by the Claimants, so its jurisdictional competence to do so need not be determined. The Tribunal notes in passing, however, that neither the ICSID Convention nor the ICSID Arbitration Rules make reference to a Partial Award. The Tribunal, nevertheless, expects the Respondent to comply with the recommendations made herein, and notes that their maintenance is consistent with that which was ordered by the Judgment.

4.30 That leaves only the question of whether a penalty should be ordered against the Respondent. As already noted, the Tribunal is not persuaded that the conduct of the Respondent was such as to involve a contravention of the recommendation. But, even if it had, any monetary compensation awarded in the Final Award can adequately compensate the Claimants for their loss, whatever that may be.

PART V: TRIBUNAL'S ORDER

5.1 The Tribunal's Provisional Measures Order of 3 March 2016 is revoked and, in lieu thereof, the Tribunal recommends that the Republic of Albania:

(a) take no steps in the proceedings identified as Criminal Proceeding No. 1564 to recommence extradition proceedings in the United Kingdom against Messrs Becchetti and De Renzis until the issuance of a Final Award in this proceeding; and

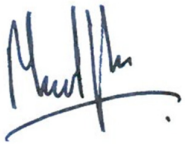
(b) take all actions necessary to maintain the suspension of the extradition proceedings (Case Numbers 1502751601 (for Mr Becchetti) and 1502752144 (for Mr De Renzis)) currently stayed, and not to take any steps to resume those proceedings, until the issuance of a Final Award in this proceeding.

5.2 The Applications are otherwise dismissed.

5.3 The costs of the Applications are reserved for later determination in the Final Award.

5.4 There be liberty to apply.

On behalf of the Tribunal,



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Michael Pryles
Presiding Arbitrator

1 September 2016.