

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

MAMIDOIL JETOIL GREEK PETROLEUM PRODUCTS SOCIETE S.A.

Claimant

and

REPUBLIC OF ALBANIA

Respondent

ICSID Case No. ARB/11/24

AWARD

Members of the Tribunal

Professor Dr. Rolf Knieper, President

Dr. Yas Banifatemi, Arbitrator

Mr. Steven A. Hammond, Arbitrator

Secretary of the Tribunal

Mr. James Claxton

Date of dispatch to the Parties: 30 March 2015

REPRESENTATION OF THE PARTIES

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Mr. Georg Scherpf
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Representing the Republic of Albania:

State Advocate's Office of the
Republic of Albania
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General State Advocate of the Republic
Blv. Zogu I
Ministria e Drejtësisë
Tirana, Albania
and
Dr. Hamid Gharavi
Ms. Sophia Von Dewall
Ms. Clea Bigelow Nuttall
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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

| | |
|---------------------------|--|
| AIOG | Albanian Institute of Oil and Gas |
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings |
| Albania/Respondent | Republic of Albania |
| BIT/Greece-Albania BIT | Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments |
| Cl. Mem. | Claimant's Memorial dated 10 August 2012 |
| Cl. Rep. | Claimant's Reply dated 6 July 2013 |
| COCOs | Company owned and company operated petrol stations |
| E [CE] [RE] | Exhibit [Claimant] [Respondent] |
| ECT | Energy Charter Treaty |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965 |
| ICSID/Centre | International Centre for Settlement of Investment Disputes |
| IDA | International Development Association |
| H. Tr., day [], page [] | Transcript of the hearing on jurisdiction, merits and quantum held between 17 and 21 March 2014 |
| LA [CLA] [RLA] | Legal Authority [Claimant] [Respondent] |
| Mamidoil/Claimant | Mamidoil Jetoil Greek Petroleum Products Societe S.A. |
| Resp. C-Mem. | Respondent's Counter-Memorial dated 11 February 2013 |
| Resp. Rej. | Respondent's Rejoinder dated 3 December 2013 |
| Request | Request for Arbitration dated 8 July 2011 |
| TARCA | Territory Adjustment Council of the Republic of Albania |

1. THE PARTIES

1.1 Claimant

1. Mamidoil Jetoil Greek Petroleum Products Societe S.A. (“Mamidoil” or “Claimant”) is a corporation organized and existing under the laws of Greece. One of its major business activities consists in the acquisition, storage, distribution and sale of fuel and oil related products. For the purposes of its activities in Albania, Mamidoil established a local subsidiary of which it is now the sole shareholder.
2. Mamidoil’s corporate headquarters are located at:

26 Fillelinon Street
105 58
Athens, Greece

1.2 Respondent

3. Respondent is the Republic of Albania (“Albania” or “Respondent”).

2. THE ARBITRAL TRIBUNAL

4. Co-arbitrator upon nomination by Respondent by its letter dated 7 November 2011:

Dr. Yas Banifatemi
Shearman & Sterling LLP
114 Avenue des Champs Elysées
75008 Paris, France

5. Co-arbitrator upon nomination by Claimant by its letter dated 16 December 2011:

Mr. Steven A. Hammond
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, N.Y. 10004-1482
U.S.A.

6. President of the Tribunal upon appointment by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes (“ICSID” or “Centre”) by letter dated 1 March 2012:

Prof. Dr. Rolf Knieper
c/o Atelier Correia
7, Place de la République
21210 Saulieu, France

3. PROCEDURAL HISTORY

3.1 Initiation of the Arbitration and Constitution of the Arbitral Tribunal

7. On 8 July 2011, Claimant filed an electronic version of its Request for Arbitration (the “Request”) with the Secretary-General of ICSID. Hard copies of the Request were filed with ICSID on 29 August 2011 complete with powers of attorney for Mr. Spyros G. Alexandris, Mr. Nassos Felonis, Mr. Artan Hajdari, Ms. Elira Kokona, Mr. Emmanouil Kalogerakis and Ms. Evanthia Mamidaki.
8. On 29 August 2011, ICSID transmitted a copy of the Request to Respondent.
9. On 12 September 2011, the Secretary-General of ICSID registered the Request, asked Respondent to identify the responsible Government authority and invited both Parties “*to inform the Centre of any agreed provisions as to the number of arbitrators and the method of their appointment.*”
10. On 14 September 2011, Respondent identified the State Advocate Office as the responsible Government authority.
11. On 22 September 2011, Respondent proposed that the Tribunal consist of a sole arbitrator, and on 13 October 2011, Claimant proposed a panel of three arbitrators, one to be appointed by each Party and the president by agreement of the Parties.
12. On 7 November 2011, Respondent invoked Article 37(2)(b) of the ICSID Convention, appointed Dr. Yas Banifatemi as arbitrator, and informed ICSID that the Parties agreed on Paris as the place of arbitration and English as the language of the proceeding. ICSID affirmed Respondent’s invocation of Article 37(2)(b) on 11 November 2011 and notified the Parties that Dr. Banifatemi had accepted her appointment on 14 November 2011.
13. On 16 December 2011, Claimant appointed Mr. Steven A. Hammond as arbitrator. ICSID notified the Parties on 29 December 2011 that Mr. Hammond had accepted his appointment.
14. On 10 January 2012, Claimant invoked Articles 38 and 40(1) of the ICSID Convention, and on 6 February 2012, ICSID informed the Parties that the Chairman of the

Administrative Council would proceed with the appointment of the President of the Tribunal in accordance with those provisions.

15. On 15 February 2012, ICSID proposed Professor Dr. Rolf Knieper as President of the Tribunal. The Parties raised no objections to the proposal. On 1 March 2012, the Chairman of the Administrative Council appointed Dr. Knieper. Dr. Knieper accepted his appointment, and the Secretary-General notified the Parties that the Tribunal had been constituted that same day.
16. On 22 February 2012, Respondent informed ICSID and Claimant that Dr. Hamid Gharavi of Derains & Gharavi would serve as its counsel. Power of Attorney for Dr. Gharavi was provided on 23 February 2012.
17. On 20 March 2012, Claimant informed ICSID and Respondent that Dr. Richard Happ of Luther Rechtsanwalts-gesellschaft would serve as its co-counsel. Power of Attorney for Dr. Happ was provided on 22 March 2012.

3.2 The First Session of the Tribunal

18. The Tribunal held a first session with the Parties on 6 April 2012 in the premises of the World Bank in Paris, France. In addition to the Tribunal and the Secretary, the following persons attended the session:

For Claimant:

Dr. Richard Happ
Mr. Spyros G. Alexandris
Ms. Elira Kokona
Mr. Manos Kalogerakis

For Respondent:

Dr. Hamid Gharavi
Ms. Melanie van Leeuwen
Ms. Sophie von Dewall
Mr. Rory V. Wheeler
Ms. Ledina Mandia
Mr. Oltion Toro

19. During the session, a number of procedural issues were discussed and decided. In particular, the Parties confirmed:
 - that the place of arbitration be Paris, France,

- that the language of the proceeding be English,
 - that the Rules of the International Bar Association (“IBA”) on the Taking of Evidence in International Arbitration adopted on 29 May 2010 serve as guidelines, and
 - that the Tribunal had been duly constituted.
20. The Tribunal and the Parties also set a timetable for the proceeding and agreed that the question of post-hearing briefs would be decided at the end of the hearing.
21. Minutes of the session were prepared and sent to the Parties in electronic version on 6 April 2012.

3.3 Further developments before the hearing

22. On 1 August 2012, Claimant asked for an extension of the time-limit for submitting its Memorial until 10 August 2012, which was agreed by Respondent and granted by the Tribunal.
23. On 10 August 2012, Claimant submitted its Memorial together with eight witness statements, one expert report on quantum and exhibits.
24. On 19 November 2012, Respondent asked for an extension of the time-limit for submitting its Counter-Memorial of two months and twenty-five days for a variety of reasons. On 3 December 2012, Claimant contested the reasons and asked that the request be rejected except for a short extension of two weeks. On 4 December 2012, the Tribunal granted Respondent an extension of four weeks and changed the timetable of the subsequent steps in the proceeding accordingly.
25. On 4 February 2013, 11 February 2013, and 15 February 2013, the Tribunal made further revisions to the timetable resulting from the common request of the Parties of 1 February 2014.
26. On 11 February 2013, Respondent submitted its Counter-Memorial together with one witness statement, one legal expert report, one expert report on damages and exhibits.
27. On 22 February 2013 and 12 March 2013 the Tribunal further revised the schedule based on the common request of the Parties.
28. On 1 March 2013, Respondent requested the disclosure of certain documents allegedly in Claimant’s possession. On 16 April 2013, Claimant agreed to the production of some of the documents and rejected the production of others. On 23 April 2013, Respondent

commented Claimant's reasons for its rejection, and Claimant objected to the comments arguing that they contradicted the agreed procedure.

29. On 24 April 2013, the Tribunal decided that Respondent's comments were admissible, and on 28 April 2013, the Tribunal ordered the production of certain documents and rejected the disclosure of others.
30. On 29 April 2013, Claimant reiterated its objection, and on 30 April 2013 the Tribunal responded, affirming its decision and the reasons for it.
31. On 4 July 2013, Claimant requested and Respondent and the Tribunal agreed to an extension of two days to submit its Reply. The date for Respondent's submission of its Rejoinder was accordingly extended.
32. On 6 July 2013, Claimant submitted its Reply, which comprised a document and an annex. By correspondence of 12 July 2013 and 15 July 2013, Respondent objected to the format and requested that the Tribunal order it changed. Claimant responded on 15 July 2013, and on 16 July 2013 the Tribunal ordered that the documents be merged and set a new date for its submission.
33. On 24 July 2013, Claimant submitted the amended Reply.
34. On 13 September 2013, Respondent requested a two-month extension for the submission of its Rejoinder. Claimant objected on 18 September 2013, and Respondent replied to the objections on 19 September 2013.
35. On 20 September 2013, the Tribunal granted the extension, which it found justified in view of the difficulties and exceptional circumstances invoked by Respondent, namely a change of Government that made the collection of information and documents practically impossible in the timeframe provided, and the fact that the procedural calendar would not be affected by such extension. The Tribunal further observed that this would not raise due process issues given that Claimant had submitted its Reply on 6 July 2013, i.e. a little less than 5 month after Respondent's Counter-Memorial. On 27 September 2013, Claimant requested the Tribunal to re-consider its decision, which Respondent objected to. On 1 October 2013, the Tribunal confirmed its decision.
36. By letter dated 2 December 2013, Respondent requested the bifurcation of the proceeding into a first phase on jurisdiction and merits and a potential second phase on damages and quantum. On 16 December 2013, Claimant objected to such bifurcation. The Tribunal rejected the bifurcation request by a decision of 20 December 2013.
37. On 3 December 2013, Respondent submitted its Rejoinder, together with a second quantum expert report, a second expert legal opinion and a further expert legal opinion, a witness statement and exhibits.

38. On 10 January 2014, the Parties notified the Tribunal of the identity of the witnesses and experts whom they wished to call for examination.
39. On 28 January 2014, Claimant requested that Ms. Michelle George, an attorney not directly involved in this case, be present during the examination of its witness Mr. Andreas Tzouros at the hearing. On 3 March 2014, Claimant provided further explanations for its request, and Respondent objected to the request.
40. On 25 February 2014, a pre-hearing conference was held via telephone pursuant to ICSID Arbitration Rule 21. On 26 February 2014, minutes of the pre-hearing telephone conference were sent to the Parties, and the Parties were notified that an audio recording of the conference was available on the server created for the case.
41. On 27 February 2014, the Secretary-General notified the Parties that Mr. James Claxton would replace Ms. Mairee Uran-Bidegain as Secretary of the Tribunal in the proceeding. A timetable for the hearing was sent to the Parties on the same date.
42. On 4 March 2014, the Tribunal rejected Claimant's request of 28 January 2014 that Ms. Michelle George be present during Mr. Andreas Tzouros' examination at the hearing.
43. On 7 March 2014, Claimant requested a change in the hearing schedule, a provision for the timing of the Tribunal's questioning at the hearing, and a global allocation of time at the hearing. On 10 March 2014, Respondent opposed the requests. On 11 March 2014, the Tribunal rejected the requests. Following Claimant's renewal of its request for a global allocation of time on 12 March 2014, the Tribunal rejected the request again on 14 March 2014, on the basis that the daily schedule agreed by the Parties during the pre-hearing conference provided sufficient guidance and a fair allocation of time. The Tribunal noted that it would provide further guidance and, if necessary, make appropriate adjustments at the opening of each hearing day.
44. On 12 March 2014, Claimant requested the removal of Mr. Armer Juka from Respondent's team on this case and a ruling that he be disallowed from participation at the hearing. On 13 March 2014, Respondent objected to the request, which Claimant supplemented with accompanying documentation. On 14 March 2014, following an inquiry by the Tribunal, Respondent confirmed that Mr. Juka had had no access to confidential information of Claimant. On this basis, the Tribunal rejected Claimant's request the same day.

3.4 The hearing

45. A hearing on jurisdiction, merits and quantum took place at the World Bank Office located at 66, avenue d'Iéna, 75116 Paris, France from 17 to 21 March 2014. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimant:

Dr. Richard Happ
Mr. Georg Scherpf
Dr. Kartin Liebner
Ms. Jola Gjuzi

Mr. Manos Kalogerakis
Ms. Eleftheria Mamidaki
Mr. Georges Vourvachakis

For Respondent:

Dr. Hamid Gharavi
Ms. Sophia Von Dewall
Ms. Clea Bigelow Nuttall
Ms. Amany Chamieh
Mr. Emmanuel Foy

Ms. Besmira Uruci
Ms. Shiva Ameli
Ms. Alma Hicka
Mr. Armer Juka

46. The following persons were examined:

On behalf of Claimant:

Mr. Kyriakos Mamidakis
Mr. Nikolaos Mamidakis
Mr. Alexandros Mamidakis
Mr. Emmanouil Kalfas
Mr. Anastasios Mavrakis
Mr. Georg Tsiropoulos

Mr. Theodoros Stamatelopoulos
Mr. Pavlos Garinis
Mr. George Momferratos
Mr. Andreas Tzouros
Mr. Ermir Dobjani
Mr. Tassos Iossiphides

On behalf of Respondent:

Mr. Genci Çelo
Mr. Avenir Peka
Mr. Neritan Kallfa

Mr. Sylvain Quagliaroli
Ms. Sylvie Duhalt

47. The hearing was audio-recorded and transcribed by Mr. Trevor McGowan and Ms. Claire Hill of The Court Reporter Ltd. At the close of the hearing, both Parties confirmed that they had been given an adequate opportunity to present their respective case before the Tribunal.¹

¹ H. Tr., day 5, page 282, paras. 3-14.

3.5 Developments after the hearing

48. On 21 March 2014, copies of the hearing transcript were sent to the Parties, and on 25 March 2014, ICSID notified the Parties that they could access an audio recording of the hearing.
49. On 4 April 2014, Respondent submitted changes to the transcript agreed by the Parties. Respondent also identified a few changes to the transcript proposed by Claimant and rejected by Respondent, all concerning transcription of testimony through interpretation. On the same date, Claimant stated that its proposed changes resulted from mistakes in interpretation that could be verified by Respondent.
50. On 8 April 2014, the Tribunal accepted the changes proposed by Claimant on the understanding that they resulted from mistaken interpretation.
51. On 15 April 2014, Claimant requested and Respondent agreed to an extension of the deadline for the filing of the Parties' submissions on costs. The Tribunal confirmed the extension on the same day.
52. On 22 April 2014, the Parties filed their respective submissions on costs.
53. The Tribunal carefully assessed the Parties' positions and the evidence put forward by the Parties in series of oral and written deliberations, with a last deliberation in Paris on 8 and 9 January 2015. The Tribunal's completion of this Award was delayed because of the failure of the Parties to timely pay the advance on funds requested on 25 November 2014.
54. The proceeding was closed on 4 March 2015.

4. THE FACTS OF THE DISPUTE

4.1 The uncontested facts

55. The dispute concerns allegations by Claimant that Respondent violated the Greece-Albania BIT in its treatment of investments made by Claimant in connection with the construction and operation of an oil container terminal on a land plot in the Durres port area and the creation and operation of company owned and company operated petrol stations (COCOs) in the country.
56. Given the profound and sometimes abrupt political, economic, social and cultural changes in Albania, it is apparent that facts emerged, events evolved and decisions were taken on several levels in a dense rhythm not always appropriately synchronized or documented: the developments concerned the level of concrete and individual commercial relations with foreign and national investors, the level of legislative reform and the level of institutional and governance reform, the latter two being partly accompanied by international organizations such as the World Bank. Although not always assisted by consistent evidence or terminology, the Tribunal finds, after a careful analysis of the Parties' written submissions, the exhibited evidence, oral presentations by counsel, and the testimony provided by witnesses and experts, that the following facts are uncontested.
57. In August 1991, the BIT was concluded.
58. In November 1993, Respondent implemented a new foreign investment law, superseding an earlier law from August 1992. The law's purpose was to attract foreign investment.
59. At around the same time, Respondent's Ministry of Public Works and Transport (the predecessor to the Durres Port Authority) published a brochure to promote investment in the port of Durres, stating that "[a]t the port of Durrës all sorts of goods, minerals, fuels, cements and other bulk articles are loaded and unloaded," and noting that "[i]nvestments [sic] in the development of the infrastructure [sic] of the eastern wharves [the area where Claimant's investment was eventually materialized] are indispensable"²
60. Claimant's business relations with Albania date back to the 1980s. When the regime changed, Claimant decided to build on these relations and to invest at an early stage in a country that had shaken off its centrally-planned economy and political regime and moved towards a market economy and democracy.

² CE-132; Cl. Rep., paras. 21-23.

61. Albania's transition to the rule of law, democracy and a market economy was naturally difficult and at times chaotic with governance structures being weak and developing slowly.³
62. From 1991 on, Claimant explored different commercial opportunities in different locations in the sector of its major business activities, which are centered on the transport, storage and trade of petroleum related products.
63. On December 16, 1994, three years after its first site visit to the port of Durres, Claimant submitted by fax an initial investment proposal to Mr. Artan Sevrani, seeking to renovate the existing tank farm. Mr. Sevrani's role and function has not been explained in this proceeding.⁴ There is no evidence that the Albanian authorities answered this proposal.
64. Claimant made a second investment proposal, on June 30, 1995, in which it identified and presented three potential sites "*suitable for erection*" of a tank farm, listed in order of preference as the port of Durres, Porto Romano, and Vlora.⁵ There is no evidence it received an official reply.
65. After having "*identified and presented three potential sites for the construction of tank farms*",⁶ Claimant came to the conclusion that the port of Durres was the most appropriate choice. It thus made proposals to Albanian authorities to build a tank farm in the port and rehabilitate part of the existing port infrastructure to discharge vessels. Claimant also proposed to create COCOs in the country,⁷ assuming "*that the necessary piece of land, after being finally selected, shall be allocated to us by the Albanian Government at a nominal price*".⁸
66. The proposals were based on a document which Claimant has presented as a business plan (hereinafter the "business plan"), which foresaw the installation of the tank farm and "*a network of gas stations operating under the Jetoil sign*".⁹ The gas stations were decisive for the viability of the project, and there is a common understanding between all financial experts that without them "*you will never have a profitable investment*", as clearly expressed by Claimant's witness T. Stamatelopoulos¹⁰ who was in charge of the financial administration of Claimant's subsidiaries from 2006 to 2008.¹¹

³ Cl. Mem., paras. 27-29; Resp. C-Mem., paras. 10 and 28.

⁴ CE-135; Cl. Rep., paras. 22-23.

⁵ CE-60.

⁶ Cl. Mem., para. 42.

⁷ Cl. Mem., para. 39; Resp. C-Mem., para. 26.

⁸ CE-60.

⁹ CE-58.

¹⁰ H. Tr., day 2, page 174; see also Expert Reports of Ernst & Young, CE-64 and CE-220; oral testimony of Claimant's expert witness Mr. George Momferratos (Ernst & Young), H. Tr., day 5, page 10; Grant Thornton,

67. During the times of the *ancien régime*, petroleum products were already imported to the port of Durres. It is the most important port in the country, conveniently close to the capital Tirana, and has an infrastructure (pipeline and jetty) and tanks of the former state-owned petroleum company. These structures were severely run down and in a state of disrepair at the moment of the regime change.
68. The port is situated close to a residential area.
69. Two other Greek companies applied for work authorization and have invested in petroleum-storage facilities in the port.
70. Claimant states that it was “*encouraged to invest in Albania*”¹² and it is not contested that it was able to “*obtain some support from the Republic of Albania*” which Respondent states was “*purely provisional and high level*”.¹³ During a number of meetings with high-level Albanian Government officials, including the Prime Minister and several Ministers, members of Claimant’s senior management received oral assurances that the investment was welcome. Although the exact timing of these meetings is unclear, at least one key meeting took place in 1998 before Claimant sought approval of its investment.¹⁴
71. At about the same time, Albania established contacts with international public institutions such as the World Bank and the European Union and solicited financial and professional assistance for the modernization and development of its public infrastructure. As part of those discussions, Albania executed with the International Development Association (IDA), a member of the World Bank Group, a credit agreement for an amount of 17 Million USD, dated 9 June 1998, for the financing of the “*Durres Port Project*”.¹⁵ The purpose of the project and credit was to increase commercialization by modernizing the port facilities and by establishing an autonomous port.¹⁶
72. On 3 July 1998, Claimant submitted a request to the Albanian Minister of Economy and Privatization to approve the investment “*for the establishment a new center for the storage of liquid fuel in Durres*” for an amount of 8 Million USD stating that, “[f]ollowing this approval, we will continue our job for a more detailed study, the preparation of the

Report dated 11 February 2013 and Report dated 29 November 2013; oral testimony of Respondent’s expert witness Mr. Sylvain Quagliaroli (Grant Thornton), H. Tr., day 5, page 60.

¹¹ H. Tr., day 2, page 161.

¹² Cl. Mem., para. 62.

¹³ Resp. C-Mem., para. 34.

¹⁴ Witness Statement of Mr. Alexandros Mamidakis, para. 8, CE-59.

¹⁵ CE-76.

¹⁶ CE 76 (Schedule 2).

*implementation projects, forecast of funds and getting the respective permits for the accomplishment of the works”.*¹⁷

73. The request was renewed on 10 November 1998 and extended to include a long-term lease contract.¹⁸
74. On 28 July 1998, Albania approved the IDA credit by Law No. 8383 “On the Ratification of the Development Credit Agreement”. The law entered into force on August 10, 1998.¹⁹
75. Part of the project financed by IDA was a study, which was carried out by the US-based consulting company Louis Berger Inc.²⁰ The survey mandate is described in the “Addendum to Contract No. 3068-2” between the Albanian Ministry of Transport, Project Implementation Unit and Louis Berger, Inc. dated 17 December 1998: “*The [latter] company was retained to ‘advise the Port of Durres Authority on the rationalization of present land use commensurate with current port operations, and to advise on land allocation for possible future development scenarios’.*”²¹
76. The study resulted in a “Land Use Plan” of March 2000 also called the “Master Plan”.²² One of the recommendations of this plan was the transformation of the port of Durres into a container terminal and the relocation of the oil tanks to a less-populated area.²³
77. When Claimant prepared its business plan in March 1998 and submitted its requests in July and November 1998, there was no indication that in the future the port of Durres would be closed to the landing of petroleum products. Claimant chose the location for its geographical, infrastructural and institutional convenience. According to clear and uncontested answers of two senior members of Claimant’s management, they would not have started the investment in Durres had they known at the time about plans of re-zoning the port and would have been hesitant to invest in Albania at all.²⁴
78. By letter dated 6 January 1999, the Directorate of Maritime Port of the Ministry of Public Works and Transport informed the Privatization Directorate of the same Ministry that by “*Decision of the Board of Directors No. 130, dated 12.12.1998, it is approved in principle the establishment of a center of fuel reservoirs accounting for a construction-mounting*

¹⁷ CE-15.

¹⁸ RE-9.

¹⁹ RE-8.

²⁰ It seems that the Claimant has abandoned its position that the Louis Berger, Inc. study and plan cannot be attributed to the IDA agreement nor to the general Durres Port Project of the World Bank (Cl. Mem., para. 79). This follows from Cl. Rep., para. 153, and also from Cl. Mem., para. 82.

²¹ CE-77. The contract is not public. Its content is unknown to the Tribunal.

²² CE-77.

²³ Cl. Mem., paras. 79-83; Cl. Rep., para. 153; Resp. C-Mem., paras. 66-71.

²⁴ Oral testimony of Mr. Nikolaos Mamidakis, H. Tr., day 2, pages 8-10; oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, pages 75-78.

value of 6 million USD in a surface of 14 thousand square meters in the southern side of the existing reservoirs [...]” and asked the Privatization Directorate to proceed accordingly.²⁵

79. By letter dated 6 January 1999, the Directorate of Enterprise Administration & Privatization in the Ministry of Public Works and Transport informed the Ministry of Public Economy and Privatization that “*the Administrative Board has approved in principle the establishment of a centre of reservoirs in the technological zone of the port*” and that it agreed to grant a lease to Claimant.²⁶
80. During its visits to Albania, Claimant made efforts to associate with a local partner. At least in part, these efforts were guided by the wish to rely on an Albanian partner for contacts with the Albanian authorities and to facilitate the granting of permits.²⁷ In 1999, Claimant entered into an association agreement with the Albanian partner “ANOIL Sh.A”, and created the Albanian subsidiary “Mamidoil Albanian”, which was incorporated on 15 March 1999.²⁸ Initially, Claimant held 80% and ANOIL 20% of the shares. From its incorporation, one person from Claimant’s senior management and the owner of ANOIL, Mr. Angjeli, acted as general director and vice general director respectively. In 2006, Claimant bought the minority shares to become the sole shareholder in the subsidiary.
81. On 2 June 1999, a lease contract was executed between the Ministry of Public Economy and Privatization and Claimant’s Albanian subsidiary Mamidoil Albanian, represented by Mr. Aleksander Mamidakis. The contract covered roughly 14 thousand square meters of a “*free site*” in the port of Durres for the purpose of “*setting up a fuel storage center according to the business plan attached*” (Article 2). The term of the contract was 20 years, i.e. until 1 June 2019 (Article 3), unless terminated by agreement of the Parties or “*when the lessee violates one of the liabilities provided in articles 10-15*” Article 16). The lessor was “*bound to guarantee the full enjoyment of the facility*” (Article 6), while the lessee was “*duty bound to use the facility, scope of such contract for the purpose and destination foreseen in article 2*” (Article 12).²⁹

²⁵ CE-13.

²⁶ CE-14.

²⁷ CE-152.

²⁸ CE-6.

²⁹ Claimant has submitted two versions of the lease contract, as CE-19 of the Request for Arbitration and CE-19a of the Memorial, the former documenting the calculation of the rent and the latter documenting a “*schedule of investment performance*”, allegedly corresponding to the “*business plan attached*” as mentioned in Article 2 of the lease contract: Cl. Mem., para. 70. Respondent doubts the authenticity and the completeness of either version because the originally attached maps are missing, and submits that it is completely unfamiliar with the “*schedule of investment performance*”: Resp. C-Mem., para. 52, Resp. Rej., para. 67. The maps alluded to are documented in RE-14. Claimant refutes the allegations as being “*not credible*” and insists that the schedule corresponds to the business plan which is described as being attached to the contract: Cl. Rep., para. 88. During the hearing, it became apparent

82. Upon instruction of the Ministry of Public Works and Transport, the Durres port authority handed the site over to Claimant's subsidiary on 1 September 1999, "*free cleared and ready for the investment of a fuel storage center*".³⁰
83. Upon reception of the letters approving the investment in principle, the execution of the lease contract and the transfer of the site, Claimant prepared for the construction of the tank farm and the rehabilitation of the infrastructure.
84. The Tribunal had some difficulties to establish the exact time-line of the construction. While Claimant's Request for Arbitration alleges that "*approximately 85% of the Project had been completed in November 1999*",³¹ Claimant's Memorial contends that it "*began with the construction of the tank farms in February 2000*",³² and Claimant's Reply specifies that it took "*six months from the handing over of the site (September 99) to the signing of the main civil works contract*".³³ During the hearing, Claimant stated that the date indicated in the Request for Arbitration "*is flatly incorrect*".³⁴ In the "Timeline" preceding its Rejoinder, Respondent submits that the construction of the tank farm had not begun – as claimed in Claimant's chronology – before October 1999 to be completed in February 2001, but that, from April to October 2001, Claimant "*invest[ed] substantial funds in the construction of additional fifth and biggest tank farm*".³⁵
85. The Tribunal deduces from the various submissions that it is uncontested between the Parties that the core construction period was between March 2000 and February 2001, with a suspension of works of about 5 months from July to December 2000. That is all the more so since it is equally uncontested that Claimant started to discharge vessels in October 2001 and continued to do so until the ban to discharge fuel from vessels in the port of Durres became effective in 2009.³⁶ In total, 202 vessels were discharged during this period. Thus, from October 2001 at the latest, the reservoirs and the discharging infrastructure must have been operative.
86. On 17 November 1999, the Director of the Durres Sea Port Authority, operating under the supervision of the Ministry of Public Works and Transport wrote a letter to "Mamidoil Albania shpk" stating, "[d]espite our verbal notification for suspending the works for the construction of the fuel depots close to the eastern docket of this Port, you pay no attention to it and continue with the works. Under these circumstances, the Authority informs you

that Article 2 refers to Claimant's business plan of 31 March 1998 as exhibited as CE-58 and that the plan was in the files but not attached as part of the lease contract.

³⁰ CE-18.

³¹ Request, para. 25.

³² Cl. Mem., para. 73.

³³ Cl. Rep., para. 46.

³⁴ H. Tr., day 1, page 38.

³⁵ Resp. Rej., pages 4-8 (Timeline).

³⁶ Cl. Mem., para. 174.

*again to suspend the works immediately until the completion of the master plan survey for the development of this Port, which is due to be completed in January 2000. On the contrary, we are going to recourse to the assistance of competent authority to affect [sic] forced suspension.”*³⁷

87. By letter dated 7 December 1999, Claimant’s Albanian partner and deputy general director in Mamidoil Albanian refuted the content of this letter and insisted, “[s]o, *Mr Director of Durres Port, it should be known that this country is regulated by laws and decisions should be abided by, including the respect for your signature and seal, which you cannot change through verbal decisions, be it even through letters, which run counter to the laws of the state. [...] We consider this letter as an unfair pressure, hindering the foreign investors and the country [...]. Under these circumstances, were [sic] should be the ones to seek the assistance of the competent authorities for you not to become an obstacle”*.³⁸
88. By letter dated 15 February 2000, the Director of the Durres Sea Port Authority reiterated its warning to Mamidoil Albanian and repeated that given the first consultations with the experts on the revision of the master plan “*it seems ungrounded and irrelevant to construct terminals and deposits of fuels at the sea port*”. The letter advised not to construct before the completion of the survey because “[i]ninstalling them would be of financial consequences to your company.”³⁹
89. In a memorandum dated 3 March 2000, addressed to the Chairman of the Council of Ministers and copied to Mr. Aleksander Mamidakis, “Mamidoil” Albania sha, the Director of the Durres Sea Port Authority summarized the situation. It referred to the results of the recommendations for a new master plan for Durres according to which “*no sites available for fuel deposits shall continue to exist*”, by referring to the request for “*a provisional suspension of the works in that site until the completion and approval of the master plan*”, and by informing the Chairman that construction is “*being continued and the investor is making payments, while the perspective is not safe.*”⁴⁰
90. The attitude of Claimant with respect to these exchanges has evolved over the course of the proceedings. While originally pleading that Respondent had “[s]uddenly and out of the blue” changed its plans for the port and had informed the investors only on 13 June 2000 when most of the construction work had already been completed,⁴¹ it stated at the hearing that it is “*willing to accept the evidence suggests that those letters, at least one of them has been received and has been replied to.*”⁴² At the same time, counsel for Claimant alleged

³⁷ RE-15.

³⁸ RE-42.

³⁹ RE-17.

⁴⁰ RE-16.

⁴¹ Cl. Mem., paras. 75 and ss.

⁴² H. Tr., day 1, page 22.

that he had “*shown those letters to our witnesses and our witnesses said, ‘Well, 14 years ago, who knows?’. They are not in the archives*”.⁴³ Claimant insists that the letters were received by Mamidoil Albanian and that “*Mamidoil Albanian is not Claimant in this case; it is Mamidoil. Whether anything which is in the sphere of a subsidiary must be imputed to the mother company is a legal question which I am currently not prepared to answer.*”⁴⁴

91. Claimant’s witness Mr. Alexandros Mamidakis testified that he saw the letter sent by the Director of the Durres Sea Port Authority on 17 November 1999 during the construction period but that he does not recall the exact month,⁴⁵ while another of Claimant’s witnesses, Mr. Nikolaos Mamidakis, testified that he saw it after March/April 2000.⁴⁶
92. The World Bank endorsed the recommendations of the March 2000 Louis Berger study, including the proposal to relocate fuel-related activities to a less populated area, in its supervision mission aide-mémoire of 14 July 2000 where it “*reiterate[d] its earlier recommendation, that the Government ask the company to relocate its tank farm to an unpopulated site near Durres as soon as possible, which appears quite feasible. [...] Minister Nako told the mission that the Government and company would study this matter over the next two to three years with a view to relocating the tank farm. The Government will also need to identify funds to compensate the company for moving*”.⁴⁷
93. The World Bank has maintained its position through the years and maintained its policy assistance in its implementation completion report of 24 June 2005.⁴⁸
94. The European Commission has equally endorsed the new orientation of Durres port, as expressed in the “*First Five-Year Review of Albanian National Transport Plan (ANTP)*”, established again by Louis Berger Inc. Part of the plan consisted in the “[r]emoving or relocating the oil product tank farm and implement an environmental clean-up of the site.”⁴⁹ In 2008, the European Commission stated that the “*condition of the present oil jetty, along the eastern breakwater, is deplorable [...]. The construction work for a Greenfield petroleum port at Porto Romano are in execution. A transfer of oil imports to the new port is expected to take place around 2009-2010. In view of the condition of the jetty in the Port of Durres, it is important that the commissioning of the new facility proceeds without delay.*”⁵⁰

⁴³ Claimant’s opening statement, H. Tr., day 1, page 22.

⁴⁴ Claimant’s closing statement, H. Tr., day 5, pages 160-161.

⁴⁵ H. Tr., day 2, page 94.

⁴⁶ H. Tr., day 2, page 24.

⁴⁷ CE-79, pages 3 s.

⁴⁸ CE-196.

⁴⁹ CE-202, para. 5.4.1.

⁵⁰ RE-52, para. 1.

95. On 13 June 2000, Respondent's Council of Ministers approved the Land Use Plan elaborated under the auspices of IDA, and the decision was published in the Official Gazette.⁵¹
96. Subsequent to the decision, the Minister of Public Economy and Privatization and the Minister of Transport informed Claimant by letter dated 21 July 2000 that *"it is not foreseen that the zone in which the fuel deposits are actually located, will serve for this purpose in the future. The plan determines the displacement of the existing deposits outside the Durres Port and the stopping of the construction of new deposits. [...] [T]aking into consideration the fact that based on the contractual obligations, that on your part you are investing in the reconstruction or construction of new deposits in this zone, based on the new requirements [...] we demand the interruption of further investments"*.⁵²
97. As a consequence, all petroleum companies active in port of Durres had to abandon their construction sites between July and December 2000. The instruction of the Ministries of Public Economy and Privatization and of Transport referred explicitly to the "Plan of Utilization of the land in Durres Port" which stipulated the closing of existing fuel deposits and a ban on the construction of new ones in Durres.⁵³
98. The ban was lifted in December 2000 after an intervention of the Greek Government, Greece being one of the major trading partners of Albania.⁵⁴ After negotiations between high-level Albanian authorities, which included the Prime Minister and several Ministers, and the senior management of Claimant and other Greek companies operating in Durres port, assisted by Greek Government officials, the Albanian Council of Ministers issued Decision No. 704, dated 21 December 2000. The decision referred to the Constitution and the "Law on the Processing, Transporting and Trading of Petroleum, Gas and their By-Products" and introduced the concept of a "temporary trading permit" to entities conducting their activity in trading petroleum and their by-products in Durres (Article 1).⁵⁵
99. On 16 February 2001, the Minister of Economy and Privatization issued a "Trade Permit" of type "A" to Mamidoil Albanian and other subsidiaries of Greek companies *"valid for a period of 18 months after the entry into power of the Decision for the displacement of deposits in the port of Durres, but not longer then [sic] 10 years"*.⁵⁶ The permit referred to Decision No. 704 and was issued on the basis of an application made by Deputy Director

⁵¹ CE-21; RE-18.

⁵² CE-22.

⁵³ CE-22.

⁵⁴ Cl. Mem., para. 99; Resp. C-Mem., para. 83.

⁵⁵ CE-29 and CE-30.

⁵⁶ CE-30a.

General, Mr. Angjeli, in the name of Mamidoil Albanian, which itself referred to that decision.⁵⁷

100. On 27 January 2011, shortly before the expiry of the trading license, Claimant approached the National Licensing Center in order to prepare an application for its renewal. The application was not processed. Since the reserve requirements were also not met, Claimant “*did not start a second application for a trading license,*”⁵⁸ and the trading license expired on 15 February 2011.
101. There has been some debate as to the term of the validity of the trading license. While Claimant contests its legality based on its temporary character⁵⁹ and Respondent considers it valid, Claimant’s witness Mr. Kalfas confirmed that the 10-year restriction was “*normal*” and accepted as long as renewable and that only a further 18-month restriction after a relocation order would have been illegal.⁶⁰ Ultimately, the Tribunal finds that the factual issues are moot because, on the one hand, no relocation order was issued and, on the other hand, Claimant refrained from making a further application in any event.
102. The legal significance of Claimant’s request for the approval of the investment of 3 July 1998, the issue of the permits and authorizations that were required from Claimant for it to proceed with its investment, and the subsequent approval by the Ministry of Public Works and Transport will be analyzed in due time. In any event, it is beyond doubt that the Parties were aware that further documentation and permits were required for the construction and operation of the tank farm. Claimant underlined their necessity when it noted that it was prepared to get “*the respective permits for the accomplishment of the works,*” and for its part Respondent referred to additional authorization by expressing its approval for the project “*in principle*” in January 1999.
103. In addition to the trade permit, the Tribunal takes note of the following dates of events and legislative acts requesting permits:
 - a) *The environmental permit:* In 1998, Law No. 7664 “On Environmental Protection” dated 21 March 1993 was in force. Its objective was to protect the environment being considered “*an essential condition for providing for the development of the society and the nation in general*” (Article 1) and stipulated that persons engaged “*in economic and social activities that may have an impact on environment, must obtain licenses*” (Article 17) before any construction. In this context, “*industrial activities*” (Article 18 c) were to be licensed by the National Agency for Environmental Protection (Article 19). The request for a license was not submitted to specific formal

⁵⁷ RE-21.

⁵⁸ Witness statement of Mr. Kyriakos Mamidakis, para. 20, CE-57.

⁵⁹ Cl. Mem., paras. 100-102.

⁶⁰ H. Tr., day 2, pages 123-124.

requirements and was to be responded to within three months (Article 20).⁶¹ Law No. 7664 was abrogated and replaced by Law No. 8934 of 5 September 2002. The new law required a periodically-renewable environmental permit for the “*operation of installations for their utilization and technological processing and other activities*” (Article 36), issued by the Minister of Environment upon request of the interested party (Articles 36/39).⁶² Both laws provide that in case of passivity of the competent authority the permit is considered approved. Claimant applied for the permit on 10 May 2000 with the Regional Environmental Agency and was granted the Environmental Permit on 31 May 2007 by the Minister of Environment “*for a temporary term, till the moment of the displacement of tanks in the final location*”.⁶³ The granting of the environmental permit had been preceded by some correspondence with and an inspection by the Ministry.⁶⁴

- b) *The construction site permit and the construction permit*: When Claimant made its application on 3 July 1998, Law No. 7693 “On Urban Planning” was still in force.⁶⁵ According to its Article 7, the “Council of Territory Adjustment of Albania”, established by the Council of Ministers “*approved [...] construction projects execution in which the building site is more than 0.5. hectare*”. For smaller sites a construction permit by local government was required (Article 29). In any constellation, the application had to be made using certain forms that were attached to the law.
- c) On 18 November 1998, Claimant wrote to the Minister of Industry stating that “*[a]fter concluding a preliminary but substantial stage of data selection and consideration, as well as discussions with the proper authorities in Albania, we are now ready to submit our proposal to your Government regarding the construction and operation of a tank farm [...]. We would highly appreciate it if you could let us have your final views on the subject as well as on the procedure to be followed for its implementation*”.⁶⁶ The letter was accompanied by a technical description, a detailed design of the depot and a memorandum of the project.⁶⁷ Subsequent to this letter and the request of 3 July 1998, the Albanian Government approved the project in principle and executed the lease contract. At that time, a new Law No. 8405 “On Urban Planning”, dated 17 September 1998, had entered into force, repealing Law

⁶¹ RE-12.

⁶² CE-106.

⁶³ CE-35.

⁶⁴ Request, paras. 39-42; cf.: letter of the Ministry of Environment, 31 January 2003 requesting elimination of pollution, CE-31; letter of the Ministry of Environment, 4 June 2003, temporarily refusing the permit, CE-107; letter of the Ministry of Environment, 26 March 2004 asking for documentation for the permit, CE-32; CE-157; CE-177.

⁶⁵ CE-168.

⁶⁶ CE-161.

⁶⁷ Cl. Rep., para. 70.

No. 7693 (Article 86). Articles 38/39 of the Law provided that before the construction of a surface structure a formal request for a building site permit had to be submitted to the respective urban planning offices, using a form (“Form No. 1”) as attached to the Law, and Articles 45 to 53 of the Law provided that in addition any person wanting to build in Albania had to request a building permit. The request had to be addressed to the urban planning section in Durres before the beginning of the construction and in a formal way, using a Form attached to the Law. Buildings constructed without permits were qualified as being “illegal” (Article 76), the decisive moment of the applicability of the law being the time of construction (Article 77). Buildings constructed without permit in approved sites are considered illegal. The Tirana municipal territory adjustment council (TAC) “*shall issue building permits when construction meets the requirement of this law*” (Articles 78/79). For illegal buildings constructed before the entry into force of the law and constructed without permit on land of which the builder is the owner, the authority may grant a permit retroactively (Article 77).

- d) While the legal frame is not in dispute, the question whether Claimant’s different requests and applications are expressions of a request for a construction site and a construction permit remain controversial and will be presented and considered in due course.
- e) *The exploitation permit*: According to Law No. 8402 “On Control and Regulation of the Construction works” dated 10 September 1998, Claimant needed an exploitation permit which was to be issued by the “section or local unit urban office” (Articles 8/13). By letters from the Ministry of Economy, the Chief of Trading and Concessions Permit Department, and the Ministry of Industry dated 23 April 2003,⁶⁸ 20 May 2003⁶⁹ and 30 March 2004⁷⁰ respectively, the Albanian authorities requested that Claimant apply for it.⁷¹ While it is uncontested that such permit was not granted, the existence of the application is in dispute: Respondent denies that an application was made⁷² while Claimant asserts that it was not able to produce the original application but that contemporaneous documents evidence that it was made.⁷³

⁶⁸ CE-34.

⁶⁹ CE-172.

⁷⁰ CE-33.

⁷¹ Request, para. 43.

⁷² Resp. C-Mem., paras. 47, 96.

⁷³ Cl. Rep., paras. 108-111, referring to CE-179 and CE-180.

- f) *The customs warehouse authorization*: On 17 October 2006, the Customs Office issued, upon Claimant's request submitted on 10 October 2006, a definitive "Authorization for the Administration of a Customs Warehouse."⁷⁴
104. Claimant maintains that it based its decision to start the construction of the tank farm in October 1999 on the following documents: the January 1999 inter-ministerial letter carrying the approval in principle, the June 1999 lease contract between the Ministry of Public Economy and Privatization and Mamidoil Albanian, the September 1999 minutes of transfer of the site, and the February 2001 trade permit in favour of Mamidoil Albanian. Claimant accepts that a construction site permit, a construction permit and an exploitation permit were not obtained following the requirements of Albanian law.⁷⁵
105. There has also been some debate whether the inter-ministerial letters approving the investment in principle and the lease contract could be considered a construction permit. Based on the opinion of its legal expert, Prof. Dobjani, Claimant has expressed its position.⁷⁶ While Prof. Dobjani's written analysis may be ambiguous,⁷⁷ the ambiguity was lifted during his oral testimony when he stated unambiguously – in agreement with Respondent's legal expert – that the inter-ministerial letter was not an approval in the sense of the Law on Urban Planning "*but just a positive opinion that the land they were asking for [...] was available for investment*"⁷⁸ and that "*the lease contract is not a construction permit, of course.*"⁷⁹
106. During their oral testimony, both legal experts also confirmed, when asked whether "*questions relating to permits and regulations in construction activities are of importance as opposed to being trivial*",⁸⁰ that they are important because they touch on "*upon safety, health and urban questions.*"⁸¹
107. Finally, after having confirmed that no construction permits were in place, both legal experts agreed that "[t]he construction police had full authority and full opportunities to go and close down that construction, if the Port Authority had informed them. But they could have been informed also by the Ministry of Public Works or the Ministry of Economy, by informing the central construction police, because the construction police operates at the

⁷⁴ CE-183.

⁷⁵ Cl. Rep., para. 93.

⁷⁶ Cl. Rep., paras. 79-80.

⁷⁷ Legal Opinion of Mr. Ermir Dobjani, paras. 7-13, CE-169.

⁷⁸ H. Tr., day 4, page 132.

⁷⁹ H. Tr., day 4, page 134.

⁸⁰ Question of counsel for Respondent: H. Tr., day 4, page 99.

⁸¹ Oral testimony of legal experts Mr. Neritan Kallfa and Prof. Ermir Dobjani, H. Tr., day 4, page 99.

*central level and local level. So it had full powers and the full opportunities to go and close down and stop the construction.”*⁸²

108. The construction police did not ever exercise this right. When the construction work was interrupted from July to December 2000, this decision was explicitly based on relocation plans and not on the absence of permits.
109. For 12 years, Claimant has imported, transported and marketed oil products in Albania. During the period from October 2001, shortly after the completion of the tank farm construction, until June 2009, the moment when the prohibition to process ships in the port of Durres became effective, that activity took place largely by sea transport to the port of Durres.⁸³ After the closure of the port, Claimant depleted the deposits in the tank farms and then continued to import small quantities of fuel by truck under the temporary trading license until shortly before its expiry in 2011.
110. During the period of operations, a number of factual events occurred, regulatory changes were introduced and governmental decisions were taken, which affected Claimant’s activity in different ways.
111. In line with European standards, Albania introduced and maintained requirements for a security reserve of fuel for wholesalers, which increased from 30 days in 1999 to 60 days in 2003 to 90 days in 2010.⁸⁴ At the same time, from 2002 onwards, Albania introduced a minimum reserve requirement of 300 cubic meters⁸⁵ for small local dealers, which would only be applicable in practice “*if the sales quantities were very small, almost unrealistic.*”⁸⁶
112. Another problem concerned the quality of diesel to be marketed. By Decision No. 147 dated 21 March 2007, the Albanian Government fixed a progressive standard of diesel quality to be traded on the Albanian market.⁸⁷
113. By Decision No. 1110 dated 30 July 2008, the Albanian Government allowed the refining of a lower diesel quality in Albania and its marketing, again tightening the criteria progressively between 2010 and 2012.⁸⁸

⁸² Oral testimony of Prof. Ermir Dobjani, H. Tr., day 4, pages 135-136; Legal Expert Opinion of Mr. Neritan Kallfa, para. 18.

⁸³ Request, para. 11.

⁸⁴ Cl. Mem., paras. 157-159; Expert Report of Ernst & Young, paras. 54-57, CE-64; First Expert Report of Grant Thornton, para. 54.

⁸⁵ Cl. Mem., paras. 157-160; Resp. C-Mem., paras. 245-246.

⁸⁶ Cl. Mem., para. 159.

⁸⁷ CE-39.

⁸⁸ CE-40. In paragraphs 164-167 of its Memorial, Claimant had alleged that the Decision referred to Albanian refineries; during the hearing, it specified its statement to mean that only one refinery was favoured for a certain period of time: H. Tr., day 1, page 56.

114. By Decision No. 52 dated 14 January 2009, the Albanian Government allowed the refinery ARMO S.A. to sell its products of lower quality to wholesalers endowed with “Trade License Type A”, and “*due to its dominant position in the market [...] at the same and transparent trading prices and conditions*” (Article 3 of the Decision). The standard was again progressively increased between 2010 and 2012.⁸⁹
115. Decision No. 52 was in force for six months. The Constitutional Court of Albania voided it on 24 July 2009. The Court found that the Decision contradicted the Stabilization and Association Agreement with the European Union and the Albanian Constitution because it curtailed the economic freedom, which is not within the competence of the executive power.⁹⁰
116. A further problem concerned the taxation of imported fuel. Claimant has alleged that the customs authorities taxed its imports based on the bill of lading quantities and not based on the quantities that left its bonded warehouse in the port. Both quantities differ because of evaporation and loss during storage, the outturn quantity being lower.
117. Claimant repeatedly complained about the taxation practice from 23 April 2003⁹¹ and filed a suit for reimbursement of allegedly overpaid taxes with the District Court of Durres on 13 June 2006.⁹² The District Court accepted its jurisdiction, but this was overturned by a decision of the Supreme Court dated 3 April 2007. Claimant appealed this decision to the Constitutional Court.⁹³ The Constitutional Court rejected the request on 24 December 2007.⁹⁴ Claimant then brought the case to the European Court of Human Rights in Strasbourg on 16 June 2009, where it is pending and awaiting the Court’s examination of admissibility.⁹⁵
118. Although they appraise the issue in a different context and perspective in general, the Parties concur that smuggling and adulteration of fuel has been a problem in Albania and the region from before the start of Claimant’s operations.⁹⁶
119. When on 21 July 2000 Respondent ordered the interruption of construction with a view to moving the tank farms, Claimant addressed a letter to the Albanian Government asking it to allow the completion of the first stage of the project and the beginning of the “*operation to be on a short term basis with respect to time and concurrently to collaborate towards*

⁸⁹ CE-42.

⁹⁰ CE-114.

⁹¹ Cl. Mem., paras. 127-130 and footnote 107.

⁹² Legal Expert Opinion by Mr. Viktor Gumi, Annex 1.D(i).

⁹³ CE-212.

⁹⁴ RE-58.

⁹⁵ CE-219; cf. Cl. Rep., paras. 191-196.

⁹⁶ Cl. Mem., paras. 116-123; CE-56; Cl. Rep., paras. 170-185; Resp. C-Mem., paras. 316-320; counsel for Respondent, H. Tr., day 1, pages 203-204.

reestablishing the project altogether".⁹⁷ The above-mentioned temporary trading license explicitly took a future displacement into account.

120. On 27 May 2001, Respondent issued Decision 358 on "Procedures and Conditions for Granting Permits, for Construction and Use of Coastal Installations, for the Transport and Storage of Oil, Gas and their By-Products". Article 9 of the Decision granted priority in the selection of sites in the newly-identified zones for the operation of seashore deposits in Porto Romano and Vlora to all "[s]ubjects which are in contractual relationship with the state for depositing in the Port of Durrës".⁹⁸
121. On 26 October 2001, Claimant suspended its original business plan and decided to "freeze" the plan to create a network of COCOs.⁹⁹ On 19 December 2003, the plan was definitively abandoned and replaced by the strategy to operate through supply contracts with independent partners.¹⁰⁰ As expressed by Claimant's counsel, "*Claimant first suspended and then later stopped its plans for investing a further 15 million in the chain of COCOs*".¹⁰¹
122. It is against this background that a high-level working group "[o]n the displacement of the fuel deposits from Durrës Port" was established in 2003, grouping key Ministries and the three Greek companies operating in Durrës, including Claimant. The group met several times in early 2003. Three of the meetings – of 12 February 2003, of 27 February 2003 and of 20 March 2003 – have been documented in minutes.¹⁰²
123. While during the first two meetings practical problems of relocation from Durrës to other ports were discussed, with Claimant's representative insisting on the necessity of financial compensation, the third meeting centered on the lack on approvals, authorizations and permits, possibly induced by a remark of Claimant's representative who had complained during the second meeting that what "*has main importance is the lack of authorization of use and exploitation*" of the tank farm.¹⁰³
124. During these meetings, the Albanian authorities stated that a number of authorizations and approvals were missing and that the "[s]tate handled the matter with some leniency, because of its will not to hold back your activity. [...] the Albanian authorities would be willing to consider the possibilities to legitimize your activity, provided that an agreement is reached on the continuation of your activity in the port of Durrës, until the decision for the relocation of the fuel storage deposits." During the meeting, Claimant's representative

⁹⁷ CE-74.

⁹⁸ CE-28.

⁹⁹ Cl. Mem., para. 153-155; Resp. C-Mem., para. 105.

¹⁰⁰ RE-39 (=CE-110).

¹⁰¹ H. Tr., day 1, page 35.

¹⁰² CE-86, CE-87 and CE 88 (=RE 41).

¹⁰³ CE-87, page 1.

referred to the lease contract and asked, “[w]hy don’t you grant us the respective permits, when the investment is the best in the Balkans?”¹⁰⁴

125. By letter dated 23 April 2003, the Minister of Economy asked the Greek companies operating in Durres, with a copy to the Greek Embassy in Tirana, to file the documentation necessary to issue exploitation permits and construction permits.¹⁰⁵
126. By letter dated 30 March 2004, The Minister of Industry and Energy informed the Minister of Economy that after the discussions of the Albanian-Greek commission in 2003, the companies operating in the port of Durres had been asked to present all the documents necessary for the certification of the tanks at their earliest convenience and that the certification would follow immediately thereafter, but none of the Greek companies had submitted the necessary information.¹⁰⁶
127. When Respondent communicated to Mamidoil Albanian for the first time in 1999 that it was considering a new land use in the port of Durres and asked it to suspend the construction of the tank farm, the alternative port of Porto Romano had no infrastructure and had no capacity to support the landing of petroleum products from vessels. The Government announced in 2003 that the necessary infrastructure was to be created. The construction of the port commenced in 2004 and lasted until 2009. In July 2009, Porto Romano was officially opened.¹⁰⁷
128. After the completion of the construction in 2001, Respondent suggested that Claimant relocate the tank farm to Porto Romano at its own costs, in light of its previous warnings on the change of legal framework. Claimant consistently refused this invitation, demanding compensation for any relocation. The Tribunal also notes that, in this arbitration, Claimant complained that it was never “ordered” to relocate, a complaint that was never made at the time of the events and which, in any event, would not advance Claimant’s case.
129. On 6 October 2006, the Ministry of Economy, Trade and Energy announced that “*in due time*” the Government would take the necessary measures to prohibit import-export activities of oil, gas and related products in other ports than Porto Romano and Vlora.¹⁰⁸
130. On 10 May 2007, the Albanian Government entered into a settlement agreement with Petrolifera, a petroleum company based in Italy, and Petrolifera Italo Albanese Sh.A. in order to terminate a dispute that Petrolifera had brought before the ICC International Court of Arbitration. In the agreement the

¹⁰⁴ RE-41, page 2.

¹⁰⁵ CE-34.

¹⁰⁶ CE-33.

¹⁰⁷ Cl. Mem., para. 111; Resp. C-Mem., para. 146.

¹⁰⁸ CE-115.

State of Albania [...] acknowledges also that there are logistics terminals both inside the port of Durres in violation of the rules set out by the master plan of said port, which prohibits the loading, downloading, handling and storage of flammable liquids in the port of Durres, and in the port of Shengjin, in violation of the Decision of the Council of Ministers no.351 dated April 29, 2001. In order to restore a competitive level playing field in full conformity with the law, the State [...] undertakes: (a) to confirm, and within a reasonable timeframe implement and enforce the above mentioned prohibitions provided for in the master plan of the port of Durres and in the Decision of the Council of Ministers n. 351 dated April 29, 2001 and to set [...] the final and not extendable, for whatever reason, deadline of 31st March 2009 for the terminals operated in the ports of Durres and Shengjin to cease their activity in the port in respect of the loading, downloading, handling and storage of flammable liquids; by the close of the day of 31st March 2009 such activities shall be therefore transferred elsewhere or immediately ceased.¹⁰⁹

131. On 25 July 2007, Respondent issued Decision No. 486 of the Council of Ministers ordering the “*interrupt[ion of] the activity of processing ships transporting petroleum, gas and their by-products in the ports of Durres and Shengjin, within 18 months from entry into force of such decision.*”¹¹⁰
132. Claimant and the other Greek operators protested, and the effective date was postponed until 30 June 2009. As from 1 July 2009, the date when Porto Romano was officially opened, no more vessels were allowed to unload in the port of Durres.¹¹¹
133. By letter dated 29 April 2008, the Albanian Minister of Economy, Trade and Energy informed the Greek Minister of Foreign Affairs that the decision concerned only the use of the port and the processing of ships and left both the lease contract and the trading license intact.¹¹² By letter dated 14 April 2010, Respondent notified Claimant that the decision to prohibit the unloading of petroleum products by ship did “*not impede the activity of company Mamidoil Albanian sh.a. for depositing and trading naphtha sub-products in the rented zone in the territory of Durres harbor, neither does it violate the rights of your company to trade as provided by ‘commercial permission’ no. 52, dated 16.02.2001 given to the company by the Ministry.*”¹¹³
134. By letter dated 25 January 2008, the Ministry of Economy, Trade and Energy reiterated Respondent’s offer to grant priority to the Greek companies operating in Durres for the selection of a relocation site in Porto Romano.¹¹⁴
135. By letter of 22 February 2008, Claimant replied that “*by virtue of the Agreement that was signed on 2.6.1999 concerning the granted land that we already legally possess [...] our*

¹⁰⁹ CE-198, para. 4.2.

¹¹⁰ CE-36.

¹¹¹ Cl. Mem., paras. 175-176; Resp. C-Mem., paras. 138-145.

¹¹² CE-47.

¹¹³ CE-118.

¹¹⁴ CE-37.

company in principle would not object to relocate to the area designated by your Government, this being conditioned upon the provision of all indispensable prerequisites towards this end, namely the creation of the necessary infrastructure in order to support the relocation". Claimant further requested "*sufficient and effective compensation for the investment that we have already materialized*".¹¹⁵

136. By letter dated 11 March 2008, the Ministry of Economy rejected the request for compensation arguing that Claimant was "*fully aware that such processing activity in the port [of Durres] would have been temporary*".¹¹⁶
137. No compensation was agreed upon. The relocation did not take place. Despite the continuing validity of the lease contract for the site in Durres port, the tank farm ceased being used. Claimant's Albanian subsidiary is currently acting as a sales agent for Claimant on a very low scale.¹¹⁷

4.2 The contestation and/or controversial appreciation of facts

138. At the closure of the hearing, it became apparent that the majority of the core facts are not disputed between the Parties. The controversy concerns mostly the factual and legal appreciation of certain events, the evolution of the context, and decisions that either Party has taken. The Tribunal will present and summarize the respective positions of the Parties, necessarily recalling some uncontested facts and being aware that the legal and factual appreciation is intertwined and might have to be taken up again later in the Award. The Tribunal has carefully analyzed the positions. When it does not refer specifically to one or the other fact, it has done so because it has concluded that it was either not substantiated or not relevant for the Award.

4.2.1 Claimant's position

139. Claimant asserts that it has extremely carefully planned its investment in Albania. It had an intensive general knowledge of the country and the region since it had already established business relations with the *ancien régime* in the 1980s by exporting coking coal to Albania and petroleum products to other countries. When the regime changed, Claimant intensified contacts with the new authorities and explored the geographical, economic and social factors and perspectives of the emerging market economy.

¹¹⁵ CE-38; cf. also Cl. Rep., para. 164.

¹¹⁶ CE-125.

¹¹⁷ Cl. Mem., para. 175; cf. also CE-120.

140. Claimant concentrated its research on its core business, i.e. the transport, storage and trade of petroleum products. All operative shareholders of the Mamidoil Jetoil companies, the members of senior management as well as key employees for commercial, technical and financial questions travelled to Albania to identify and specify business opportunities.
141. Claimant looked for the appropriate port that could be used for landing petroleum products and their storage and compared the three ports of Durres, Porto Romano and Vlora. Durres was the only port conveniently located and equipped with infrastructure while Porto Romano was practically non-existent and Vlora was far away from the economic center. No further disadvantages were detectable.
142. Claimant looked for local partners, not least to be well informed about all legal and regulatory requirements for the creation of modern storage facilities and retail gas stations. The local partner would be entrusted with the procedures to receive all necessary permits and authorizations. This is clearly expressed in a letter from Mr. Alexandros Mamidakis to Mr. Llazar Angjeli, the owner of the ultimate local partner, dated 15 March 2000, where he asks for assistance for *“any problems with the authorities during the execution of the project and that we always have all the necessary permits and approvals.”*¹¹⁸
143. When Claimant bought the local subsidiary’s minority shares in 2006, it did so partly because it was *“not happy with this specific partner”* and partly because it planned to be listed on the Alternative Investment Market in London.¹¹⁹
144. After several years of diligent planning which included numerous discussions with the Prime Minister, line Ministers and high technical Government officials, Claimant informed the Government for the first time in writing in 1995 that it had chosen the port of Durres as its first choice for the location of the tank farm and asked for the designation of a site. The Government responded enthusiastically and endorsed the choice.
145. In his witness statement, Mr. Alexandros Mamidakis described the interaction as follows:
6. Based on a twenty year business plan, which we considered very reasonable, and numerous talks with government officials, we felt confident to invest in Albania. Initially we wanted to purchase land for our operations, but such an opportunity did not materialize. Alternatively, we looked at leasing a site for a planned tank farm.
 7. The authorities recommended Durres as an investment site and assured us that the market conditions would soon improve (see meeting below with the Minister of Economy and the Minister of Energy). The site was previously also used for fuel tanks by the formerly state-owned petrol company. The port of Durres was our first choice as it not only offered the necessary general infrastructure but also a pipeline for the unloading of ships that was specifically built for the operation of tank farms. At the meetings, there was no alternative investment site discussed.

¹¹⁸ CE-192.

¹¹⁹ Witness Statement of Mr. Nikolaos Mamidakis, CE-124, H. Tr., day 2, page 40; Cl. Mem., para. 66.

8. One of the meetings was held with the Minister of Economy (Mr. Anastas Angjeli) and the Minister of Energy (Mr. Bufi) in 1998. Present at the meeting was also Mr. Kalfas (Technical Consultant for Claimant) and Mr. Nikolaos Mamidakis (Managing Director). In this meeting, both Ministers encouraged us to apply for an approval to invest in tank farms in the port of Durres and assured us that the market conditions would soon improve and that the necessary licenses for the operation will be granted. At that time, I was not aware of any relocation plans of the government. I think the relocation was not even in their heads at that time. Had we known anything about the relocation plans, we would not have invested 8 million USD in a tank farm. The other sites did not offer the necessary infrastructure and an investment did not seem viable there. At these meetings, we also discussed our plans to establish an extensive retail-network. This included buying out existing petrol stations and also setting up new stations. Both Ministers were eager to convince us to invest in Albania. We applied to have our investment approved. After receiving the “go-ahead”, we signed a lease agreement and about half a year later we began the construction of the oil tanks.¹²⁰
146. Had Claimant known at that time that plans existed to change the use of the port of Durres fundamentally, it would not have invested without formal and official re-assurances that it could go ahead. It is very possible that it would have desisted from investing in Albania altogether.¹²¹
147. Further planning was effectuated which finally resulted in the business plan of 1998. The fact that the plan is succinct and concentrated on major results and orientation is typical for a family-run business where all partners are intimately involved in the evolution of an investment project.
148. It was only after all these inquiries, research and the establishment of the business plan that Claimant requested the approval for the investment in July 1998 and again in November 1998. A full technical and financial documentation was attached to the requests. When the Albanian authorities approved the investment in January 1999 and when they negotiated and concluded the lease contract in June 1999, they were therefore fully informed of the project. In fact, both the business plan and the Investment Schedule were in the files of the office that signed the lease contract even if those documents were not formally attached to the contract.¹²²
149. The project as presented in 1998 was only the first step in Claimant’s overall plans: “*In a second step, Claimant planned to distribute the oil from the tank facilities to industrial clients and consumers throughout Albania and build additional tank farms.*”¹²³
150. Even after the request for the approval of the investment had been lodged, the local subsidiary had been set up, the necessary approval had been received, the lease contract had been concluded and the site had been transferred, the investment activity could not

¹²⁰ CE-59.

¹²¹ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, pages 75-78.

¹²² Oral testimony of Mr. Genci Çelo, H. Tr., day 3, page 245; Claimant’s closing statement, H. Tr., day 5, page 147.

¹²³ Cl. Mem., para. 4; Witness Statement of Mr. Alexandros Mamidakis, para. 5, CE-59.

begin. It took another six months of preparation of the site, selection of contractors for the construction of the reservoirs, and further discussions with Albanian authorities before the execution of the first phase of the investment and the construction of the reservoirs could begin.¹²⁴

151. There is some uncertainty as to the scope and application of legal due diligence. While Claimant asserts in general terms that local legal advice was sought,¹²⁵ its witness Mr. Kalfas, who was instrumental in the establishment of the project in Albania, stated when asked why Mamidoil did not instruct a law firm with handling legal due diligence, *“I don’t see a reason for that. If you are technically capable to do so and when you are contacting the right authorities, then I don’t see why you need a lawyer.”*¹²⁶
152. In any event, Claimant’s owners and senior management Messrs. Kyriakos, Nikolaos and Aleksandros Mamidakis testified unanimously that during numerous meetings – as underlined by Mr. Aleksandros Mamidakis’s statement that *“[w]e had meetings in 1998, 1999, 2000 and even in 2010”*¹²⁷ – the high Government officials and political decision-makers consistently endorsed the plan, made assurances as to the regulatory requirements and encouraged Claimant to go ahead with the project. All of these representations were made orally, without written confirmation,¹²⁸ and are therefore not in evidence beyond the testimony of the witnesses.
153. The local partner responsible for the day-to-day business equally affirmed that no obstacles existed and that the procedures were going forward normally.¹²⁹
154. With respect to the relationship between the construction period and the emerging plans to re-zone the port of Durres, Claimant has modified its initial position in two aspects. It no longer contends that 85% of the construction work was completed in November 1999, i.e. at a date when the Durres Port Authority had not yet sent a letter to Mamidoil Albanian informing it that a new master-plan for Durres was under serious debate; nor does Claimant contend that it had only been informed about the new plan for the port of Durres in June 2000 when 85% of the construction work was completed.
155. Claimant confirms now that the Port Authority sent a letter of warning in November 1999 and that the letter was received and answered by the Deputy General Director of Mamidoil Albanian. Claimant’s witness and General Director of Mamidoil Albanian, Mr. Aleksandros Mamidakis, has stated that there was no need to take note of the letter since

¹²⁴ For the foregoing cf. Cl. Mem., paras. 36-72; Cl. Rep., paras. 15-47.

¹²⁵ Cl. Rep., paras. 37-39.

¹²⁶ H. Tr., day 2, page 122.

¹²⁷ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, page 80.

¹²⁸ Oral testimony of Mr. Emmanouil Kalfas, H. Tr., day 2, page 137.

¹²⁹ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, pages 96-97.

the sender had no authority to emit any warnings and that he personally had no knowledge of the letter and subsequent letters, despite that one was addressed to him, before sometime in early 2000. Moreover, he also stated that Claimant reverted to the competent Albanian authorities in order to receive re-assurances that the investment was not called into question and that such assurances were given orally.¹³⁰ He further stated that the local partner and his deputy general director, with whom he followed the day-to-day business but who was more in charge of the details, had equally assured Claimant that it “*should proceed as planned*”.¹³¹ As already stated, Claimant’s witness Mr. Nikolaos Mamidakis, Claimant’s managing director, testified that he saw the letter at least around March/April 2000.¹³²

156. Claimant further asserts that one of the two major results of the negotiations that have taken place with Respondent, with the assistance of the Greek Government after the interruption of the construction in July 2000, has been the authorization to resume and complete the construction work in December 2000. The authorization was given by the Prime Minister who was at the same time the chairperson of the TACRA, the body in charge of the approval of construction permits under the Law on Urban Planning. The other major result was the issuance of the trading permit, which allowed Claimant to operate the tank farm until February 2011 unless a prior order of relocation were to be issued. Claimant considers that a prior termination would be illegal.¹³³
157. Claimant asserts that after all of the discussions with and the decisions of high-ranking Albanian officials, it was entitled to believe in good faith that the possible re-zoning of the port of Durres would neither affect the legality nor the reality of its investment there, and that it could trust the stability of the lease contract.
158. Despite the government’s assurances that the investment in and operation of the port of Durres were accepted, welcome and safe, Claimant did not rule out a possible relocation to Porto Romano if financial compensation were paid. Claimant consistently communicated its flexibility to the government, both in 2003 when the Albanian-Greek high level working group met as well as in letters of 27 January 2003¹³⁴ and 22 February 2008,¹³⁵ i.e. after Respondent’s decision to prohibit further landing by vessels in the port of Durres.
159. By rejecting any claim for compensation, Respondent violated the commitment it had expressed vis-à-vis the World Bank in 2000 when a Minister had told the World Bank mission that “*the Government and the company would study this matter over the next two*

¹³⁰ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, pages 60-80.

¹³¹ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, page 81.

¹³² H. Tr., day 2, page 24.

¹³³ Claimant’s closing statement, H. Tr., day 5, pages 167-168; Cl. Mem., paras. 100-103.

¹³⁴ CE-90.

¹³⁵ CE-38.

to three years with a view to relocating the tank farm. The Government will also need to identify funds to compensate the company for moving."¹³⁶ Moreover, in 2010 a review of the master-plan by Louis Berger Inc., which at this time acted for the European Commission, warned that the companies operating in Durres "[m]ight seek compensation for the early termination of the lease."¹³⁷

160. Claimant alleges that Respondent's decision to close the port of Durres for the discharge of petroleum products beginning in 2009 was not based in public policy considerations at all but had its only rationale in the settlement agreement with Petrolifera, wherein Respondent had promised to close the ports of Durres and Shengjin from 31 March 2009 at the latest.
161. Claimant further alleges that when the decision was taken, the Albanian Government had abandoned the master plan that had been accepted more than six years before but that was not being put into effect. Respondent's indifference towards environmental and safety problems in ports close to residential areas is clearly documented by the facts that firstly, the port of Shengjin was re-opened in clear contradiction to previous policy announcements, and secondly, Respondent explicitly authorized Claimant to carry on its activities of storage and transport to and from the tank farm by truck. The real purpose of the decision, according to Claimant, was to favor Claimant's Italo-Albanian competitor Petrolifera by prohibiting the landing of ships.¹³⁸
162. With respect to the environmental permit, the construction site permit, the construction permit and the exploitation permit, Claimant generally asserts that it has continuously requested that the local authorities direct Claimant to the requirements and assist with the necessary documentation. In many meetings with the responsible Ministers, Claimant alleges to have been told orally to go ahead with the investment and not to worry about permits, which would automatically follow as a pure formality. When addressing technical departments, the reaction was that nothing more was needed because "*you already have the governmental authorization*".¹³⁹
163. Claimant relies on Professor Dobjani's expert opinion and his statement that authorities were not abreast of the procedural requirements or prerequisites of good governance and were "*hesitant to touch issues with foreign investors*".¹⁴⁰
164. Claimant finally submits that Respondent never alleged that either the construction or the operation of the tank farm were illegal and that it never indicated that it would close the

¹³⁶ CE-79, pages 3-4.

¹³⁷ CE-202, page 110.

¹³⁸ For the foregoing cf. Cl. Rep., paras. 153-167.

¹³⁹ Claimant's closing statement, H. Tr., day 5, page 169; cf. also Claimant's witness statements of Messrs. Anastasios Mavrakis (CE-83), Emmanouil Kalfas (CE-61) and Pavlos Garinis (CE-83).

¹⁴⁰ Claimant's closing statement, H. Tr., day 5, page 170.

tank farm as stipulated in the different laws on the environment and on urban planning. On the contrary, Respondent showed a vivid interest in the operation by collecting millions of tax revenue on the project over the years.

165. Specifically, as to the different permits, Claimant contends as follows:
166. *The environmental permit*: Claimant applied for it in May 2000 when the construction was underway. It took Respondent several years until it reacted to the application for the first time. Under these circumstances, the permit was considered granted, according to Article 20 of the Environmental Law of 1993 and Article 38 of the Environmental Law of 2002.
167. Out of precaution and since a written permit – or confirmation of the implicitly-granted permit – had still not been issued, Claimant applied a second time under the new law. The Ministry of Environment rejected the request by pointing to an Environmental Survey of Durres Port according to which a “*disturbing environmental problematic*” prevailed in the port.
168. The review, however, did not concern Claimant’s tank farm but the old, formerly State-owned reservoirs that were, indeed, in a state of disrepair. In contrast to these tanks, Claimant’s installation was constructed and maintained according to high international safety standards. This is not only confirmed by international agencies such as Lloyd’s Register of shipping and Industrial Services but also by the Albanian authorities themselves, who confirmed that the tanks are basically clean and well maintained as well as well built and sound.¹⁴¹
169. During the time of operation, no incident was recorded except for damage to the pumping pipeline from the pier to the deposit, which according to Claimant was misleadingly characterized by counsel for Respondent as an “explosion”. The Albanian authorities inspected the incident and the repair and stated that the problem had been eliminated and that there “*are no unaccomplished tasks*”.¹⁴²
170. Claimant’s witness, Mr. Alexandros Mamidakis, testified that the tank farm was situated in an enclosed area of the port, more than 400 to 500 meters away from residential buildings, separated by a road and therefore not posing any safety risk.¹⁴³
171. According to Claimant, the excellent quality of the installation and the fulfilment of all technical requirements have been consistent over time, and when the permit was finally granted, it was based on exactly the same documentation that had been submitted with the first request. According to Article 24 of the 1993 Environmental Law, the permit has a

¹⁴¹ CE-108.

¹⁴² CE-157.

¹⁴³ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, page 72.

retroactive effect. The fact that the authorities did not close down the tank farm as foreseen in Article 24 establishes that the retroactive effect was triggered.¹⁴⁴

172. *The construction site permit and the construction permit:* Claimant does not allege that it applied for a construction site permit. It alleges, however, that the request for the approval of the investment of 3 July 1998 is at the same time an application for a construction permit and that the inter-ministerial “approval in principle” of 6 January 1999 is at the same time a construction permit.
173. In its Reply, Claimant equates the approval application to a construction-permit application and the approval in principle to a construction permit.¹⁴⁵ When confronted with these assertions during the hearing it replied:

We have said consistently that Claimant always thought it had applied for a construction permit, and you will hear the witness Emmanuel Kalfas I think tomorrow, who will say that when he was informed that what they had might not be sufficient, he went to the Urban Planning Office and they told him, ‘You don’t need a construction permit; you already have one’. [...] and given the intricacies of Albanian law, I also briefly needed to review -- well, what we are saying is: yes, we applied for a construction permit. If you look at this letter of November 1998 (CE-162), it says the ‘proposal to [the] Government regarding the construction and operation of a tank farm’, and it contains then more than ten pages of technical documentation. We say here today that this was clearly not in the form required by law. But we ask the government at the end of that letter: ‘We would highly appreciate it if you could let us have your final views on this subject as well as on the procedure to be followed for its implementation.’ And then we had this in-principle approval. Now, this in-principle approval is not a formal construction permit as such; it doesn’t comply to the form as required, as foreseen by the law. But as our legal expert Mr Dobjani has said in his opinion, it was this in-principle approval which was decisive, because once this in-principle approval has been given, the rest is only a mere formality. That is why we today say we ask you to look at the content and not at the form.¹⁴⁶

174. In its closing statement, Claimant reiterated

- that Prof. Dobjani, Claimant’s expert on Albanian law had opined that “*not even the government knew exactly what the procedures for the building of a tank farm were*”,¹⁴⁷
- that its senior management was convinced that the request was treated as an application,
- that “*they did not know the permit was not applied for in time*” and that they trusted the local partner to comply with all the formalities,¹⁴⁸

¹⁴⁴ For the foregoing cf. Cl. Mem., paras. 146-152; Cl. Rep., paras. 102-107 and 114-122.

¹⁴⁵ Cl. Rep., para. 76.

¹⁴⁶ Claimant’s opening statement, H. Tr., day 1, pages 106-107.

¹⁴⁷ Claimant’s closing statement, H. Tr., day 5, page 143.

- that until 2003, nobody had ever indicated that Claimant “*might have a problem with the construction permit, although the government, contrary to what Respondent has said, knew or should have known long before*”,¹⁴⁹ and
- that “*the Prime Minister personally had negotiated the settlement after the construction stop in 2000, and we know from the testimony of the expert witnesses that the Prime Minister chairs TACRA. And we say now this is a matter of imputing knowledge, and we say that the government at that time should have known whether there is a construction permit or not; and if there is one, they should have alerted Mamidoil.*”¹⁵⁰

175. Claimant asserts with respect to the construction permit that the approval in principle and the authorization by the Prime Minister to terminate the construction are to be considered as the substantive basis for the formal construction permit which – seen in context – is no more than a pure formality which does not impact on the legality of the tank farm.
176. In addition to the quoted documents, Claimant produced requests for a construction site permit and construction permit using the Forms prescribed by Law No. 8405.¹⁵¹ The forms are undated but seem to be stamped by a notary in 2001. They are signed with the name of Mr. Alexandros Mamidakis who personally, when confronted with the document, testified that he had never seen the document and that the signatures were not his.¹⁵²
177. In his closing statement, counsel for Claimant asserted that “*in Albania it is not unusual for someone else to sign for someone*” and that a possible explanation for the problem “*would be that for kind of normal matters, which are not of extreme importance, where you think someone needs to see it, you simply sign in the name of the general director. But I am speculating and I am not assessing evidence*”.¹⁵³
178. Claimant finally asserts that Respondent granted the authorization for the customs warehouse in the port of Durres without any problem and that such authorization depends on a valid construction permit.¹⁵⁴
179. *The exploitation permit:* Claimant alleges that it has applied for an exploitation permit, as evidenced by contemporaneous correspondence with Respondent. The copy of the

¹⁴⁸ H. Tr., day 5, pages 165-167.

¹⁴⁹ Claimant’s closing statement, H. Tr., day 5, page 167 (the Tribunal believes that there is a typo in the text and the last sentence should read “and if there is none” instead of “one”).

¹⁵⁰ Claimant’s closing statement, H. Tr., day 5, page 176.

¹⁵¹ Cl. Rep., para. 131; CE-201.

¹⁵² H. Tr., day 2, page 106.

¹⁵³ Claimant’s closing statement, H. Tr., day 5, pages 179-180.

¹⁵⁴ Claimant’s opening statement, H. Tr., day 1, page 101; for the foregoing in general cf. Cl. Mem., paras. 142-144; Cl. Rep., paras. 66-93.

application was simply not found in the files. Claimant further alleges that, despite numerous complaints about the absence of any response, the Albanian authorities remained completely passive and unresponsive. Since they did not in any way interfere with the operation of the tank farm, Claimant was entitled to believe the Ministers' assurances that the permit was no more than a formality and would in no way hinder the exploitation of the tank farm as a legal matter, as the permit was implied. In addition, and in any event, the trading permit encompassed the exploitation permit.¹⁵⁵

180. With respect to other events and circumstances, which it alleges encumbered its investment and operation, Claimant accentuates certain aspects of facts that are basically undisputed.
181. Concerning reserve requirements, Claimant does not complain about the gradual increases that were in line with European standards but rather about the dramatic decrease from 3000 to 300 cubic meters, which it says created unfair market conditions because it allowed small competitors without structured reservoirs to flood the market, particularly as they did not have to fear any governmental control.¹⁵⁶
182. With respect to the quality of diesel that could be marketed in Albania, Claimant alleges that Respondent reduced the requirement in favour of a local refinery that was up for privatization. The international operators had no access to these products and were at the same time not allowed to import the lower quality diesel. Claimant argues that the Constitutional Court invalidated this "*apparent and severe market distortion*" in 2009.¹⁵⁷
183. Claimant further argues that the intention of the changes of reserve requirements and diesel-quality standards had the purpose "*to force importers out of the market*". The measures were focused on the companies operating in Durres.¹⁵⁸
184. Concerning fuel smuggling and adulteration, Claimant's focus is less on the fact that Albania was notorious for such behavior but rather that Respondent did nothing to combat it, despite many complaints and concrete proposals by Claimant and other companies to reverse the trend and despite that mechanisms, channels and methods of smuggling were common knowledge. Instead of improving, the situation worsened from 2003 on because Respondent turned "*a blind eye on a variety of illegal activities and practices*", leaving Claimant unprotected.¹⁵⁹

¹⁵⁵ Cl. Rep., paras. 66-93.

¹⁵⁶ Cl. Mem., paras. 157-160.

¹⁵⁷ Cl. Mem., paras. 164-168.

¹⁵⁸ Cl. Mem., para. 169.

¹⁵⁹ For the foregoing cf. Cl. Mem., paras. 116-123 and 161-162; Cl. Rep., paras. 170-185.

185. With respect to the alleged “*excessive and completely arbitrary tax claims*”,¹⁶⁰ Claimant submits that Respondent has imposed excise taxes and VAT on quantities as shown on the bill of lading and not on the actual quantities as they left the customs warehouse. Claimant contends that, due to evaporation and other losses during transport and unloading, the difference between the two quantities is considerable. According to Claimant, it corresponds with international practice and an EU Directive to use the outturn quantity for calculating the taxes. By disrespecting the international practice and European law, the customs authorities have collected “*much higher taxes than it was obliged to*”.¹⁶¹
186. Claimant also brought a claim of unjust enrichment for reimbursement of the overpaid taxes and “[d]espite the clear legal situation, the Custom Office asked the District Court to reject Mamidoil Albanian’s claim for lack of jurisdiction arguing that they should have first initiated an administrative request before the Customs Office according to Art.249 of the Customs Code”.¹⁶² The district court found in favour of Claimant. The decision was overturned by the Supreme Court and “*unforeseeably deviated from established practice*”, and the latter decision was not quashed by the Constitutional Court. Claimant alleges that both courts’ conduct amounts to a denial of justice since a new judicial review before the Customs Authority is time barred and Claimant is deprived of judicial remedies.¹⁶³ Since 2009, the matter has been pending before the European Court of Human Rights.¹⁶⁴
187. In its Memorial, Claimant has also alleged that “[t]hroughout the years of operation, Claimant was exposed to arbitrary taxation. Even where Claimant obtained favorable court decisions for reimbursement, Respondent refused to pay. This was a common practice in Albania”.¹⁶⁵ Claimant has not substantiated or evidenced these allegations and has not pursued them in its Reply.
188. In summary, Claimant asserts that “[d]ue to the legal uncertainty that came with the extensive fuel smuggling, the tax evasion by competitors, the conditional Trading License and Respondent’s unpredictable behaviour, Claimant adjusted its original business plan. The plan to set up a network of company owned and company operated petrol stations (COCOs) was abandoned and a more cautious, short term approach was adopted. As a consequence, the whole operation was downsized”.¹⁶⁶ Claimant’s witness Alexandros Mamidakis adds that Claimant took “*a more cautious approach*” in Albania and decided to

¹⁶⁰ Cl. Mem., paras. 124-135; Cl. Rep., paras. 186-196.

¹⁶¹ Cl. Mem., para. 130.

¹⁶² Cl. Rep., para. 191.

¹⁶³ Cl. Mem., para. 131.

¹⁶⁴ For the foregoing in general cf. Cl. Mem., paras. 124-135; Cl. Rep., paras. 186-196.

¹⁶⁵ Cl. Mem., para. 134.

¹⁶⁶ Cl. Mem., para. 153.

suspend the COCO concept “*due to the suddenly adopted plans by the Albanian government to relocate the tank farms and the uncertainty that came with it*”.¹⁶⁷

4.2.2 Respondent’s position

189. Respondent alleges that Claimant invested in Albania in 1998 in the import, storage, transport, wholesale and retail sale of petroleum products “*in the aftermath of Albania’s social, economic and financial breakdown and in the midst of the chaos it had brought*” by revisiting an older plan dating from 1995.¹⁶⁸ Claimant sought to be operating in Albania very early, even before normal market conditions were in place, in order to secure a competitive advantage of market penetration and notoriety.

190. Instead to plan the investment, it decided in a span of some days:

to fast-track its establishment in the market with complete disregard for the existing laws and regulations at the time, so as to take advantage of the chaos from which the country was emerging (in an industry which would, by its public order nature, inevitably and imminently be subject to further regulation), and place the Republic of Albania and its future competitors before a *fait accompli*.

[...]

On 31 March 1998, the Jet Oil Group’s Northern Greece Directorate reverted to the Board of Directors of Claimant with a mere 3-page letter, which Claimant has elevated, for the purposes of this arbitration, to a “Business Plan.” The Northern Greece Directorate of the Jet Oil Group sets forth in this “three pager” its assessment of Claimant’s entry into Albania’s petroleum market through the development of wholesale activities, a network of petrol stations and associated carwash activities. Notably, it anticipated that within five years Claimant would be able to secure a stable 16%-18% market share within a five year period, resulting in a profit of approximately USD 4 million per year.

The so-called ‘Business Plan’ did not address in any way, be it directly or indirectly, the governmental approvals, authorizations or permits that were necessary to conduct the envisaged operations pursuant to Albanian law, let alone the specific procedures, conditions or timeframe required to obtain the same. The “Business Plan” ignored the forthcoming inevitable regulations in this public order sector, in a country which it knew to be in “*a state of transition*,” and similarly ignored other important matters relevant to the envisaged activity, such as the existing black market, taxation issues, alternative location options (be it Port of Duress or one of the other possible locations it had identified earlier).¹⁶⁹

191. Respondent contends that it was obvious for any observer of the Albanian economic and political development that the country would try to integrate itself into an ecologically-oriented market economy, which necessitated profound regulatory changes and an adaptation of its infrastructure.

¹⁶⁷ Witness Statement of Mr. Alexandros Mamidakis, para. 5, CE-59.

¹⁶⁸ Resp. C-Mem., para. 26.

¹⁶⁹ Resp. C-Mem., paras. 28-30; Resp. Rej., paras. 30-35.

192. According to Respondent, Claimant failed not only to take necessary future changes into consideration but did not even bother to understand the legal requirements that were in force during the preparation and execution of its construction.
193. Instead, Respondent argues that Claimant relied on vague declarations of support as well as informal and oral assurances that are not documented in evidence, not just as a proof of a general non-objection to the investment, but as a firm legal basis for a multi-million-dollar construction of a tank farm in a densely populated port where some old and run-down petroleum reservoirs were rotting.
194. Respondent further asserts that Claimant did not ask itself whether the communist-style use and administration of the most important port of the country, Durres, with its apparent deficiencies and pollution hazards would continue.
195. Respondent argues that the three page “business plan” cannot be considered the result of any due diligence in general and legal due diligence in particular. Despite its utter lack of completeness, no local legal advice was sought to learn about the regulatory requirements, authorizations and permits, which must precede any construction and exploitation of reservoirs for petroleum products, which is apparently an ecologically-sensitive installation and activity.
196. Respondent alleges in particular that Claimant should have been aware that Albania had received support and assistance from international development agencies such as the World Bank (IDA) and European institutions for the modernization of its infrastructure including road and maritime transport. The agreement with IDA, which explicitly mentioned the port of Durres as its central target, was published in the Official Gazette¹⁷⁰ and accessible to any interested person and certainly any trained lawyer.
197. Even if Claimant had carelessly not endeavored to learn about these upcoming developments that would have an impact on the characteristics of the port of Durres, Claimant was definitely informed about these perspectives and plans by the letter sent by the Durres Sea Port Authority dated 17 November 1999. The letter summarized and repeated a previous verbal notification. Besides requesting the suspension of construction works, the letter informed Claimant that a review was underway to establish a new master plan for the port.
198. The Port Authority is part of the Ministry of Public Works and Transport and thereby part of the governmental structure.¹⁷¹ Several other warning letters followed, which reiterated that the “*perspective is not safe*”,¹⁷² that Claimant should suspend the construction and that

¹⁷⁰ RE-8.

¹⁷¹ RE-15.

¹⁷² RE-16.

the “*financial consequences*” of any decision taken against these requests would have to be borne by Claimant.¹⁷³

199. Respondent has noted that two of the owners and members of senior management of Claimant have admitted to have been informed about the letter before March /April 2000, thus belying the initial allegation that the decision to re-zone Durres “*came out of the blue*” and was not communicated to Claimant before June 2000 when the master plan and the new orientation of the port were formally adopted.
200. Respondent also has expressed its doubts that correspondence of such vital importance and partly addressed to one of the co-owners of Claimant, who was at the same time general director for Mamidoil Albanian and who followed “*with our local partners part of the day-to-day business*”,¹⁷⁴ should have gone unnoticed. It further asserts that in any event Claimant cannot hide behind its own passivity and lack of organization. The letter must be considered received when it reached the local office even if its individual managers remained ignorant of it or claim that they may have neglected it because it came from a governmental level under the Ministers.¹⁷⁵
201. The letter was received before any major construction costs on the tank farm had been incurred.
202. While the warning letters had no immediate legal consequences, they put Claimant clearly on notice about what would be the future orientation of the port of Durres. Importantly, the letter by the Ministries of Public Economy and of Transport dated 21 July 2000¹⁷⁶ also ordered the interruption of further investment in the port and referred to the Decision of the Council of Ministries of 13 June 2000¹⁷⁷ by which the new master plan for Durres that foresaw the dislocation of all petroleum tanks had been accepted.
203. Respondent asserts that its subsequent decision to authorize the completion of construction works in the port and the granting of a temporary trading license had come about after a political intervention by the Greek government, Greece being a politically-important neighbor and economically the most important trading partner of Albania, and had been the result of political negotiations.¹⁷⁸ It was thus a “*politically-driven solution*” and taken only “*to accommodate the Greek Government*” which had exerted “*substantial political and diplomatic pressure*”.¹⁷⁹

¹⁷³ RE-17.

¹⁷⁴ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, page 60.

¹⁷⁵ Respondent’s opening statement, H. Tr., day 1, pages 155-162.

¹⁷⁶ CE-22.

¹⁷⁷ CE-21.

¹⁷⁸ Resp. C-Mem., paras. 83-86.

¹⁷⁹ Resp. C-Mem., paras. 85-86; Resp. Rej., para. 170.

204. The compromise was negotiated and concluded “*upon the express understanding that it was Mamidoil Albanian’s own business decision to continue its operations on this provisional basis in the Port of Durres and that it eventually would have to relocate its business in view of the adopted Land Use Plan.*”¹⁸⁰
205. Respondent asserts that it authorized the completion of the construction and granted the temporary trading license in order to allow Claimant to develop its business and prepare for the relocation for which it was granted a priority site in Porto Romano. It scrupulously respected the decision and interfered in no way with Claimant’s business.¹⁸¹
206. According to Respondent, it was exclusively Claimant’s “*reckless business decision*” that finally led to the suspension and then termination of the development of COCOs, which “*single-handedly killed any possibility of developing a financially viable business*”.¹⁸² Claimant also made the business decision not to apply for a new trading license when the temporary one expired in 2011. This can be compared to the experience of another Greek company, “Global”, which applied for and received the license without difficulty. In sum, Claimant was confronted with the negative consequences of its wrong decisions and wanted to pull out of the country with a maximum of compensation.¹⁸³
207. During negotiations and efforts to find a politically-acceptable way out of the consequences of Claimant’s disregard of the imminent reforms in the port, the issue of Claimant’s compliance or non-compliance with regulatory requirements and permits was not in any way addressed. The focus of the discussions was on other issues. Respondent insists that it did not know then or when the question of compensation for moving was discussed with the World Bank mission in July 2000¹⁸⁴ that some of the crucial permits were not applied for, let alone granted.¹⁸⁵
208. In any event, neither the approval in principle nor the lease agreement nor the trading license did or could substitute the necessary permits and legalize the illegalities linked to their absence. Moreover, there was no waiver of these requirements, which exist to protect the public interest.¹⁸⁶
209. Respondent asserts that it abstained from implementing the Council of Ministers’ Decision No. 294 of 13 June 2000 approving the new Land Use Plan for Durres before the

¹⁸⁰ Resp. Rej., para. 174.

¹⁸¹ Resp. C-Mem., paras. 143 and 236-260; Resp. Rej., paras. 337-339.

¹⁸² Resp. C-Mem., para. 260.

¹⁸³ Resp. Rej., para. 176.

¹⁸⁴ CE-79.

¹⁸⁵ Respondent’s opening statement, H. Tr., day 1, pages 165-166; Respondent’s closing statement, day 5, pages 221-222; Resp. Rej., para. 19.

¹⁸⁶ Resp. C-Mem., paras. 133-142; Resp. Rej., para. 179; Respondent’s opening statement, H. Tr., day 1, pages 180-181, 200-201; Respondent’s closing statement, H. Tr., day 5, pages 222-227.

infrastructure in Porto Romano was built. By following this consistent line of policy, it had neither abandoned the master plan and the resulting plan of relocation from Durres, nor had it waived its right to implement it for the sake of public interest when all the conditions were met.¹⁸⁷ In fact, it is still pursuing the plan, which has been integrated into a national transport plan established together with the European Union¹⁸⁸ and supported by the World Bank.¹⁸⁹

210. According to Respondent, it is public knowledge that the construction of the infrastructure in Porto Romano was tendered in 2003, that construction started in 2004 and that the new port for the landing of petroleum products by ship was opened in July 2009.¹⁹⁰
211. It was inevitable that once these infrastructures existed the Government would close the port of Durres to tankers. That was announced by letter of 6 October 2006 addressed to all companies operating in Durres¹⁹¹ and implemented by the Council of Ministers' Decision No. 486 dated 25 July 2007.¹⁹² The decision granted a delay of 18 months, which was slightly extended to be effective as of 1 July 2009. Since that time, and in spite of requests by the Greek operators in Durres, no more ships carrying petroleum products are allowed into the port of Durres.
212. Respondent insists that the delay was granted to take into account the completion of the construction work in Porto Romano, on the one hand to accommodate competitors by keeping the port open as long as possible, and on the other hand by allowing them to organize the relocation.
213. As far as the Greek companies including Claimant are concerned, the decision was as conservative as possible. It firstly granted a period of 18 months for adaptation, and secondly, rather than order relocation, it restricted the prohibition on the landing of ships, thereby allowing the storage of petroleum products and the transport by road to and from the reservoirs beyond 2009. This was meant to mitigate the effects for all companies operating tank farms in Durres.¹⁹³
214. Respondent further insists that Claimant had accepted to relocate and that Respondent maintained a priority site in Porto Romano for Claimant. At the same time, Claimant was not entitled to ask for compensation since it had executed its investment in bad faith, rushing into Durres and investing the bulk of money into the tank farm without bothering

¹⁸⁷ Resp. C-Mem., paras. 133-142.

¹⁸⁸ Resp. Rej., para. 194; RE-52; also CE-202.

¹⁸⁹ CE-196.

¹⁹⁰ Resp. C-Mem., para. 136.

¹⁹¹ CE-115.

¹⁹² CE-36.

¹⁹³ Resp. C-Mem., paras. 135-137; Respondent's opening statement, H. Tr., day 1, page 165.

to acquire the basic permits when it already knew that the relocation would be necessary.¹⁹⁴

215. The ban of petroleum tankers from Durres was an important step in the implementation of the master plan, which in turn responded to vital safety, environmental and public policy concerns. Another important aspect was that the plan had already partly been respected and accounted for when dealing with other companies that wanted to import fuel to Albania and that were not allowed to operate from the port of Durres, in anticipation of its imminent closure. These newcomer companies were entitled to rely on the government's consistent conduct and on the implementation of the master plan in accordance with its international obligations.

216. Respondent explained:

Did we comply with this obligation of good faith duty to mitigate? We did, by granting that temporary permit, and by respecting it. In 2007 it's true that a new Council of Ministers' decision was issued. Why? Because we have to comply with international law. We cannot take a measure to say, "You cannot go into the port of Durres", direct all the newcomers and others to other ports, and keep indefinitely the port of Durres open."¹⁹⁵ The competitors rightly said: You cannot ban us to go there, and at the same time allow others to stay there forever.¹⁹⁶

217. The Decision to ban ships from Durres therefore did "*nothing more than to partly implement the long-standing and well-known Council of Ministers Decision No. 251 of 20 April 2001 and Decision No. 21 of the Territorial Regulatory Council of 19 October 2001 which foresaw in the relocation of the activities of processing and the storage of oil in Porto Romano*".¹⁹⁷ It was a decision that "*served the overriding interests of the public at large, was entirely foreseeable*" and is not identical in scope with the settlement agreement with Petrolifera.¹⁹⁸

218. With respect to the environmental permit, the construction site permit, the construction permit and the exploitation permit, Respondent asserts that none of them has been applied for with the competent authorities, in a timely manner, in the legally prescribed form and accompanied by the appropriate documentation.¹⁹⁹

219. Respondent also maintains that it cannot be held against it that for some time it was not aware that Claimant was proceeding without the required permits. When it found out in

¹⁹⁴ Resp. C-Mem., para. 141.

¹⁹⁵ Respondent's opening statement, H. Tr., day 1, page 164.

¹⁹⁶ Respondent's opening statement, H. Tr., day 1, page 174.

¹⁹⁷ Resp. Rej., para. 186.

¹⁹⁸ Resp. Rej., paras. 196-197, 198; Witness Statement of Mr. Avenir Peka.

¹⁹⁹ Resp. C-Mem., paras. 47, 179-206; Resp. Rej., paras. 77-120, 132, 152-153; Respondent's opening statement, H. Tr., day 1, page 194.

early 2003, Respondent put Claimant on notice and started to press it to submit the necessary documentation for a possible regularization of the situation. This is evidenced by the minutes of the meeting of the working committee of 20 March 2003 and by correspondence between the Parties. Respondent explains that it was willing to consider regularization in order to save Claimant's investment.²⁰⁰

220. As to the different permits in detail, Respondent contends as follows:

221. *The environmental permit*: Respondent asserts that Claimant has not followed the clear provisions of either Law on Environmental Protection when it applied for a permit on 10 May 2000, i.e. months after the start of its construction, with the Regional Environmental Agency.

222. It further asserts that the application as evidenced did not contain the supporting documentation that the law requires.

223. Respondent asserts that contrary to Articles 18 and 19 of the 1993 Law on Environmental Protection, which stipulate that the application for a permit concerning toxic substances must be made to the Council of Ministers before the activity starts, Claimant made the application after the start of the construction of the tank farm and to the Regional Environmental Agency and not to the Council of Ministers.

224. Respondent also contends that Articles 34 ss. of the 2002 Law on Environmental Protection was not complied with. That provision requires that the application be made before the beginning of an activity that is "*likely to affect the environment*" (Article 34), that necessary supporting documentation be submitted, and that the proper recipient be the Minister of the Environment.

225. Respondent further alleges that, contrary to Claimant's allegations, it reacted to the application in a timely fashion. Respondent refers to an exchange of letters where Claimant admits in a letter dated 15 February 2001 to have understood that the "*granting of Environmental License was not approved*".²⁰¹

226. Moreover, a series of inspections were undertaken. An inspection conducted from 11 to 22 March 2002 found that "*the new facilities are basically sound and well built*" but detected 18 deficiencies, including the risk of an explosion presenting "*a high risk situation to these residents*". The report recommended the relocation of the site to a less-populated area.²⁰²

227. A further study was carried out by the Durres Port Authority, which also detected environmental problems including the "*elimination of secondary pollutions of fuel*

²⁰⁰ Resp. C-Mem., para. 251; Resp. Rej., paras. 19, 154, 166, 297, 312.

²⁰¹ CE-103.

²⁰² CE-108, para. 6.3.

*deposits, elimination of fuel leaks, internal drainage with fuel tankers, processing the ballasts of the fuel remaining in the discharge pipeline” among others.*²⁰³

228. The risk of an explosion materialized in early 2003 with the “*explosion of a junction of the discharge line in the Mamidoil S.A. entity*”. Even if this incident was quickly addressed and had no major consequences, it demonstrated, together with the studies, that it was urgent to close the port of Durres for landing and handling petroleum products.
229. When Respondent finally granted the temporary environmental permit on 31 May 2007, it was “*issued for a temporary term, till the moment of the displacement of tanks in the final location*”²⁰⁴ and was meant to regularize Claimant’s position until its move to Porto Romano. The permit did not cure the deficiencies of procedure and the related illegality of Claimant’s activity arising from the non-respect of both laws on environmental protection²⁰⁵.
230. *The construction site permit and the construction permit*: Respondent asserts that Claimant never even pretended to have applied for a construction site permit and that the documents it considered to be applications for a construction permit are seriously flawed.
231. Both the Laws on Urban Planning of 1991 and of 1998 provide that a written application, using specific forms which are attached to the laws, is mandatory for each person wanting to construct in Albania. Both laws provide that construction site permits and construction permits on surfaces bigger than 0.5 hectares must be approved by the TACRA, which is chaired by the Prime Minister. Both laws equally provide that the applications must be filed, together with the legally-specified documentation, before the beginning of any construction activity and that the granting of the construction permit is dependent on the previous granting of the construction site permit.
232. Since the construction started at the beginning of 2000, the 1998 Law was applicable.
233. Respondent asserts that the requests in 1998 for approval of the investment and the conclusion of a lease contract do not under any circumstances fulfill the criteria of a valid request for a construction permit under the law.
234. Respondent relies on the unequivocal statements of both Claimant’s and Respondent’s legal experts. While Prof. Dobjani’s written analysis seems ambiguous, according to Respondent the ambiguity was lifted by his oral testimony, which unambiguously stated that the request for approval of the investment “*is not an application formally*”.²⁰⁶ Both

²⁰³ Resp. C-Mem., para. 117.

²⁰⁴ CE-35.

²⁰⁵ For the foregoing cf. Resp. C-Mem., paras. 98-99, 108-122 and paras. 199-205; Resp. Rej., paras. 127-137.

²⁰⁶ H. Tr., day 4, page 131.

experts on Albanian law have confirmed that the different applications, requests and correspondence do not qualify as requests in the sense of the law.

235. Respondent submits the following further arguments for this opinion: Firstly, when the request was formulated in 1998, no lease contract was yet in place and no site was identified. A valid request for a construction site permit and a construction permit must contain, as a prerequisite, the identification of a site. Secondly, the requests relied on by Claimant were addressed to the Minister of Economy and Privatization and not to the competent authority, the TACRA. Thirdly, the supporting documentation was at least incomplete, if not totally absent. Fourthly, none of the forms, which are required by and attached to both laws, were used.²⁰⁷
236. Respondent has analyzed the two forms that were submitted by Claimant as exhibits to its Reply.²⁰⁸ It submits that although the forms are undated, it is evident from a notarial stamp at the margin that they date from 31 August 2001, i.e. many months after the completion of the construction. It further notes that one of the forms refers to an exploitation permit and not a construction permit, that both forms are largely incomplete, that nothing indicates that any documents were attached, and that no evidence suggests that they were filed with the competent authorities. According to Respondent, since not even the signature is truthful, the forms must be disregarded.²⁰⁹
237. Respondent further contends that the two requests for the permits as well as the permits themselves are absent. Neither the inter-ministerial approvals in principle nor the lease contract qualify as anything approaching a construction site permit or a construction permit. Both legal experts unequivocally confirm this.
238. Respondent argues that it is wrong to assume that the Parties had reached an understanding that the application and the permits had been established in substance if not in form. Firstly, there are no representations to this effect by Government officials in evidence. Secondly, when Respondent allowed the completion of the construction in 2000, it was not aware of the lack of the permits and the illegality of the construction. Thirdly, the fact that Respondent decided not to demolish the construction once it learned that the permits did not exist was based on a “*lenient good faith stance*”,²¹⁰ which also led it to grant Claimant the possibility to fructify its investment and minimize the losses caused by its illegal conduct. Fourthly, the fact that Claimant has received a customs warehouse certificate cannot be interpreted as Respondent’s tacit recognition of the existence of the construction permit because the authorization does not require that such permit be submitted.

²⁰⁷ Resp. C-Mem., paras. 179-206; Resp. Rej., paras. 77-120.

²⁰⁸ CE-201.

²⁰⁹ For the foregoing cf. Resp. C-Mem., paras. 179-198; Resp. Rej., paras. 70-125; Respondent’s closing statement, H. Tr., day 5, page 240.

²¹⁰ Resp. Rej., para. 154.

239. Respondent asserts that according to both Laws on Urban Planning, Claimant's constructions were illegal and could not be legalized. Respondent's conduct cannot be interpreted as a waiver to sanction the illegality. The proposals to regularize the situation were motivated, again, by the desire to mitigate Claimant's damages and pave the way for a fresh start.²¹¹
240. *The exploitation permit*: Respondent asserts that Claimant did not apply for an exploitation permit to evaluate the design, implementation and testing of constructions as to their urban planning, technical and economic conditions.²¹²
241. Respondent alleges that even if it is accepted *arguendo* from secondary evidence that an application was made, the same evidence proves that it was made after the start of the tank farm's operation and therefore was untimely.
242. Respondent alleges further that the documentation was certainly not submitted and in any event would have been difficult to obtain since it includes a testing document that was not obtained because of multiple, serious shortcomings detected during operation.
243. From 2003 onwards, Respondent kept reminding Claimant on different occasions that the permit was lacking and urged it to regularize the situation by submitting a formal application and the appropriate documentation. When Claimant finally filed an application in May 2003, it was incomplete. Claimant failed to complete it despite requests to do so.
244. Consequently, no exploitation permit was ever granted, and Claimant operated the tank farm illegally. This is all the more so, according to Respondent, since the temporary trading permit does not substitute for the exploitation permit.²¹³
245. In sum, Respondent asserts that Claimant operated over the years without at least three important permits, which are all crucial for economic, social, urban planning and environmental policies. Respondent made efforts to help Claimant to regularize the situation to allow it to conduct its business legally, but despite these initiatives, Claimant never made valid and documented applications. Respondent therefore maintains that Claimant has conducted its business illegally from the beginning until the end of the use of the tank farms.²¹⁴
246. With respect to other events and circumstances that were identified by Claimant as factual bases for violations of international law, Respondent contends as follows.

²¹¹ For the foregoing cf. Resp. C-Mem., paras. 182-198; Resp. Rej., paras. 122-124; Respondent's closing statement, H. Tr., day 5, pages 221-227.

²¹² RE-13.

²¹³ For the foregoing cf. Resp. C-Mem., paras. 210-212; Resp. Rej., paras. 138-155.

²¹⁴ Respondent's opening statement, H. Tr., day 1, page 201; Respondent's closing statement, H. Tr., day 5, pages 223-227.

247. With respect to the reserve requirements, Respondent asserts that the measure to reduce the security reserve from 3000 cubic meters to 300 cubic meters was intended to put into practice the overall goal of the Government to enhance market competition. It was a contribution to market liberalization and had a welcome effect in this sense, ensuring a better supply of consumers.
248. According to Respondent, the measure was not aimed at Claimant but at market competition in general.
249. Had Claimant wished to make sure that such a legitimate public policy was not pursued, it could have negotiated to protect itself with specific assurances and stabilization clauses.²¹⁵
250. On the other hand, Respondent argues that the fact that it did not force Claimant to relocate from Durres and that it allowed Claimant to continue to operate the reservoirs means that Claimant could have profited from its storage capacity and maintained the legal security reserve when applying for a new trading permit in 2011. It could even have rented the reservoirs out to other wholesalers exposed to the reserve requirements.
251. Respondent also notes that the reserve requirement did not prevent Claimant from applying successfully for such new trading license.²¹⁶
252. With respect to the measures changing the quality requirements for diesel, Respondent submits that it was only in force for six months. Respondent disagrees with Claimant that such a short-lived measure purportedly relating only to one quality of diesel could have had an impact on Claimant's business, diverted clients to competitors, and generally seriously impaired its business.
253. Respondent further underlines that the Constitutional Court did not invalidate the measure because it was discriminatory but rather because a constitutionally incompetent body took the measure.²¹⁷
254. With respect to fuel smuggling and adulteration, Respondent does not deny that smuggling was a problem. However, “[w]hen Claimant came in, there was already smuggling. Every country has smuggling. Albania was arising from chaos; this was one of the problems”.²¹⁸
255. However, smuggling was apparently not the reason for Claimant's suspension of the creation of COCOs in 2001 because Claimant only started to complain about smuggling in

²¹⁵ Resp. C-Mem., para. 247.

²¹⁶ Resp. Rej., paras. 339-340.

²¹⁷ For the foregoing cf. Resp. C-Mem., paras. 302-303; Resp. Rej., paras. 399 and 408; Respondent's opening statement, H. Tr., day 1, pages 204-205.

²¹⁸ Respondent's opening statement, H. Tr., day 1, page 203.

2003. Furthermore, the smuggling did not prevent Claimant from increasing its investment in 2006 when it acquired the minority shares in Mamidoil Albanian for a high price.

256. Respondent also claims that it made very serious efforts to combat smuggling:

- by inviting the European Commission to deploy a Customs Assistance Mission, which helped to restore control and develop a viable customs service,
- by entering into a bilateral “Agreement on Deployment and Naval Assistance in the Customs Sector” with Italy, and
- by creating a nation-wide customs operation with UNCTAD to implement an automated customs service which allowed – according to UNCTAD – for risk management, anti-corruption measures, strong audit and monitoring functions and established route control tools.

257. By a combination of these instruments, Albania argues that it has largely fulfilled its due diligence obligations under international law and was praised by the European Union “*as the leading country in the region for its anti-smuggling activity and intelligence development*”.²¹⁹

258. With respect to the allegedly excessive tax claim, Respondent asserts firstly that the claim is totally unsubstantiated because no documents are submitted to evidence the excise tax and VAT calculations, to demonstrate the exact basis of calculation, to evidence the amount of taxes allegedly imposed and allegedly paid, and to evidence the amount that was allegedly overpaid.

259. Respondent alleges further that Claimant’s assertion that the Albanian tax calculation did not correspond to international standards and contradicted a Directive of the European Union is irrelevant for the dispute because Albania is not member of the EU and “*has broad sovereign discretion to levy taxes*”.²²⁰ In fact, the EU Customs Assistance Mission to Albania confirmed in 2005 that the customs authorities “*can legally use six different methods to calculate the value of goods for custom purposes*”.²²¹ It might have been a policy reform target to calculate volume based on shore outturn quantities rather than bills of lading, but such a reform target would not invalidate the law in force.

260. Respondent finally submits that the Supreme Court’s decision and the Constitutional Court’s decision in the context of Claimant’s claim for the reimbursement of overpaid

²¹⁹ RE-35, page 8.

²²⁰ Resp. Rej., para. 407.

²²¹ CE-203.

taxes are consistent with national law. Moreover, despite these decisions, Claimant resorted to other domestic remedies to have its claims adjudicated.²²²

²²²For the foregoing cf. Resp. C-Mem., para. 301; Resp. Rej., paras. 402-407; Respondent's opening statement, H. Tr., day 1, pages 207-211.

5. JURISDICTION

5.1 The Relevant Instruments

261. In its Request, Claimant has based its claim on the ICSID Convention and on the BIT.

262. Article 25(1) of the ICSID Convention provides the requirements for ICSID's jurisdiction:

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

263. Article 10 of the BIT sets forth the requirements for a dispute between an investor and a Contracting Party to be brought to arbitration.²²³

- (1) Any dispute between either Contracting Party and an investor of the other Contracting Party concerning investments or the expropriation or nationalization of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.
- (2) If such dispute cannot be settled within six months from the date either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal. [...]
- (3) [...]
- (4) In case both members have become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of the Other States, disputes between either Contracting Party and the investor of the other Contracting Party under the first paragraph of this Article shall be submitted for settlement by conciliation or arbitration to the International Centre for Settlement of Investment Disputes.

264. It is established and undisputed between the Parties, as regards the ICSID Convention and the BIT, that:

- (i) Albania and Greece are Parties to the ICSID Convention, which is applicable between either of them and an investor of the other State;
- (ii) The Greece-Albania BIT was in force when the investment was made and therefore applies to the present dispute;

²²³ CE-11.

- (iii) Claimant is a national of Greece and meets the requirements to be a protected investor under the ICSID Convention and the BIT;
- (iv) The dispute is of a legal nature; and
- (v) The Parties have not reached an amicable settlement.

265. In its Memorial, Claimant has also asserted that “*Respondent’s consent to ICSID arbitration of the dispute at hand is also found in the Energy Charter Treaty*”.²²⁴ Claimant thus refers to the ECT as an additional ground on the basis of which it may bring this arbitration, based on Respondent’s consent expressed at Article 26 of the ECT.

266. Article 26 of the ECT provides for the possibility of ICSID arbitration:

- (1) Disputes between a Contracting State and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, settled amicably.
- (2) [...]
- (3) (a) Subject only to subparagraphs (b) and (c), each contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
- (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2(c) the Investor shall further provide its consent in writing for the dispute to be submitted to:
 - (a)(i) the International Centre for Settlement of Investment Disputes [...] if the Contracting Party of the Investor and the contracting Party to the dispute are both parties to the ICSID Convention [...]
- (5) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written comment of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; [...]

267. Claimant concedes that the Request does not “*explicitly mention the ECT*” but considers this fact “*irrelevant*”.²²⁵ By arguing that it does not rely on the ECT to “*add additional claims*” or “*change the scope of claims submitted in the Request for Arbitration*”, Claimant further admits that, when it brought this arbitration, it did not rely on the ECT as a basis for the Tribunal’s jurisdiction, but that such reliance was sought only at the time it submitted its Memorial.

268. In order to circumvent the difficulty of relying on an instrument which was not invoked at the time the arbitration was started, Claimant has alleged that the ECT is “*applicable*” to

²²⁴ Cl. Mem., para. 199.

²²⁵ Cl. Mem., para. 201.

the present dispute “*as substantive law*”.²²⁶ In particular, Claimant argues that, in the absence of a choice of law in the BIT, Article 42 of the ICSID Convention mandates that the Tribunal apply the law of the host State and such rules of international law as may be applicable. According to Claimant, “*the rules of international law applicable to this dispute are the BIT and the ECT. The BIT is applicable directly between Respondent and Claimant. [...] The ECT is applicable by virtue of Art. 42 of the ICSID Convention and the BIT*”.²²⁷ Claimant further argues that the ECT “*is part of the applicable law as the BIT directly incorporates it*”,²²⁸ by reference to Article 11 of the BIT which provides that “[i]f the provisions of law of either Contracting party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement”.

269. In its Counter-Memorial, Respondent observed that the Request is silent on the ECT and that it was only in its Memorial that Claimant “*for the very first time raised allegations of breaches of the ECT*”.²²⁹ Following that, however, Respondent did not object to the Tribunal’s jurisdiction on the basis of the ECT; rather, it systematically referred to and refuted the substance of Claimant’s allegations that Respondent breached the ECT.
270. During the hearing, the Tribunal raised this question and sought clarification from the Parties about the difference between ‘applicable law’ and ‘basis for jurisdiction’, in view of the impact, if any, on its jurisdiction, of Claimant’s choice to initiate the arbitration on the basis of the BIT only and to then rely on the ECT as a further ground for the Tribunal’s jurisdiction as the “*applicable law*”.²³⁰
271. The Tribunal notes that this question has some significance, given that the ECT contains certain standards of protection which are absent from the BIT, such as the standard of fair and equitable treatment, the standard of unreasonable and discriminatory measures, and the standard of most constant protection and security.
272. In response, Claimant’s counsel, recognizing that its argument was “*perhaps a bit novel*”,²³¹ noted that Respondent had not contested the application of the ECT and that there was at least a subsequent agreement between the Parties to apply that Treaty in this

²²⁶ Cl. Mem., paras. 199, 201, 209-211.

²²⁷ Cl. Mem., para. 208.

²²⁸ Cl. Mem., para. 210.

²²⁹ Resp. C-Mem., para. 5.

²³⁰ H. Tr., day 1, page 260.

²³¹ H. Tr., day 5, page 263.

arbitration.²³² It further argued that nothing in the ICSID Convention prevented Claimant from subsequently basing its claim on an additional treaty.²³³ Finally, relying on an interpretation of Article 11 of the BIT, which it recognized is not a most-favored-nation clause, counsel for Claimant argued that the ECT shall apply because it has “*better provisions*” and because Article 11 of the BIT is “*a very wide clause [which] legitimately can apply also to procedural matters, because [...] procedural regulations – such, for example, as the definition of applicable law in 26(8) of the ECT – form part of the treatment, at least would accord investors a more favourable treatment or may accord them a more favourable treatment than another treaty*”.²³⁴

273. In turn, counsel for Respondent indicated seeing “*that there is an estoppel argument also on jurisdiction that is made in regards to the scope of the application of the ECT*”, emphasizing that it had “*not objected to the fact that by way of the MFN clause or other clause, the substantive provisions of the ECT may be applicable. However, [it] never admitted that for admissibility and jurisdictional purposes, the ECT provisions apply*”.²³⁵ In the alternative, it argued that assuming the Tribunal finds “*that the provisions of the ECT apply also to jurisdiction and the question of admissibility, our second argument on illegality based on customary international law would still apply*”.²³⁶

274. The question before the Tribunal is whether, to the extent the arbitration had not been brought on the basis of the ECT, Claimant could rely on that Treaty as the international instrument providing for Respondent’s consent to arbitration and the standards of protection against which the conduct of Respondent would be assessed.

275. The Tribunal notes that the applicability of a rule as a matter of substance is distinct from the issue of whether an international treaty can, in a given case, be the basis for a claim and establish a respondent State’s consent to arbitration.²³⁷ In this respect, the Tribunal notes that Claimant initiated its claims on the basis of the BIT, not the ECT. Nor did Claimant ever amend its Request to refer to the ECT as a basis for its claim; to the contrary, Claimant insisted that it did not rely on the ECT to “*add additional claims*” or “*change the scope of claims submitted in the Request for Arbitration*”, although the Request generally relied on “*Respondent’s breach of its obligations under the BIT*” rather than refer to alleged breaches in relation to specific provisions of the BIT.²³⁸

²³² H. Tr., day 5, pages 261-262.

²³³ H. Tr., day 5, page 263.

²³⁴ H. Tr., day 5, pages 264-267.

²³⁵ H. Tr., day 5, page 269.

²³⁶ H. Tr., day 5, page 270.

²³⁷ On this issue, see Y. Banifatemi, “The Law Applicable in Investment Treaty Arbitration”, in *Arbitration under International Investment Agreements* 191 (K. Yannaca-Small ed., Oxford University Press, 2010).

²³⁸ Request, para. 59 and Request for Relief.

276. Further, the Tribunal is not convinced that an investor can import the standards of protection of a different treaty (here, the ECT) by simply referring to that treaty as the ‘law applicable’ to the merits under another treaty (here, the BIT). The notion of applicable law would, in such case, operate as a most-favoured-nation clause with regard to both jurisdiction and merits, which it is not.
277. Having said that, the Tribunal is mindful that, although it objected to Claimant’s reliance on the ECT, Respondent did not object on the basis of the Tribunal’s jurisdiction *per se*; rather, it adopted a defense of its conduct on the merits in reference to the ECT standards, contesting that the provisions of the ECT had been breached by such conduct. When asked about this issue by the Tribunal at the hearing, Respondent indicated that it had “*not objected to the fact that by way of the MFN clause or other clause, the substantive provisions of the ECT may be applicable*” and that it “*read the Article 11 clause as not meaning anything other than the substantive laws*”.²³⁹ In other words, Respondent was not objecting to the Tribunal’s jurisdiction to hear the Claimant’s claims on the basis of the ECT. Respondent did, however, make clear that it objected to the Tribunal’s jurisdiction under the ECT on the basis that Claimant’s investment had been made illegally and therefore could not benefit from the protection of the ECT, an objection that was also raised in relation to the BIT.
278. With the above in mind, to the extent the Parties both took positions as to the propriety of the Respondent’s conduct under the ECT, for this reason alone the Tribunal will consider the ECT when addressing the existence and legality of an investment under each of the BIT and the ECT and Respondent’s compliance with both the BIT and the ECT.

5.2 The Investment of Claimant

5.2.1 Claimant’s position

279. Claimant asserts that it has made an investment in Albania by constructing a tank farm in the port of Durres including the construction of access infrastructure and by its operation.
280. Claimant contends that it employed its own funds to build the tank farm, provided management at its own costs and created Mamidoil Albanian as an operating vehicle. Once Mamidoil Albanian was incorporated, Claimant transferred the assets that it had financed against a controlling majority of shares to it and invested further in its stock by acquiring the minority shares against cash in 2006.²⁴⁰

²³⁹ H. Tr., day 5, page 270.

²⁴⁰ Cl. Mem., para. 183; Cl. Rep., para. 207.

281. There is some uncertainty about the nature of the lease contract, which was concluded between the Ministry of Public Economy and Mamidoil Albanian. Claimant insists that the “*investments encompass also the main assets of Mamidoil Albanian – the Lease Contract concluded with Respondent and the tank farm*”²⁴¹ but later specified, “[w]e do not say that the leasing contract as such has been breached. What we say is that the investment which is the company which operates the tank farm on the leased property has been strangled off and indirectly expropriated”.²⁴²

5.2.2 Respondent’s position

282. Respondent does not contest that Claimant invested in the tank farm (Respondent claims nearly the opposite, namely that Claimant invested too much too quickly), that it owns the shares in Mamidoil Albanian legally and that the lease contract between Mamidoil Albanian and Respondent was valid.²⁴³

283. When appraising the three components – the shareholding, the lease contract concluded by Mamidoil Albanian, and the tank farm held by Mamidoil Albanian – Respondent concludes:

Indeed, it is by Claimant’s own admission that the tank farm formed the very basis for entering into the Lease Agreement and the setting up of a local investment company (i.e. Claimant’s shareholding in Mamidoil Albanian). It is therefore undeniable that the tank farm constitutes the very core of Claimant’s purported investment and that, as a result, the whole of the shares in Mamidoil Albanian, the Lease Agreement and the tank farm must be regarded as a single investment, by virtue of the principle of “unity of investment.”²⁴⁴

284. Respondent alleges, however, that the lease contract “*in and of itself*” does not qualify as an investment because it lacks the “*element of contribution and risk, and moreover did not make a contribution to the host State’s economy*”.²⁴⁵

5.2.3 The Determination of the Tribunal

285. The Tribunal agrees with Respondent that the construction of the tank farm, the setting-up of the Albanian subsidiary that was first controlled and later wholly owned by Claimant, the conclusion of the lease contract by the subsidiary, and the operation of the tank farm by the subsidiary are to be considered as a unity.

²⁴¹ Cl. Mem., para. 197.

²⁴² H. Tr., day 1, page 69.

²⁴³ Resp. C-Mem., paras. 158 ss.; Resp. Rej., paras. 216 ss.

²⁴⁴ Resp. C-Mem., para. 172 (footnotes omitted).

²⁴⁵ Resp. C-Mem., footnote 199.

286. The Parties agree that Claimant committed its own resources to the project in the long-term perspective of a commercial return and that Claimant assumed a commercial risk. They further agree that the import, transport and distribution of petroleum products were and are of importance for the development of the Albanian economy.
287. Taken together, these various elements constitute an investment within the meaning of Article 25 of the ICSID Convention, Article 1 of the BIT and Article 1(6) of the ECT, which both Parties agree to.
288. The Tribunal does not have to decide whether one of the items, such as the lease contract, looked at in isolation qualifies as an investment. It is a part of a unity that the Tribunal must appraise in its totality. In doing so, the Tribunal has no doubt that the requirement that there be an investment under the different treaties has been met.

5.3 The Legality of the Investment and the Requirement of Good Faith

5.3.1 Preliminary remark

289. The legality of the investment and the good faith of Claimant are central issues in the present dispute and have been intensively debated by the Parties. They may be determinative for both the Tribunal's jurisdiction and the merits of the dispute and are intertwined.
290. In the context of the merits, the question centers on the investor's perspective and on the potential impact of the legality of its investment on this perspective. For the appreciation of the jurisdictional dimension, the expectations of the State are determinative.
291. In exchange for their acceptance to enter into investment treaties and giving their consent to the resolution of investment disputes by arbitral tribunals, States expect that such protection would extend only to investments that have been made lawfully
292. In the present case, the principle of legality is specified in Article 2 of the BIT which provides:

Each Contracting Party shall in its territory promote, as far as possible, investments by investors of the other Contracting Party and admit such investments in accordance with its legislation.

293. Although the text of the ECT does not contain an explicit provision relating to the legality of investments, the Tribunal is convinced that it likewise does not protect investments made unlawfully. The Tribunal agrees with the award in *Plama v. Bulgaria*, where the tribunal held:

Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.²⁴⁶

294. While the principle that an investment must be made legally in order to benefit from the protection of international law is well established and accepted by this Tribunal, the specificities of each case impose thorough scrutiny as to its applicability in specific circumstances. This applies to considerations of both jurisdiction and merits.

5.3.2 Claimant's position

295. Claimant contends that its investment was and is legal and was made in compliance with all necessary permits and Governmental authorizations.
296. It asserts that for the three core elements of its investment, “[t]he Respondent did not even argue that the shareholding in Mamidoil Albania or the Lease Contract concluded with Respondent were illegal investments”.²⁴⁷
297. With respect to the tank farm, its argument is less straightforward. Claimant has insisted that it has applied for and received the trading permit, the customs warehouse authorization and – albeit belatedly due to Respondent’s fault – the environmental permit. It claims to have applied for but not received – again due to Respondent’s fault – the exploitation permit. Claimant declares that it did not find the application for the exploitation permit in its files but submits secondary evidence which documents that the application was made.²⁴⁸
298. Claimant further asserts that the environmental permit was “regarded as approved” since the authorities failed to act on the application within 6 months.²⁴⁹ This is allegedly supported by Article 20.2 of the “Law on Environmental Protection”, dated 21 January 1993²⁵⁰ as well as Article 38 of the successor “Law on Environmental Protection”, dated 5 September 2002.²⁵¹ Under this logic, since Claimant applied for the permit on 10 May 2000, the application was considered approved in November of the same year.
299. As to the construction site permit and the construction permit, Claimant has repeatedly alleged that it applied for them by its request of 3 July 1998 to approve the investment and

²⁴⁶ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 15 April 2009, para. 138.

²⁴⁷ Cl. Rep., para. 207.

²⁴⁸ Cl. Rep., para. 108.

²⁴⁹ Witness Statement of Mr. Pavlos Garinis, H. Tr., day 3, pages 43 et ss.

²⁵⁰ RE-12.

²⁵¹ CE-106.

that the ensuing approval encompassed the permit.²⁵² It has further alleged that in addition to the application in substance, “*out of precaution and also because authorities suddenly started to asking for building permits from the local authorities on the basis of the new laws, Claimant filed for a construction site and construction permit*”.²⁵³

300. On other occasions, it has submitted that it might not have applied for the construction permit on time but that it was not aware of this fact.²⁵⁴ It has insisted that the “*Central Government had substantively approved the project. The issuance of a local construction permit, if at all necessary, was a mere formality*”.²⁵⁵ The fact that it was not able to “*obtain and present a formal construction site permit and a construction permit is no serious violation of mandatory public order*” and does not amount to illegality.²⁵⁶

301. In addition, it claims having received consistent oral assurances from high Government officials that the investment was welcome and legal and that the formal requirements would be taken care of. According to Claimant, even the Urban Planning Office advised that no further construction permit is needed since “*you already have one*”.²⁵⁷

302. Claimant points to the “inspection deed” of the “State Inspectorate of Oil, Gas Inspection and their By Products”, dated 17 January 2005.²⁵⁸ It states as follows:

1. The implementation of the approved projects on whose basis the construction permission, the exploitation permission and the trading permission, is issued: *The implementation is made in line with the projects prepared by the Greek company “Tensor” s.a. which has also made the installation. Certification has been done by Lloyd’s.*

2. The implementation of the technical deeds and our technical certificate regarding the granting of permission: *There are no unaccomplished tasks. There has been only the damage of the terminal pipeline.*²⁵⁹

303. Claimant asserts that the legality is further documented by the fact that it received the trading permit and operated the tank farm in full knowledge of the Albanian authorities and that it paid regular taxes. When it started the investment, it did not know that a re-zoning of the port of Durres was under discussion. At no point in time did the authorities contest the legality but rather they regularly confirmed its right to conduct its business. Claimant

²⁵² Cl. Rep., paras. 76-79; Claimant’s opening statement, H. Tr., day 1, pages 107-108.

²⁵³ Cl. Rep., para. 130.

²⁵⁴ Claimant’s closing statement, H. Tr., day 5, page 166; Cl. Rep., paras. 208-213.

²⁵⁵ Cl. Rep., para. 213.

²⁵⁶ Claimant’s opening statement, H. Tr., day 1, page 111.

²⁵⁷ Claimant’s opening statement, H. Tr., day 1, page 105.

²⁵⁸ Cl. Rep., para. 122.

²⁵⁹ CE-157.

concludes that it is obvious that Respondent itself “*was convinced of the legality of the operation*”.²⁶⁰

304. Claimant asserts that “*not every possible breach of domestic legal requirements, however formal these might be, leads to illegality of an investment under international law. The case law is quite clear. Mere formal failures, such as the failure to obtain a permit which would have been granted, are not sufficient to constitute illegality*”.²⁶¹
305. Claimant relies on *Tokios Tokelès v. Ukraine* where the tribunal noted that “*minor errors*” and “*a failure to observe the bureaucratic formalities of the domestic law*” would not amount to illegality.²⁶² It further relies on *Desert Line v. Yemen* where the tribunal found that an investment could not be declared illegal because the investor had not applied for and not received a certificate by a low-ranking investment authority that would undoubtedly have been issued upon request “*both because of the general endorsement of the investment at the highest level of the State, and in light of the YIL benefits by the ad hoc decision communicated by the Vice Prime Minister*”.²⁶³
306. Claimant further asserts “*that only a serious violation of domestic law, such as the illegality of the investment per se, or fraud or corruption used in the acquisition of the investment, can lead to illegality of the investment*”.²⁶⁴
307. In this connection, Claimant relies on *Hamester v. Ghana*, where the tribunal concluded:

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g. by the tribunal in *Phoenix*).²⁶⁵

²⁶⁰ Cl. Rep., paras. 212-217.

²⁶¹ Cl. Rep., para. 202.

²⁶² *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 86; confirmed by *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 297.

²⁶³ *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 117.

²⁶⁴ Cl. Rep., para. 203.

²⁶⁵ *Gustav F.W. Hamester & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 123; also *Desert Line*, para. 104; in *Phoenix*, the tribunal had found: “*In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal’s view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT. [...] The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law.*”

308. Claimant also points to the award in *Quiborax v. Bolivia*, where the tribunal found that the legality requirement is limited to non-trivial violations, violations of the host State’s investment regimes and fraud.²⁶⁶
309. In any event, Claimant contends that “*illegality is a matter of merits and not of jurisdiction*”, and the jurisdictional objection of illegality is unfounded.²⁶⁷
310. Claimant summarizes this strand of arguments by insisting that Respondent “*has failed to explain how the lack of or late application for permit caused substantive and serious illegality*”, that it had thoroughly discussed the project with Respondent, that it received the Ministries’ approval for the investment, and that the “*Respondent’s authorities never during the operation of the tank farm questioned its legal validity or ordered its demolition*”.²⁶⁸
311. In a different vein, Claimant asserts that Respondent is barred from relying on an alleged illegality for two related reasons.
312. Firstly, Claimant alleges that the failure to issue the necessary permits after having approved the project and executed the lease was in itself a violation of the fair and equitable treatment standard, which “*prohibits the State to act contradictory in administrative proceedings*”.²⁶⁹
313. Claimant also refers to Article 3 of the Swiss-Albanian BIT, which it claims can be invoked through the MFN clause contained in Article 3 of the Greek-Albanian BIT. This article provides that the Contracting States will issue all necessary authorizations to admitted investors.²⁷⁰
314. Claimant argues that Respondent was obliged to issue the permits. To the extent that it did not, it failed to fulfil its obligations under international law. It would profit from its own

The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction. [...] Of course, the analysis of the conformity of the investment with the host State’s laws has to be performed taking into account the laws in force at the moment of the establishment of the investment. [...] There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.” Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 101-104.

²⁶⁶ Cl. Rep., para. 203; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 266.

²⁶⁷ Cl. Rep., paras. 239, 238. The Claimant relies on *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 112.

²⁶⁸ Cl. Rep., para. 209.

²⁶⁹ Cl. Rep., para. 221.

²⁷⁰ Cl. Rep., para. 223.

wrongdoings if it were allowed to invoke the lack of permits, which it should have delivered.²⁷¹

315. Secondly, Claimant asserts that Respondent is estopped from invoking illegality.

316. Claimant relies on *Kardassopolos v. Georgia*, where the tribunal found:

In the Tribunal's view, Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void ab initio under Georgian law. The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia (including, inter alia, President Gamsakhurdia, President Shevardnadze, Prime Minister Sigua and Prime Minister Gugushvili) were closely involved in the negotiation of the JVA and the Concession. The Tribunal also notes that the Concession was signed and "ratified" by the Ministry of Fuel and Energy, an organ of the Republic of Georgia.

The Tribunal further observes that in the years following the execution of the JVA and the Concession by SakNavtobi and Transneft, respectively, Georgia never protested nor claimed that these agreements were illegal under Georgian law. In light of all of the above circumstances, the Tribunal is of the view that Respondent created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection. [...]

The Tribunal is comforted in this finding by the decision of the ICSID Tribunal in the case of *Southern Pacific Properties (Middle East) Limited v. Egypt*. [...]

It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally non-existent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victims who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer. [...]²⁷²

317. In this connection, Claimant alleges:

Not only had Government ministers solicited and authorized the project and entered into the twenty-year leasing contract, but also for years afterwards no authority, whether central or municipal, doubted the legality of construction and operation of the tank farm. Those

²⁷¹ Cl. Rep., paras. 219-225.

²⁷² *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras. 191-194; also: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 607.

authorities were aware of the tank farms, issued permits, but never challenged the legality of the tank farm's construction and operation.²⁷³

318. Claimant refers to a World Bank mission report, which quotes a Minister as having approved the construction of the new tank farms.²⁷⁴ It also refers to a newspaper interview where the newly elected Prime Minister Ilir Meta told reporters:

I would like to underscore that the Meta government is the first government that has approved a master plan of the World Bank for the development of at least 20 years of Durres Port. Such a thing is of huge importance not only for Albania, [...] during the Meta government no contract has been signed with a local or foreign company for the exploitation of the territories of Durres port. These are inherited contracts [referring to the lease contract of Claimant and the other two Greek investors] they are legal ones, which implies that the current government, although is not accountable for the signing, cannot avoid the legal and financial obligation arising to the Albanian state due to non-observation.²⁷⁵

319. Claimant finally quotes from a letter of the Ministry of Economy, Trade and Energy, dated 14 April 2010, which states that the activity of Claimant “*for depositing and trading naphtha sub-products in the rented zones in the territory of Durres harbour*” is not impeded and that the trading license and lease remain intact.²⁷⁶
320. Claimant summarizes this strand of arguments by insisting that for 12 years Albanian authorities never challenged the legality of its activities and, as a result, they are now estopped from asserting illegality.
321. Claimant further argues that it acted at all times *bona fide* while Respondent acted *mala fide*.
322. Claimant contends that it worked consistently and diligently in order to obtain all necessary permits and authorizations. It was partly frustrated in its effort and partly assured that the approval of the investment by the central Government included the necessary permits. When the authorities suddenly started to ask for construction site and construction permits, Claimant applied for them. It thus had no reason to assume that the tank farm might not comply with legal requirements.²⁷⁷
323. As to Respondent's re-zoning plans and the report by Louis Berger Inc., Claimant alleges that it was not aware of the Government's plans until the letter of 21 July 2000, when the

²⁷³ Cl. Rep., para. 229.

²⁷⁴ Cl. Rep., para. 231.

²⁷⁵ Cl. Rep., para. 232, quoting CE-13.

²⁷⁶ Cl. Rep., para. 233, quoting CE-118.

²⁷⁷ Cl. Rep., paras. 129-138.

Ministry of Public Economy and Privatization requested Claimant to stop the construction.²⁷⁸

5.3.3 Respondent's position

324. Respondent contends that the Tribunal lacks jurisdiction because neither the Greek-Albanian BIT nor the ECT protects investments that are illegal, nor do they allow investors to bring claims against a sovereign State when they have acted in bad faith: “*Claimant’s purported investment has never acquired any legal status under Albanian law, and cannot now provide the basis for a claim under international law*”.²⁷⁹
325. Respondent alleges that the investment has to be appraised as a whole and cannot be divided into purportedly legal and illegal parts such as the lease, the shares in the Albanian subsidiary and the tank farm. The whole project presents a unity centered on the operation of the tank farm without which the lease contract would not have made economic sense and no subsidiary would have been created. According to Respondent, the illegality of the tank farm infected the totality of the investment.²⁸⁰
326. Respondent relies on doctrine that clearly supports that “*the entire operation directed at the investment’s overall economic goal*”²⁸¹ has to be identified, and in this connection, Respondent refers to case law that considers the totality of “*assets*”²⁸² and not just single assets in isolation.
327. Respondent further asserts that Claimant did not apply, timely or otherwise, for the four required “*important permits*”²⁸³ – the importance being explicitly recognized in the language used by Claimant – and that the permits were never granted.²⁸⁴
328. Respondent contends that under Albanian law – which is not different from most other legal systems in the world – before any construction begins, an investor must apply for a construction site permit and a construction permit according to the “Law for Urban Planning”, dated 17 September 1998.²⁸⁵ This Law was applicable to Claimant’s project

²⁷⁸ Cl. Mem., paras. 75 et ss.; Cl. Rep., paras. 139 et ss.; during the oral hearing the Claimant conceded that the warning letter of November 1999 had been received by the Albanian subsidiary as detailed in paras. 86-91 of this Award.

²⁷⁹ Resp. Rej., para. 314.

²⁸⁰ Resp. Rej., paras. 238-246.

²⁸¹ RLA-2, page 272.

²⁸² *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114.

²⁸³ The expression is used in Cl. Mem., para. 136.

²⁸⁴ Resp. C-Mem., paras. 179-206; Resp. Rej., paras. 238-260.

²⁸⁵ CE-101.

which received approval in principle in early 1999, the site being possessed by Claimant September 1999.²⁸⁶

329. The purpose of the Law is to enhance the “*following policies [...]: the current and future economic and social development at the national and local level, national defense, environmental protection, preservation and implementation of urban planning, architectural and archeological values, the protection of legitimate interests related to private property*”.²⁸⁷
330. Respondent has described the process of application as detailed in the law. It points to the clear provisions on the recipient of the application, the form of the application including the completion of forms attached to the law, the submission of accompanying documents, and the distribution of competences between the central and local level for the issuance of the permits.
331. Respondent deduces from these requirements that the request for the approval of the investment of July 1998 does not fulfil the minimum requirements of a valid application.
332. It also alleges that the forms, which Claimant submitted together with its Reply, do not fulfill these requirements because they are not dated (they carry only a date of a notarial stamp), they are incomplete, and they are not accompanied by supporting documents. In addition, they give rise to suspicion and doubts as to their authenticity.²⁸⁸
333. Respondent further asserts that the competent authorities at the central and local Government levels never examined or approved, let alone issued, the construction site and construction permits.
334. Respondent points to Article 76 of the law, which provides that “[b]uildings without permits are considered illegal” and that “no indemnity or expropriation shall be made for illegal buildings”. The investment is therefore “illegal per se. As a consequence, its investment is deprived of the protections offered by the BIT, the ECT and the ICSID Convention”.²⁸⁹
335. Respondent notes that Claimant has not initiated any of the exceptional proceedings to legalize the construction as provided in Article 79 of the law²⁹⁰ and that it is too late for Claimant to legalize its activities.

²⁸⁶ Resp. C-Mem., para. 179; as to the form requirements this law has not added fundamentally new provisions as compared to the predecessor of 1993: cf. Second Legal Expert Opinion of Mr. Neritan Kallfa.

²⁸⁷ CE-101, Article 2; Resp. C-Mem., para. 179.

²⁸⁸ Resp. Rej., paras. 82-97.

²⁸⁹ Resp. C-Mem., para. 198; Resp. Rej., para. 251.

²⁹⁰ Resp. Rej., paras. 261-268.

336. As to the environmental permit, its prerequisites are provided for in the “Law on Environmental Protection”, dated 21 January 1993, whose objective is to protect the environment and natural resources, including the “*water ecosystems, atmosphere, soil ecosystems [...]*”.²⁹¹
337. Respondent asserts that according to Article 18 of the law as applicable in 1999, Claimant was obliged to apply for the permit before the start of construction. The fact that it failed to do so renders the construction of the tank farm illegal. The fact that it later – in 2007 – received a temporary permit in accordance with the new law is irrelevant, first because the permit did not pertain to the construction but only to storage and trading, and second because it does not have retroactive effect.²⁹²
338. Respondent summarizes its position by stating that since Article 24 of the Law provides that activities performed without an environmental permit “*shall be closed down, prohibited or interrupted totally or partially*”, Claimant’s investment is illegal and not protected by the BIT, the ECT or the ICSID Convention.²⁹³
339. As to the exploitation permit, Respondent disputes Claimant’s assertion that it applied for the permit and that the Albanian authorities had failed to issue it.
340. It alleges that a first and incomplete application was submitted after the beginning of operations of the tank farm, contrary to the requirements of the “Law on Control and Regulation of Construction Works” dated 10 September 1998.²⁹⁴ Despite repeated requests from the Ministry of Economy in 2003 and 2004 to Claimant to submit the application and the relevant documentation, in particular the testing certificates, Claimant failed to comply with the legal requirements.
341. Respondent submits that “[t]he Government took a lenient good faith stance towards Mamidoil Albanian but pointed out in clear and unequivocal terms that the illegal situation could not endure”.²⁹⁵
342. Respondent insists that the illegalities were never cured, notwithstanding the granting of the trading license, since that license has no connection to the construction of the tank farm, concerns exclusively the right to conduct a wholesale business in the port of Durres and “*did not and could not retroactively legalize the construction of the fuel tank, nor could it or did it amount to a waiver of the other required permits and regulations*”.²⁹⁶ Respondent claims that this is also true of the statement made by the State Inspectorate in

²⁹¹ CE-101, Articles 3 and 4; Resp. C-Mem., para. 199; Resp. Rej., para. 252.

²⁹² Resp. Rej., paras. 203-205.

²⁹³ Resp. Rej., paras. 252-255.

²⁹⁴ RE-13.

²⁹⁵ Resp. Rej., paras. 154 and 138-153; also Resp. C-Mem., paras. 210-212.

²⁹⁶ Resp. C-Mem., paras. 94 and 208-210; Resp. Rej., paras. 167-181.

2005, which did not concern the construction of the tank farm but rather the inspection of the technical standard and security. The answers were in reply to standardized questions, which were based on assumptions and did not imply that Claimant's activities were legal.²⁹⁷

343. Respondent asserts that the construction permits, the environmental permit and the exploitation permit are required of any national or foreign, physical or legal, person and that the permits serve important and serious public policy objectives in the fields of urban planning, public health, social well-being, economic development, technical sustainability, and nature and landscape protection. They are by no means trivial and demand respect and compliance.
344. Respondent contends that Claimant's failure to apply for and obtain the permits leads to the consequence that the investment is neither "*in accordance with its legislation*", as explicitly required by Article 2 of the Greek-Albanian BIT, nor is it protected by the ECT, which equally does not extend its dispute settlement mechanism to investments that are "*contrary to domestic or international law*", as affirmed by the arbitral tribunal in *Plama v. Bulgaria*.²⁹⁸
345. Respondent asserts, "*independent[ly] of specific language to this effect in the applicable treaty [...] the illegality of an investment does constitute a bar to jurisdiction. This has been confirmed by numerous tribunals, including the tribunals in Phoenix v. Czech Republic, Jan Oostergetel v. Slovak Republic, Anderson v. Costa Rica, Tokios Tokelès v. Ukraine and Alpha Projektholding v. Ukraine*".²⁹⁹
346. Respondent quotes from these decisions and awards, which use similar language to the tribunal in *Saba Fakes v. Turkey*, which stated:

the BIT protection shall not apply to investments which have not been established in conformity with Respondent's laws and regulations [...]. If this condition is not satisfied, the BIT does not apply. As a result, the Contracting Party cannot be deemed to have given its consent to arbitrate.³⁰⁰

²⁹⁷ Resp. Rej., para. 267. The statement refers to CE-157.

²⁹⁸ Resp. C-Mem., para. 161; Resp. Rej., para. 221. The Respondent relies on *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 15 April 2009, para. 138.

²⁹⁹ Resp. Rej., para. 222 (footnotes omitted).

³⁰⁰ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 115; similar in: *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, Decision on Jurisdiction, 30 April 2010, UNCITRAL, para. 176; *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, para. 57; *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 84; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 294.

347. Respondent further contends that Claimant has incorrectly asserted that jurisprudence has restricted the illegality criterion “*exclusively to cases of ‘fraud’, ‘corruption’ or illegality of the investment ‘as such’*”.³⁰¹ The awards and decisions quoted to this effect have consistently pointed to fraud and corruption as obvious examples but not as exclusive circumstances.³⁰²
348. Respondent admits that “*tribunals have distinguished between serious and minor violations of the host State’s law*”,³⁰³ such as registration as “subsidary private enterprise” instead of “subsidary enterprise”³⁰⁴ or a failure to re-register,³⁰⁵ but insists that these circumstances are radically different from the case at hand:
- Clearly, the minor administrative errors allegedly committed by Tokios Tokelès and Alpha Projektholding stand in no comparison with the multiple and independent serious violations of mandatory public order provisions under Albanian law [...] that Mamidoil Albanian, intentionally or negligently, committed. The failure to obtain the required construction, exploitation and environmental permits for the construction and exploitation of a petroleum tank farm does not, under any standard, qualify as a “*failure to observe the bureaucratic formalities*”³⁰⁶ and cannot be disingenuously downplayed as trivial, as Claimant seeks to do.³⁰⁷
349. Respondent further asserts that it violated neither the fair and equitable treatment standard of the ECT nor Article 3 of the Swiss-Albanian BIT when it did not issue the relevant permits.
350. Respondent conceded that it might otherwise be liable if it had formally authorized the investment, Claimant had complied with the application procedure, and then Respondent had refused to issue the permits. To support this argument, Respondent relies on *MTD v. Chile*, where the tribunal found that “[t]o the extent that the application for a permit meets the requirements of the law, then, in accordance with the BIT and Article 3(2) of the Croatia BIT, the investor should be granted such permit”.³⁰⁸
351. However, in this case Respondent contends that Claimant failed to apply for the permits as required by law. Had it done so, “*the competent authorities would have assessed the*

³⁰¹ Resp. Rej., paras. 224-234.

³⁰² Resp. Rej., paras. 226-229.

³⁰³ Resp. Rej., para. 230.

³⁰⁴ As in *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 83.

³⁰⁵ As in *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 294.

³⁰⁶ Quote from *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 97.

³⁰⁷ Resp. Rej., para. 233.

³⁰⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 205; Respondent relies further on *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 182

*applications and would have issued the requested permits, provided the relevant requirements set by law were satisfied”.*³⁰⁹

352. Respondent further asserts that it is not estopped from invoking the illegality of the investment, stating that “[i]n view of the far-reaching consequences (namely: a loss of right) estoppel only operates as a binding preclusion in [...] exceptional circumstances”.³¹⁰

353. Respondent relies on *Chevron v. Ecuador* where the tribunal found that:

... estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim.³¹¹

354. Respondent contends that this threshold has not been reached in this case. It states that:

ICSID case law demonstrates that in cases where an estoppel-defense was raised by investors to counter allegations of illegality, tribunals have consistently held that a State may be estopped from invoking the illegality of the investment only where it is demonstrated that the State knowingly overlooked a failure to comply with its law and furthermore endorsed an investment which was not in compliance with its laws.

Tribunals have moreover concluded that where the investor was aware of the illegality or did not have any legitimate reason to believe that its investment was legal, estoppel does not apply.³¹²

355. Respondent alleges that in the present case:

- it did not know at the beginning that Claimant had built the tank farm without availing itself of the necessary permits, that it never acknowledged that Claimant’s behavior was legal, and that when it found out about the lack of permits it clearly and unequivocally insisted that the situation be remedied,³¹³ and

³⁰⁹ Resp. Rej., para. 312.

³¹⁰ Resp. Rej., para. 287.

³¹¹ *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, Case No. AA 277, PCA, Interim Award, 1 December 2008, para. 143.

³¹² Resp. Rej., para. 290; the Respondent refers to tribunals’ statements in: *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, Case No. AA 277, PCA, Interim Award, 1 December 2008, para. 353; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 120; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 194.

³¹³ Resp. Rej., paras. 295-300.

- “[t]he impugned illegalities are not attributable to Respondent, but are exclusively the product of Claimant’s own negligence, if not its intentional disregard of mandatory requirements under Albanian law”.³¹⁴

356. Respondent finally asserts that Claimant made its investment in bad faith and that, according to international law, such an investment falls outside the jurisdiction of international arbitral tribunals. Respondent states that it consented to the jurisdiction of ICSID only for good faith conduct of potential investors.³¹⁵

357. In this connection, Respondent relies on *Phoenix v. Czech Republic* where the tribunal stated:

States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investment not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.³¹⁶

358. Respondent accordingly concludes that:

- that Claimant rushed in and made its investment without prior due diligence;
- that Claimant started to construct the tank farm on the basis of an internal approval of the investment and of a lease contract without any further documentation and without official, written assurances by competent high Government authorities;
- that Claimant recklessly disregarded warnings of an upcoming change of the Durres port area, which was made in the public interest and backed by international organizations;
- that Claimant failed to apply for important permits that are unequivocally and transparently requested by law in order to maintain the public, social, environmental and economic interests of the State, although it was aware that these permits would be necessary for the construction and operation of the tank farm to be legal;
- that Claimant ignored good faith requests by Respondent to apply for the permits under the established procedure after the termination of the construction, which would have allowed Respondent to find ways to cure the illegalities.³¹⁷

³¹⁴ Resp. Rej., para. 293.

³¹⁵ Resp. C-Mem., paras. 216-220; Resp. Rej., paras. 274-282.

³¹⁶ *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 106.

³¹⁷ Resp. C-Mem., paras. 26 et ss. and 216-221; Resp. Rej., paras. 30 et ss. and 274-282; the Respondent argues in particular that the facts must be distinguished from *Desert Line v. Yemen* where the Claimant had entered into a series of contracts that had been ratified in writing by the highest authorities, where the law was not entirely clear and where the State may have waived the obligation to receive a formalistic investment certificate.

5.3.4 The Determination of the Tribunal

359. As stated in the preliminary remarks, the Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions.
360. This principle is reiterated in Article 2 of the Greek-Albanian BIT, and likewise applies to the substance of the protection when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality.
361. The Tribunal will hereinafter address the different issues disputed by the Parties.
362. The first issue concerns the composition of the investment.
363. On one occasion, Claimant distinguished between Claimant's shares in the Albanian subsidiary "Mamidoil Albanian", the lease contract executed between "Mamidoil Albanian" and the Ministry and Privatization, as well as the construction of the tank farm and operation of the tank farm. At the same time, Claimant has insisted that "*Mamidoil Albanian is not Claimant in this case; it is Mamidoil*".³¹⁸ Claimant insists that Respondent has not challenged the legality of either the shares or of the lease.
364. Respondent has argued that the composite parts of the investment form a whole and must be considered together.
365. The Tribunal has considered the factual circumstances of the investment and found that, as already stated in chapter 4.1 of this Award, the different components cannot be seen in isolation. The sole objective of the lease was "[f]or *setting up a fuel storage center*" Article 2).³¹⁹ Claimant created and controlled the subsidiary again with the sole objective to construct and operate the tank farm and conduct the import and trade of petroleum products. It financed the construction partly by loans, which were later converted into shares. The senior management, except for a temporary local partner, was seconded by Claimant's Greek headquarters.

³¹⁸ Claimant's closing statement, H. Tr., day 5, page 160; Cl. Rep., para. 207.

³¹⁹ CE-19a.

366. The three elements considered above form a unity. The Tribunal thus does not have to treat the question of whether Claimant can assert rights under a lease to which it was not formally a party. It considers the lease to be an integral part of the investment.
367. Likewise, the nature and fate of the investment pertaining to the construction and operation of the tank farm extends automatically to all other components. The lease without storage facilities makes no economic sense, and the *raison d'être* of the fully-controlled and, after 2006, fully-owned subsidiary is equally bound to the construction and operation of the tank farm.
368. Claimant itself agrees to such an encompassing view when it asserts: “[w]e do not say that the leasing contract as such has been breached. What we say is that the investment which is the company which operates the tank farm on the leased property has been strangled off and indirectly expropriated”.³²⁰
369. In sum, the Tribunal finds that the components of the investment form an inseparable whole and that the determination of the legality of the construction and/or operation of the tank farm would affect its totality.
370. Respondent has challenged the legality of the investment on two counts. It alleges first that Claimant failed to perform any due diligence, rushed in recklessly and built the petroleum reservoir at a moment when it was obvious that the transport sector and the seaports in particular would soon undergo a fundamental re-structuring and re-zoning, in particular in the densely populated port of Durres. It further alleges that in order to present Respondent with a *fait accompli*, it did not bother to avail itself of fundamental permits, which it knew were important and to be received before the construction started.
371. The Tribunal realizes that the two allegations aim at different dimensions of potential illegality, the first at a violation of substantive law, and the second at a violation of procedural rules.
372. The Tribunal finds that an investment can be illegal and as a consequence not protected by investment conventions when it contravenes substantive law, in other words when it does not comply with material norms regulating investments. Norms may prohibit certain business activities, such as the production of drugs, or they may reserve certain sectors to national entities or protect certain sectorial or geographical areas, for example, by making an investment in a national park illegal.
373. The Tribunal agrees in this respect with *Phoenix v. The Czech Republic* where the tribunal found:

³²⁰ Claimant’s opening statement, H. Tr., day 1, page 69.

If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process.³²¹

374. In the present case, the master plan for Durres provided for a prohibition on the landing of petroleum products at the port, and Respondent alleges that Claimant, had it conducted due diligence, should have known that this development was inevitable and that, in any event, it was informed accordingly before it started construction.
375. The Tribunal rejects this argument. The decisive moment for the appreciation of the investment's substantive legality is when the investment is planned and made. When the Parties executed the lease and when the site was transferred into Claimant's possession, neither Party anticipated the changes and restrictions on the port of Durres.
376. When the new master plan entered into force in June 2000 and when Respondent tried to enforce it in July 2000 by ordering the interruption of the construction, these events could not retroactively render the investment illegal. This is all the more so since Respondent later explicitly authorized Claimant to terminate the tank farm and to operate it for the totality of the term of the lease.
377. For these reasons, the Tribunal is convinced that the investment is not tainted by illegality as a substantive matter and rejects the arguments to the contrary.
378. The second source of possible illegality concerns procedural rules. In the Tribunal's view, an investment can be found illegal for procedural reasons when the investor does not respect the norms regulating the process of investment. The investment may be legal in substance but still tainted by illegality when the investor violates procedural norms and regulations for setting up its investment. Fraud and corruption are prominent examples of such behavior. However, such serious contraventions of law are not alleged in this case.
379. The Tribunal has to determine whether Claimant has applied for a number of permits which are necessary for the construction and operation of the tank farm and whether Respondent has issued the respective permits. In case they were not applied for and/or not issued, it has to determine whether the absence of any one of the permits is of a nature to qualify the investment as illegal. If that turns out to be the case, the Tribunal has still to determine whether Respondent is entitled to invoke illegality.
380. The Tribunal will examine the permits and their legal requirements one by one.

³²¹ *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101.

381. *The construction site permit and the construction permit*: The “Law on Urban Planning”, dated 17 September 1998, is applicable to these permits.
382. There has been some debate between the Parties about whether the preceding law should be applied. It entered into force on 29 April 1991³²² and was repealed through Article 86 of the new law on 17 September 1998. The Tribunal does not see how this law could be applicable. Both laws provide that a party that intends to build must first request a permit for the site that it wants to use. In the present case, the Durres port authority handed the site over to Claimant’s subsidiary on 1 September 1999, based on the lease contract dated 2 June 1999. Before these dates, no site was available. Therefore, the law of 1991, which was repealed in 1998, cannot be applicable.
383. The Tribunal notes, however, that with respect to the form of applications, the new law does not differ fundamentally from its predecessor. Both laws provide that the application must follow certain formal requirements and be made on forms that are attached as parts of the laws (cf. Articles 22 and 31 of the old Law; Articles 38 and 45 of the new Law).
384. Article 38 of the Law on Urban Planning describes in clear and unambiguous language:
- Any foreign or domestic physical or juridical person who wants to construct an underground or surface building structure must submit a request in writing, including any urban study, for the approval of the building site and urban conditions. Requests for building sites shall be made according to form no.1 that is attached to this law.
385. Article 39 describes in equally clear and unambiguous language to which authority the application must be submitted. Likewise, Article 45 provides in equally clear and unambiguous language that any party that wants to construct must apply for a construction permit and then sets out – not different in form and substance from Article 38 – what documentation must be attached.
386. Article 53 describes in clear and unambiguous language that in respect of structures above a specified size, as defined in Article 7 of the law, the TACRA of the central Government shall issue the permit. The tank farm enters into this category of buildings. This is not contested between the Parties.
387. Any lawyer with some specialization in the field of administrative law would have been able to give advice on these rather straightforward procedures.
388. Claimant chose not to employ a lawyer and not to seek advice on the application requirements. Claimant’s witness Mr. Emmanouil Kalfas who had worked for Claimant

³²² CE-168; cf. point III of the Legal Opinion of Mr. Ermir Dobjani, CE-169.

since 1971 and was its major counsel for the identification, preparation and implementation of investment in Durres³²³ opined as follows:

Question: why did Mamidoil not, for example, instruct a law firm with the due diligence or the legal and administrative requirements?

Mr. Kalfas: I don't see the reason for that. If you are technically capable and you are contacting the right authorities, then I don't see why you need a lawyer.³²⁴

...

Question: Do you really think that it is reasonable to proceed with an investment without knowing the legal framework required for the implementation of a project, especially a tank farm? The licences, the permits, is that reasonable, according to you?

Mr. Kalfas: Absolutely. When we are talking about this type of investment, [...] we don't need a lawyer. [...] But to build the unit, the laws are there, regulations are there, I am there, and I don't need anybody else to guide me.³²⁵

389. The Tribunal considers such an approach as unhelpful in fulfilling the obligation to comply with the legal requirements of a host State for a foreign investment.
390. When Claimant submitted its request for the approval of the investment on 3 July 1998, it stated that, “[f]ollowing this approval, we will continue our job for [...] getting the respective permits for the accomplishment of the works”.³²⁶
391. During that period, Claimant was aware that it needed more than the request to comply with the Albanian legislation. In its Statement of Reply, Claimant alleged that the request for the investment approval was at the same time the application for the construction permit.³²⁷ In its opening statement at the hearing, it reiterated that it had made the application, if not in form then in content.³²⁸
392. The Tribunal rejects this argumentation. It is evident and was initially accepted by Claimant that the request for the approval of the investment, alone or in conjunction with the request for the lease contract, was not an application for a construction permit, neither in content nor in form, let alone a construction site permit. Even a superficial reading of the above-quoted articles of the Law on Urban Planning leave no doubt as to the correctness of this finding.
393. Claimant submits that the Tribunal must take the special circumstances of the Albanian administration into account. It alleges that according to its legal expert, Professor Dobjani, “not even the government knew exactly what the procedures for the building of a tank farm

³²³ Witness Statement of Mr. Emmanouil Kalfas, CE-61.

³²⁴ Oral testimony of Mr. Emmanouil Kalfas, H. Tr., day 2, page 122.

³²⁵ Oral testimony of Mr. Emmanouil Kalfas, H. Tr., day 2, pages 126-127.

³²⁶ CE-15.

³²⁷ Cl. Rep., para. 76.

³²⁸ Claimant's opening statement, H. Tr., day 1, page 107.

were”.³²⁹ Claimant also states that the authorities were not helpful and did not guide it in the accomplishments of its tasks.

394. To the Tribunal’s mind, this argument might be relevant to the proper issuance of the permits. However, it is irrelevant with respect to the application. Claimant’s non-respect of the content and the form of the applications for both permits are exclusively its own responsibility. It also bore responsibility for complying with the legal requirement and for coordinating with “*the right authorities*” as underlined by Claimant’s consultant Mr. Kalfas. The burden of initiating compliance with national legal requirements cannot be shifted to Respondent.
395. Respondent’s legal expert, Mr. Neritan Kallfa, confirmed without hesitation that the approval request does not represent a valid and necessary application for a construction site permit and a construction permit.³³⁰
396. In his written opinion, Claimant’s legal expert, Professor Dobjani, did not specifically mention the issue of application. However, he identified the central Government as the competent body to approve the construction. The Tribunal assumes that the statement implies that the application existed.³³¹
397. Professor Dobjani’s written opinion is ambiguous, both with respect to the application and to the central Government’s approval. He resolved these ambiguities during the hearing.
398. When asked whether the “*approval in principle*” letter of 6 January 1999 was an approval for the construction permit, he answered: “[n]o, it is not an approval. It is just a positive opinion that the land they were asking for, which was under the jurisdiction of the port, was available for investment”. He characterized the letter as meaning. “[i]n general, I agree but we have to discuss the details”. When asked whether the lease contract is a construction permit, he answered: “*the lease contract is not a construction permit, of course*”.³³²
399. Given these unequivocal statements of both legal experts on Albanian law and given the Tribunal’s own reading and understanding of the Law on Urban Planning, the Tribunal finds that Claimant did not apply for a construction site permit and/or a construction permit when it requested the approval for the investment and executed the lease contract.
400. The Tribunal has further examined two application forms for permits that correspond to two of the forms attached to the Law on Urban Planning. Claimant submitted these forms

³²⁹ Claimant’s closing statement, H. Tr., day 5, page 143.

³³⁰ Legal Expert Opinion of Mr. Neritan Kallfa, paras. 50-57; Second Legal Expert Opinion of Mr. Neritan Kallfa, paras. 49-53.

³³¹ Legal Opinion of Mr. Emir Dobjani, para. 9, CE-169.

³³² Oral testimony of Prof. Dobjani, H. Tr., day 4, pages 132, 133, 134.

with its Reply, alleging that it has filed them when local authorities suddenly started to ask for building permits.³³³ Respondent has questioned the authenticity of the forms and criticized that they were incomplete and not accompanied by adequate documentation.³³⁴

401. The Tribunal agrees that the forms are incomplete and not dated. One carries a notarial stamp with the date of 31 August 2001. What troubles the Tribunal more, however, is that the alleged signatory, Mr. Alexandros Mamidakis, who is the deputy managing director of Mamidoil Jetoil and who was the general director of Mamidoil Albanian, declared that he had never seen the forms before the hearing and had not signed them. When asked, “[s]o you say these applications which were submitted by your counsel with the reply were forms which were not filled by you and not signed by you, and you don’t know who signed that and who filled them?” his answer was “[y]es, that’s correct”.³³⁵
402. In its closing statement during the hearing, counsel for Claimant submitted: “[a]s I understand, [...] it was Tasos Mavrakis who explained it is not unusual for someone else to sign for someone. For example, in Germany it would be legal to authorize my associate here to sign in my name [...]”.³³⁶
403. The Tribunal does not know the details of Albanian law. It excludes, however, that a signature and a document carrying such signature is valid if the alleged signatory has neither signed the document, nor authorized a third person to sign it, nor even named a third party for signature. The Tribunal rejects therefore the assertion that the forms are valid applications for a construction site permit and a construction permit.
404. The Tribunal has to determine whether the approval in principle and the lease, together with numerous verbal encouragements by high Government officials and politicians, qualify as a construction site permit and a construction permit in the absence of formally valid applications. Further, even if the documents and verbal assurances did not qualify as permits in a formal sense, the Tribunal must decide if they would fulfil the requirement of an approval in principle by the central Government in accordance with the Law on Urban Planning, upon which the actual permits would not be more than a trivial formality.
405. Respondent’s legal expert has categorically denied such a possibility. He argued that the approval in principle met neither the formal nor the substantive requirements of either of the Laws on Urban Planning because the approval did not contain the legally required information and was signed by a non-competent Government body. It was “*not a blanket*

³³³ Cl. Rep., para. 131; cf. CE-201.

³³⁴ Resp. Rej., paras. 82-97.

³³⁵ Oral testimony of Mr. Alexandros Mamidakis, H. Tr., day 2, page 106.

³³⁶ Claimant’s closing statement, H. Tr., day 5, page 179.

authorization. At the most, it meant that Claimant could start the process of applying for all necessary permits”.³³⁷

406. In his written opinion, Claimant’s legal expert explained in general terms that the central Government “*had exclusive competence to issue the approval for construction sites such as the leased and in principle it was the competent authority to approve the construction permit*”. The further steps were “*a mere formality*”.³³⁸ The expert did not give a clear answer in his opinion to the question whether the “*approval in principle*” letter and the lease qualified as such an approval. As pointed out in paragraphs 397-398 of this Award, during his oral presentation he unequivocally stated that both documents did not qualify as an approval under the Laws on Urban Planning.
407. Given the unequivocal statements of both legal experts on *Albanian* law and given the Tribunal’s own reading and understanding of the Law on Urban Planning, the Tribunal does not hesitate to find that Respondent did not issue a construction site permit and/or a construction permit.
408. Does the result change given that that several high-level politicians and Government members gave assurances? In fact, Claimant’s witnesses, members of the senior management and members the family who own Claimant unanimously told the Tribunal that during frequent meetings, Ministers expressed enthusiasm and assured the partners to go ahead with the project and that missing formalities would be brought into order. Respondent expressed doubts as to the content of these discussions.
409. The Tribunal does not doubt that the meetings took place, that politicians made political declarations, encouraged the Claimant in general terms and made positive remarks on compliance with formalities. However, all of these friendly discussions remained on the level of verbal exchanges; none resulted in an agreed letter of intent, in any type of formal representations or in recorded minutes of meetings. On the contrary, when Claimant made its request for the approval of the investment, it took more than six months and at least one reminder by Claimant until the director of the port authority finally gave his approval. According to Claimant’s legal expert, the resulting letter did not amount to more than a first step before discussion of the details of the project. It took another five months before the lease was executed and another three months before the site was handed over. On these facts, the Tribunal does not see evidence of legally relevant representations of high-ranking and competent members of the Albanian Government.
410. The Tribunal agrees with Respondent that these circumstances differ widely from those described in *Desert Line v. Yemen*. They are not of a nature to express legally binding

³³⁷ Second Legal Expert Opinion of Mr. Neritan Kallfa, paras. 66 and 62-65.

³³⁸ Legal Opinion of Mr. Emir Dobjani, para. 10, CE-169.

assurances and approvals, against which a final formal certificate or permit might have been no more than a minor and trivial formality.

411. On the other hand, the Tribunal has to assess whether Claimant was entitled to rely on verbal assurances and approvals, made without adherence to the formal procedure. Relying on the World Bank's "Doing Business 2013", Claimant asserts that competences of Albanian officials were conflicting and chaotic, TACRA did not meet for years, and no building would ever be constructed if one relied on its formal approval.³³⁹

412. Both legal experts contradict the World Bank's findings. Respondent's experts assured:

I live in Tirana, and I am saying that when it comes to infrastructure, industrial, if there are foreign investments in that sector, the whole system works in order to make this appropriate. And I have my own practice. We work for big groups, like in the airport, even the port, and everything was somehow addressed in advance, addressed in particular in advance from TACRA. So if you see the decision taken from TACRA, you see the main projects are spotted.³⁴⁰

413. For his part, Claimant's expert added:

Has the national TACRA been operational? I have seen that it has been [...]. Every two or three months it has met.³⁴¹

414. The Tribunal has no reason not to believe these informed and concurring statements. The fact that Albanian authorities may work recognizably slower than in other countries is no reason to disregard their work and authorizations.

415. The Tribunal has also to assess whether the absence of formal construction permits was set off by the fact that Respondent never challenged the legality of the construction, never imposed any sanctions and never dismantled the tank farm. Claimant alleges that these facts are an implicit acknowledgement of the investment's legality. It adds that by acts and words subsequent to the construction and attributable to Respondent, Respondent has explicitly recognized and established the legality of the investment.³⁴² In this connection, it enumerates the following acts and statements:

- The acknowledgment of Minister Nako vis-à-vis a World Bank mission that the Government would have to identify funds to compensate the investors in the port of Durres;³⁴³

³³⁹ Cl. Rep., paras. 127-128.

³⁴⁰ Oral testimony of Mr. Neritan Kallfa, H. Tr., day 4, pages 139-140.

³⁴¹ Oral testimony of Mr. Emir Dobjani, H. Tr., day 4, page 140.

³⁴² Cl. Mem., para. 198; Cl. Rep., paras. 54-58.

³⁴³ Cl. Rep., para. 231.

- A newspaper interview by Prime Minister Meta acknowledging that the investors in Durres had legally-valid contracts which the Government had to respect;³⁴⁴
- The inspection deed of 17 January 2005, where the construction permit is mentioned as having been issued;³⁴⁵
- The customs warehouse certificate, which could not have been issued without a valid construction permit; and³⁴⁶
- The authorization to complete the construction of the tank farm after the order of July 2000 to interrupt it, and the temporary trading permit that was issued and had as a prerequisite the legality of the tank farm.³⁴⁷

416. The Tribunal notes that the different allegations are not related to and do not have any bearing on the construction permits. It does not share Claimant’s appreciation of the facts. As to the general attitude of Respondent, it is true that it never imposed sanctions and did not order the destruction of the tank farm as the law provided. Yet, the decision not to impose sanctions must not be confounded with an implicit issuance of a permit. Conversely, Respondent repeatedly requested that the situation concerning the missing permits be regularized. Claimant reports that Respondent’s “*authorities suddenly started to asking [sic] for building permits from the local authorities*”.³⁴⁸ That must have been around 2001, by which time the forms had been made available. This obligation was further stressed during a ministerial meeting of a working group when a Government representative stated that “*for the fuel storage deposits that were built, [...] we observe that these companies have submitted technical documentation in the project phase, which have not been approved by the respective bodies of the local government in compliance with Albanian law. In particular [...]*”.³⁴⁹ The fact that the construction permits are not explicitly mentioned does not support the conclusion that Respondent considered that obligation to have been satisfied. The Tribunal is willing to accept Respondent’s assertion that “*Respondent took a lenient good faith stance towards Mamidoil Albanian but pointed out in clear and unequivocal terms that the illegal situation could not endure*”.³⁵⁰

417. As to the specific acts and words, the Tribunal has not found an acknowledgment to the effect that the construction was legal despite the non-application for the construction permits and despite the absence of these permits. In fact, both Prime Minister Meta and Minister Nako spoke about contractual rights and made no remark on administrative legal

³⁴⁴ Cl. Rep., para. 232.

³⁴⁵ CE-157.

³⁴⁶ Cl. Rep., paras. 113, 133-134.

³⁴⁷ Cl. Rep., para. 100.

³⁴⁸ Cl. Rep., para. 131.

³⁴⁹ RE-41, page 2, and – in a different translation – CE-88.

³⁵⁰ Resp. Rej., para. 154.

requirements. Both officials had taken office not long before they made the statement. The Tribunal finds it improbable that they were aware of the technicalities as far as the construction permits of Claimant were concerned, that they intended to say that the investment was legal despite their absence and that their remarks substituted for their issuance.

418. The Tribunal also finds that the inspection deed of January 2005 does not establish any permit but assumes that the construction, environmental and trading “*permissions*” had been issued. The deed is a demonstration of Prof. Dobjani’s findings, according to which good governance was lacking after the pyramid crisis and, in particular, intra-governmental cooperation did not work well. The inspector delivered a convincing professional analysis in-and-of itself and for the stated purpose. At the same time, it was not aware of the state proceedings that involved other departments even within the same Ministry. In the Tribunal’s view, the deed does not substitute for or prove the existence of construction permits.
419. With respect to the customs warehouse certificate, the Tribunal has studied Mamidoil Albanian’s internal memorandum of 14 September 2001.³⁵¹ It is obvious that the construction permits do not figure among the documents required for the certificate. In the Tribunal’s view, the certificate does not prove the existence of the permits.
420. With respect to the authorization to resume the construction work of December 2000 and the issuance of the temporary trading permit, which followed Respondent’s order of July 2000 to interrupt the construction, the Tribunal understands that Respondent faced a dilemma.
421. On the one hand, it was eager to implement the program of modernization of the transport sector and the new orientation of the port of Durres, as recommended by the World Bank and other donors and international experts. The Government considered these public policy choices as “*of very huge importance not only for Albania, but also for the development of a great part of Southeastern Europe*”³⁵². It is in this perspective that Albania adopted the new land use master plan for Durres in June 2000. The dates correspond with the period of a World Bank mission. The mission had voiced concerns about the situation in the port of Durres and strongly recommended a de-localization of the petroleum-related activities.³⁵³ The mission report preceded the order to stop the construction by one week.
422. On the other hand, Respondent was eager to accommodate Claimant and the other Greek petroleum importers that were in the process of building their reservoirs in the port of

³⁵¹ CE-178.

³⁵² CE-81.

³⁵³ CE-79, paras. 12-13.

Durres. That was all the more so after the political and diplomatic interventions of the Greek Government, Albania's most important trade partner, which continued for several years and which urged Albania to allow Claimant, a Greek investor, to go ahead with the construction and later the operation of the tank farms.

423. The resulting negotiations between Respondent, Claimant and the Greek Government as well as the Albanian decisions center on this dilemma and the policy issues of re-zoning and re-localization. The problem was exacerbated by the fact that any non-Greek newcomer in the petroleum sector would be banned from Durres.
424. The Tribunal is convinced that these considerations motivated the central Government to authorize the completion of construction and to issue a temporary trading license. Respondent did not immediately enforce the new Land Use Plan for Durres against Claimant and the other Greek investors.
425. For the Greek companies, this politically-motivated arrangement had a welcome side effect bearing on further development: While Respondent banned all other importers of petroleum products from Durres to their competitive disadvantage, Claimant and the other Greek companies continued to profit from the privileged situation of the port of Durres and from its installations, which had survived the breakdown of the *ancien régime*.
426. Under these circumstances, it would have been inappropriate for Claimant to assume that the issue of construction permits had become redundant and that it was dispensed from pursuing the legally imposed obligation of submitting applications.
427. For these reasons, the Tribunal rejects the argument that the authorization to complete the construction of the tank farm encompasses in substance and content the construction permits. Claimant was allowed to resume the construction and benefit from the physical and legal status as it had existed before the order to suspend the works. The status of the lack of permits had not changed.
428. As for the trading permit, the Tribunal has studied the legal requirements and has not found that its validity has as a prerequisite a construction permit.
429. For all these reasons, the Tribunal finds that no construction site permit or construction permit was ever applied for or granted.
430. The consequence of the absence of the two permits is clearly stated in Articles 76 and 78 of the Law on Urban Planning: "*Buildings without permits are considered illegal*". Such constructions are not entitled to any indemnity for expropriation resulting from the implementation of urban plans.
431. Both legal experts on Albanian law support this conclusion, with Claimant's legal expert insisting that "[t]he construction police had full authority and full opportunities to go and

close down that construction, if the Port Authority had informed them. [...] I don't know, I can't explain why they didn't".³⁵⁴

432. The law states that the competent authority “*makes its decision for the demolition*” (Article 79), which the Tribunal understands to imply that it may also decide against demolition. The Tribunal will determine in due course whether the decision not to demolish the tank farm has legal significance.

433. Respondent's legal expert opined in turn that the illegal construction could not be legalized under the provisions of Article 79 of the Law of Urban Planning because the requirement of the approved site, as stipulated in Article 78, was not fulfilled.³⁵⁵ The Tribunal understands both norms in this same sense and recalls that no construction site permit had been issued.

434. The Tribunal thus concludes that the construction was illegal and not legalized.

435. *The environmental permit*: The Tribunal acknowledges that the Parties do not contest:

- The necessity of such permit, which follows from the unambiguous wording of Article 18 of the “Law on Environmental Protection”, dated 21 January 1993,³⁵⁶ which was in force when Claimant built the tank farm.; the successor “Law on Environmental Protection”³⁵⁷ entered into force on 5 September 2002, i.e. after the completion of construction;
- That Claimant applied for an environmental permit on 10 May 2000, when the construction was underway;
- That a temporary environmental permit was issued on 31 May 2007; and
- That between the first application and the issuance of the permit, Claimant filed a second application to accommodate the new Law, that several inspections by diverse agencies took place and that some correspondence was exchanged between the Parties.

436. The Tribunal notes that Article 17 of the Law of 1993 provides that “*physical or juridical persons, who engage in economic and social activities that may have an impact on environment, must obtain licenses [...]*”. Article 18 provides that “[l]icenses shall be provided for the following economic and social activities: [...] c) *Construction of roads, railways seaports, hydro technical plants, other industrial activities, [...]*”.

³⁵⁴ Oral testimony of Mr. Emir Dobjani, H. Tr., day 4, pages 135-136.

³⁵⁵ Second Legal Expert Opinion of Mr. Neritan Kallfa, paras. 72-74.

³⁵⁶ RE-12.

³⁵⁷ CE-106.

437. Respondent's legal expert opined that "*there can be no doubt that both the construction and the operation of a fuel farm required, as a mandatory pre-condition, an environmental permit*".³⁵⁸
438. Claimant's legal expert has not given an opinion on the question.
439. The Tribunal does not follow the view of Respondent's expert. The law mentions the construction of roads, for example, but does not specify in a different provision that the operation of these constructions required an additional license. The Tribunal interprets the provision therefore as necessarily meaning that the term "construction" also encompasses operations. A different interpretation would lead to the situation that a railway or another industrial site might be constructed but not operated for lack of a license. The Tribunal cannot imagine that this is what the law means to express.
440. Further, the Tribunal has not found a clear indication in Articles 17 to 20 that the request for the permit must be filed before the beginning of the construction.
441. The Tribunal's opinion seems to be shared by the competent Albanian authorities. Firstly, they processed the request without complaining that it had not been made timely. There was some controversy and correspondence on different topics but not on a late submission. Secondly, they issued the permit for the "*storage and trading fuels*" but did not either complain or impose sanctions for the absence of a different permit for construction.
442. Moreover, Claimant specified in its request that "*it is building a facility in Durrës Port*" that "*will occupy a surface [...]*".³⁵⁹ The wording clarifies that the tank farm was under construction at the time of the request. Time passed, operations started and the competent authorities issued the permit based on a request that was clearly submitted for both the construction and operation phases. The authorities found that construction was completed and a permit for that phase was moot. It apparently understood the request as well as Article 18 (c) of the Law to encompass operations.
443. In light of this interpretation, the Tribunal finds that Respondent applied for the environmental permit in a timely manner and that the late issuance, which is at least partly due to investigations and inspections, has no effect on its legality. In fact, both the old and the new laws provide that a request, which is not acted on by the authorities within 6 months, is considered approved (Article 20 of the 1993 Law and Article 38 of the 2002 Law).
444. The Tribunal therefore concludes that with respect to the environmental permit, Claimant made its investment in accordance with the Albanian legislation.

³⁵⁸ Legal Expert Opinion of Mr. Neritan Kallfa, para. 27.

³⁵⁹ CE-174.

445. *The exploitation permit*: The Tribunal notes that the Parties do not contest:

- The necessity of the permit to be issued according to Article 13 of the “Law on Control and Regulation of the Construction Works” of 10 September 1991. However, the Parties are in disagreement as to its relevance: while Respondent qualifies it as one of the important permits to establish the legality of an operation, Claimant qualifies it as “*a simple testing document: it simply requires that a testing officer comes*” to set up the “*document which confirms that what you’ve built accords to the technical standards*”,³⁶⁰ and
- That the permit was not issued.

446. The Tribunal further notes that the Parties are in dispute over the question of whether Claimant had filed an application before September 2001 or only on 15 July 2003, after repeated reminders by Respondent.

447. No application pre-dating the letter of 15 July 2003 is in evidence. Claimant explains that it “*could not retrieve the official application from its files*” but its existence is proven by an internal memorandum of the then General Manager of the subsidiary who stated, “[a]ll forms of tank measurement, firefighting service, environmental branch are submitted to the urban planning of Albania”.³⁶¹ The urban planning section is the correct recipient of the application (Article 11 of the Law).

448. Respondent states that it has not received the application, which would have been untimely anyway since it was not prepared before full operation of the tank farm.³⁶²

449. The Tribunal does not doubt that Claimant prepared its application and sent it, although it is surprised that a copy of an important document for the regular operation of the investment would not be kept on file.

450. The Tribunal also does not doubt that Respondent did not receive the application. In fact, it has reminded Claimant several times to make applications: during a meeting of the Working Group on relocation on 20 March 2003,³⁶³ by letter dated 23 April 2003,³⁶⁴ by letter dated 20 May 2003³⁶⁵ and by an internal memorandum dated 30 March 2004.³⁶⁶

³⁶⁰ Claimant’s opening statement, H. Tr., day 1, pages 95 and 97.

³⁶¹ Cl. Rep., para. 108; Claimant refers to CE-178.

³⁶² Resp. C-Mem., paras. 97 and 210; Resp. Rej., paras. 141-147.

³⁶³ RE-41 and – in a different translation –CE-88.

³⁶⁴ CE-34.

³⁶⁵ CE-172.

³⁶⁶ RE-49.

451. In reaction to the letters, Claimant answered first by telefax dated 24 June 2003 stating, “[a]lthough we followed your instructions, we regret we see the continuation of the old familiar tactics of delay, with respect to the exploitation permits in Durres”.³⁶⁷ In a letter dated 15 July 2003, Claimant wrote, “[p]ursuant to the proceedings for being equipped with the respective exploitation permits of the Deposits in Durres Port, at your request, we are re-sending the study file of the fire protection scheme”.³⁶⁸
452. Under the factual circumstances, the Tribunal does not fully understand the reference to “old familiar tactics of delay” because Claimant accepts that other permits for which valid applications were made, such as the custom warehouse certificate, the temporary trading license or the environmental permit, were correctly issued. The Tribunal rejects the implicit accusation that Respondent refused to grant permits despite valid applications.
453. The Tribunal notes that Respondent considered Claimant’s letter of 15 July 2003 – although incomplete – to be an application.³⁶⁹ Respondent complained that it was not correctly documented, and since no further documents are in evidence it seems that Claimant did not comply with this request. In any case, the exploitation permit was not issued.
454. The Tribunal further notes that a number of inspections have been conducted over the years:
- a first field inspection by Lloyd’s Register on 5 and 6 June 2001 which stipulated that “[t]he above described tests and examinations were carried out with satisfactory results”,³⁷⁰
 - an extensive “Environmental Review for Durres Port Dredging Program and other Activities” which led to an “Oil/Fuel Inspection and Analysis Report” which did not solely focus on Claimant’s investment. It stated, in relation to Mamidoil’s tank farm, that in general “the site [...] looked well maintained” but recommended certain improvements,³⁷¹ and
 - an inspection by the Albanian Ministry of Industry and Energetics State Inspectorate on 17 January 2005, which noted that the implementation of the security norms and conditions were “correct” and that “[t]here are no unaccomplished tasks”.³⁷²

³⁶⁷ CE-180.

³⁶⁸ CE-179.

³⁶⁹ Resp. Rej., para. 152.

³⁷⁰ CE-82.

³⁷¹ CE-108, pages 10-11.

³⁷² CE-157.

455. The Tribunal has taken note of Claimant’s uncontested assertion “*that despite these delays, the tank farm operated with full knowledge of all authorities*”.³⁷³ The Tribunal does not exclude that the “*lenient stance*” which Respondent – in its own words³⁷⁴ – took towards the operation was also based on the informed certitude that the security norms and technical standards had been satisfied.
456. This does not mean that the operation of the tank farm was legal, and it is true that from 2003 on, Respondent “*pointed out in clear and unequivocal terms that the illegal situation could not endure*”.³⁷⁵
457. The Tribunal has studied the “Law on Control and Regulation of the Construction Works” and agrees with the analysis of Respondent’s expert that the failure to obtain the exploitation permit constitutes a violation of that law. Claimant did not operate the tank farm in accordance with Albanian legislation because it had no exploitation permit.
458. However, the consequences of the violation are different than those set out in the Law on Urban Planning. Firstly, the law avoids calling operation without a permit “illegal”, and secondly, it does not explicitly authorize the authorities to stop the operation. Rather, it enumerates sanctions consisting of different monetary fines (Article 15).
459. Instead of imposing fines, Respondent chose to offer that Claimant “*make applications for the missing permits, including the exploitation permit, with the competent authorities in an attempt to cure (to the extent possible) its illegalities*”.³⁷⁶
460. In the Tribunal’s view, this suggestion implies the recognition that a late application would cure the breach of Claimant’s obligation to apply for the permit at the start of the operation. With this in mind, the Tribunal finds that it is not obliged to decide the dispute over the question of whether the application was made timely.
461. However, this finding does not imply that Claimant was exempt from submitting an application with supporting documentation when asked to do so. The Tribunal has found no evidence that Claimant complied with the respective requests by the Albanian authorities. The finding equally does not extend to the undisputed fact that no permit was issued and that the operation did not comply with Albanian’s procedural law.
462. Having stated that Albanian law was violated by the construction of the tank farm without the construction site permit and the construction permit as well as the operation of the tank

³⁷³ Cl. Rep., para. 110.

³⁷⁴ Resp. Rej., para. 154.

³⁷⁵ Resp. Rej., para. 154.

³⁷⁶ Resp. Rej., para. 149.

farm without the exploitation permit, the Tribunal will address Claimant's assertion that Respondent is barred from relying on the missing permits.

463. Claimant asserts that Respondent was obliged to issue the permits after having approved the project and after having concluded the 20-year lease.
464. The Tribunal rejects this argument for the simple reason that Respondent's obligation could not have arisen before Claimant had properly applied for the permits. Only after this time would Respondent have been in a position to examine whether all the requirements were met which, if they had been, would have obliged Respondent to issue the permits.
465. As developed in this Award, the necessary applications have not been made in the proper form and substance.
466. The Tribunal has to determine further whether Respondent is estopped from invoking the illegality.
467. In paragraphs 408-419, the Tribunal concluded that the conduct of different Government bodies cannot be characterized as an implied issuance of the permits.
468. Claimant alleges that "*over the last 12 years*" Respondent has consistently acknowledged the legality of the investment. Further, it quotes a number of declarations from an ex-Prime Minister, an ex-Minister and ministerial departments that allegedly support estoppel. Claimant argues that in invoking illegality now, Respondent contradicts prior conduct on which Claimant can rely in support of its argument.³⁷⁷
469. The Tribunal shares the opinion that the principle of estoppel is embedded in international law. It is a principle where for reasons of material justice a person is hindered from exercising an existing right. It is apparent that such a consequence must be restricted to exceptional circumstances. Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct. Mere inactivity, as opposed to an act, is not enough and is addressed by norms on statute of limitation.
470. The Tribunal believes that the required exceptional circumstances are absent in the relations between the Parties in this case.
471. Firstly, Claimant's allegations that "[n]ot only had Government ministers solicited and authorized the project and entered into the twenty-year leasing contract, for years afterwards no authority, whether central or municipal doubted the legality of construction

³⁷⁷ Cl. Rep., paras. 52-60 and 226-235.

and operation of the tank farm”³⁷⁸ are not entirely correct. The Tribunal has seen evidence that Claimant, but not Respondent, solicited Claimant’s investment.

472. It is also not the case that for years Respondent has not doubted the legality of the investment. The Tribunal learned from Claimant itself that local authorities started to ask for building permits in 2001,³⁷⁹ and beginning 2003 the central Government also started to insist that permits were lacking and asked for efforts to regularize the situation.
473. Secondly, none of the declarations of the Albanian Government officials contains a statement that confirms the legality of the construction and the operation of the tank farm.
474. As to the statement “[t]he Government will also need to identify funds to compensate the company for moving”, this is part of the summary of an internal discussion between a World Bank mission in July 2000 where the World Bank delegation made a number of observations and recommendations that were responded to by a Minister who had taken office shortly before.³⁸⁰ The Tribunal is uncertain whether the quoted recommendation is attributable to the Minister or to the World Bank delegation. However, even if it were the summary of a reflection of the Minister, it does not represent an acknowledgement of legality with respect to missing construction and exploitation permits.
475. The statement of the ex-Prime Minister was made on 29 August 2000 in a newspaper interview, shortly after the temporary stop of the construction and not long after he took office. It reads: “[t]hese are inherited contract³⁸¹, they are legal ones, which implies that the current government [...] cannot avoid the legal and financial responsibility, regarding the obligation arising to the Albanian state due do non-observation”.³⁸² The statement refers to the lease contracts concluded with the Greek companies. It is wrong to imply that the interviewee wanted to express that the Government would abstain from challenging the illegality of the construction and operation of the tank farm.
476. The other quotations presented by Claimant deal with the validity of the lease contract and the temporary trading license.³⁸³
477. The Tribunal is unable to interpret these statements as the basis for conduct and to qualify them as exceptional circumstances that would hinder Respondent from exercising its right to invoke illegality due to the absence of permits.

³⁷⁸ Cl. Rep., para. 229.

³⁷⁹ Cl. Rep., para. 131.

³⁸⁰ Cl. Rep., para. 231; it refers to CE-79.

³⁸¹ He refers to the lease contracts with the Greek companies.

³⁸² Cl. Rep., para. 232; it refers to CE-81.

³⁸³ Cl. Rep., paras. 232-234.

478. The Tribunal therefore rejects the application of the principle of estoppel to the circumstances of the dispute.
479. In sum, the Tribunal concludes that Claimant has not built and has not started to operate the tank farm in accordance with Albanian legislation and that Respondent is not barred from invoking the resulting illegality.
480. The Tribunal finds, however, that this conclusion is not sufficient to bar its jurisdiction to hear and decide the dispute based on the general assumption that States do not consent to the arbitration of disputes relating to illegal investments. The result of such a sweeping and undifferentiated opinion might contradict the purposes of international conventions for the protection of investments.
481. In fact, not every type of non-compliance with national legislation bars the protection of an investment. First, it is evident that there must be an inner link between the illegal act and the investment itself. Illegal conduct of the investor will not affect the investment insofar as it does not relate to its substance or procedural requirements but rather occurs without any material connection to the investment.³⁸⁴
482. Second, tribunals have circumscribed the concept in a teleological intention in order to restrict its application. It is in this perspective that they have stated that the illegality must be “serious”³⁸⁵ or “manifest”,³⁸⁶ and that “minor errors” and “a failure to observe the bureaucratic formalities of the domestic law”³⁸⁷ will not justify the denial of jurisdiction.
483. The Tribunal agrees with the view that not every trivial, minor contravention of the law should lead to a refusal of jurisdiction. It must strike a balance between two criteria. On the one hand, neither Claimant nor the Tribunal may presume that the host State waives its sovereignty and agrees to the arbitration of disputes when the investor made the investment in violation of its substantive or procedural legislation. On the other hand, States must not be allowed to abuse the process by scrutinizing the investment *post festum* with the intention of rooting out minor or trivial illegalities as a pretext to free themselves of an obligation. A State must act consistently with its obligations and not resist jurisdiction because it wants to escape the consequences of its standing agreement to arbitrate.
484. Claimant has argued that Respondent hid behind alleged violations of bureaucratic formalities and minor errors to escape jurisdiction. Respondent argues that the non-application and non-issuance of the permits are far from being minor administrative errors.

³⁸⁴ *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 119.

³⁸⁵ *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 294.

³⁸⁶ *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 104.

³⁸⁷ *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 86.

485. Respondent's legal expert Mr. Kallfa explained that the Law on Urban Planning "*was enacted for overriding reasons of public interest and public order, namely to ensure proper regard for the State's policies regarding social development, national defense and environmental protection*".³⁸⁸
486. Claimant's legal expert Prof. Dobjani developed his opinion in two steps. In his written opinion, he described the content of the Law on Urban Planning and expressed that "*the central government (KRRTRSH) had exclusive competence to issue the approval*" and once this approval is given, the approval by the local authority KRT "*was a mere formality*".³⁸⁹ Here he does not evaluate the circumstances of the case. He did not clearly state whether he considered the approval in principle of 6 January 1999 and the lease contract of 2 June 1999 as approvals under the Law on Urban Planning. During his oral statement, however, he complemented his written opinion and unequivocally opined that they were not.³⁹⁰
487. In addition, when asked whether he agrees "*that questions relating to permits and regulations in construction activities are of importance as opposed to being trivial*" and that the issue "*touches upon safety, health and urban questions*", Prof. Dobjani answered unequivocally, "*[y]es, they are important*".³⁹¹
488. The Tribunal has no reason not to accept the legal experts' opinions. Both versions of the Law on Urban Planning spell out the social, political and economic importance of those laws. This is unsurprising and corresponds to urban-planning laws in most countries.
489. For these reasons, the Tribunal rejects the argument that the non-application for and the non-issuance of the permits were but minor administrative errors.
490. However, the Tribunal notes that Respondent has not drawn the consequences that Albanian law provides. It has not ordered the demolition of the tank farm, which the Law on Urban Planning allowed it to do, nor has it imposed any sanctions, which the Law on Control and Regulation of the Construction Works allowed it to impose. Rather, Respondent has consistently, and in good faith, tried to cooperate with Claimant by repeatedly requesting and inviting it to submit the applications in the proper form and accompanied by the necessary documentation as enumerated in the laws.
491. The Tribunal finds that this conduct has not cut off Claimant's obligation to obtain the required permits, which could not be issued without the proper application. It further holds that Respondent is not estopped from invoking the missing applications and permits

³⁸⁸ Legal Expert Opinion of Mr. Neritan Kallfa, para. 8.

³⁸⁹ Legal Opinion of Mr. Ermir Dobjani, para. 10, CE-169.

³⁹⁰ Oral testimony of Prof. Ermir Dobjani, H. Tr., day 4, pages 132, 133, 134.

³⁹¹ Oral testimony of Prof. Ermir Dobjani, H. Tr., day 4, page 99.

because it consistently insisted that they were missing. Finally, the Tribunal finds that Respondent did not acknowledge the legality of the construction and operation.

492. At the same time, Respondent has, by its conduct, declarations and requests, conveyed to Claimant that it was ready to consider curing the illegalities if Claimant was willing to regularize the files. Such cooperation between the Parties succeeded for the environmental permits, but it did not succeed for the construction permits or the exploitation permit. Claimant never produced valid applications for the former and stopped providing around 2003/2004 documents in support of the application for the latter, as requested by the authorities.
493. Under the specific circumstances of the case, the real issue is less one of the seriousness or triviality of the illegality but, rather, concerns finality. The Tribunal interprets Respondent's proposals as indications that it was ready to disregard the illegality for the past, to suspend it for the present and to repair it for the future. It was ready to enter into a debate about the legal framework of the investment and not repudiate it as it was.
494. This is exactly where the arbitral process can make a valuable contribution by ascertaining the Parties' positions objectively and neutrally. It is true that a State cannot be expected to have consented to an arbitral dispute settlement mechanism for investments made in violation of its legislation. However, it can be expected to accept the jurisdiction of an arbitral tribunal when, in that State's own appreciation, the illegality of the investment was susceptible of being cured, as that State's legalization offers show. In such circumstances, the legal significance of the absence of permits is to be determined as a question of merits – namely whether Respondent's international responsibility is engaged in the face of Claimant's violation of Albanian law – rather than this Tribunal's jurisdiction.
495. For all these reasons, the Tribunal concludes that it has jurisdiction to hear the Claimant's claims.

6. MERITS

496. Claimant has asserted the following substantive claims under the BIT and under the ECT:

- Albania has violated its duty not to expropriate Claimant's investment without compensation as required under Article 4.2 of the BIT and Article 13.1 of the ECT;
- Albania has violated its duty to accord Claimant's investment fair and equitable treatment as implicitly required by the BIT and explicitly by Article 10.1 of the ECT by failing to provide a stable and transparent legal framework, to respect legitimate expectations, to abstain from exerting pressure and by denying justice to Claimant;
- Albania has violated its duty to refrain from unreasonable and discriminatory measures as required by Article 10.1 of the ECT;
- Albania has violated its duty to provide most constant protection and security as required by Article 10.1 of the ECT.

497. Claimant has based these different claims largely on identical facts. The Tribunal believes, however, that as each head of claim invokes a specific standard of protection, specific facts must be shown for each claimed violation. The Tribunal will therefore examine the facts and arguments separately for each claim.

6.1 Expropriation

498. Article 4.2 of the BIT provides:

Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to an expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against prompt, adequate and effective compensation.

499. Article 13.1 of the ECT provides:

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.

6.1.1 Claimant's position

500. Claimant contends that Respondent did not directly expropriate its titles and rights but that the totality of its actions and omissions “*from the change of the land use plan in 2000 up to the refusal to renew the trading license at the end of 2010 amount to an unlawful indirect and creeping expropriation*”. In other words, the aggregate effect of Respondent’s actions was tantamount to an expropriation and had an effect equivalent to an expropriation.³⁹²

501. Claimant argues that the text of both the BIT and the ECT covers indirect expropriation. Moreover, arbitral case law and literature confirm that a series of measures which, taken individually, may not have the effect of an expropriation, may amount to an expropriation if taken together. According to Claimant, “[i]t is the hallmark of indirect expropriation that no rights are taken”, as it is “*the hallmark of an creeping (sic) expropriation that the investment which is affected is not taken, but deprived of any value*”.³⁹³

502. With respect to the concept of indirect expropriation, Claimant relies on the award in *Tecmed v. Mexico* where the tribunal found:

To establish whether the Resolution is a measure equivalent to an expropriation [...], it must be first determined if Claimant, [...] was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the Landfill or to its exploitation – had ceased to exist. In other words, if due to the actions of Respondent, the assets involved have lost their value or economic use for their holder ...³⁹⁴

503. Claimant further relies on the award in *AES v. Hungary* where the tribunal agreed with *Tecmed* and argued:

For an expropriation to occur, it is necessary for the investor to be deprived, in whole of significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.³⁹⁵

504. Other tribunals have concurred and found that an expropriation can occur although no title is taken directly. The revocation of a free zone certificate as in *Goetz v. Burundi*³⁹⁶ or of an

³⁹² Cl. Mem., paras. 212, 216, 221; Cl. Rep., paras. 257-259.

³⁹³ Cl. Rep., para. 255.

³⁹⁴ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 115.

³⁹⁵ *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 14.3.1; cf. also: *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 444.

³⁹⁶ *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, para. 124.

import license as in *Middle East Cement v. Egypt*,³⁹⁷ if vital for the use and profitability of the investment, qualify as an indirect expropriation.³⁹⁸

505. Claimant accepts that the State is entitled to act in the public interest and enforce regulatory measures but argues that these measures must be reasonable, proportionate and not confiscatory, which was not the case concerning Respondent.³⁹⁹ It quotes *Feldman v. Mexico*, where the tribunal held:

The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions.⁴⁰⁰

506. Claimant further contends that the assertion that the measures are effectively in the general public interest “*is irrelevant [since] [t]he purpose of a measure is less important than its effect*”.⁴⁰¹ It refers to *Santa Elena v. Costa Rica* where the tribunal found that “*where property is expropriated, even for environmental purposes [...] the state’s obligation to pay compensation remains*”, as laudable and beneficial as those measures may be.⁴⁰²

507. According to Claimant, the principle is all the more applicable since Respondent used the argument of the protection of public interest as a mere pretext, documented by the fact that it did not live up to its own measures.⁴⁰³

508. With respect to the concept of creeping expropriation, Claimant relies on *Vivendi v. Argentina II* where the tribunal held that:

[i]t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached.⁴⁰⁴

³⁹⁷ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 107.

³⁹⁸ Cl. Mem., para. 220.

³⁹⁹ Cl. Rep., paras. 258-260.

⁴⁰⁰ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 105; similar in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 423-424.

⁴⁰¹ Cl. Rep., para. 264.

⁴⁰² *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 72.

⁴⁰³ Cl. Rep., paras. 267-268, quoting *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 432.

⁴⁰⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.31.

509. Claimant also relies on *Siemens v. Argentina* where the tribunal found:

[b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.⁴⁰⁵

510. Finally, Claimant argues that the process of creeping expropriation can extend over long periods of time, such as in *Santa Elena v. Costa Rica* where it stretched over more than 17 years and where the tribunal found:

the period of time involved in the process may vary – from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.⁴⁰⁶

511. Claimant relates the following factual allegations to its appreciation of the law.

512. The first measure that curtailed the profitability of its investment was the enactment of the new Land Use Plan in June 2000, which would eventually ban petroleum products from the port of Durrës, including the unloading of vessels. Thus Claimant argues that the measure was unreasonable vis-à-vis Claimant because it came unexpectedly and at a moment when Claimant was still implementing its investment, in legitimate reliance on the validity of the 20-year lease contract. The contract had created a stable legal basis for its investment, which the new Land Use Plan destroyed. Mamidoil acted in good faith when it relied on the stability of the legal framework and constructed the tank farm. Had it known that a new land use was in preparation, it would not have invested.⁴⁰⁷

513. The announcement of a relocation of the tank farm, which came with the new Land Use Plan, had the effect that the stable legal framework did not exist any longer. Therefore, the initial investment plan to build and operate COCs “*for which the fuel tanks had been constructed*” had to be reconsidered and then abandoned in 2001/2003.⁴⁰⁸

514. The alternative to contractual gas stations was less profitable, and the lack of regulation as well as the distortion of the fuel market “*made it impossible to earn any profits*”.

⁴⁰⁵ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 263.

⁴⁰⁶ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 76.

⁴⁰⁷ Cl. Mem., paras. 212, 227-228; Cl. Rep., paras. 249-250.

⁴⁰⁸ Cl. Mem., para. 229.

Nevertheless, Claimant continued to operate its investment expecting that the regulatory framework would improve.⁴⁰⁹

515. “*The final blow*” in a series of measures was the closing of the port of Durres for the discharging of petroleum tankers in 2007, which took effect in 2009. This completed the indirect and creeping expropriation, and the operation of the tank farm became “*completely uneconomical*”. Furthermore, this hindered Mamidoil from refilling the reservoir and maintaining the security reserve, which were preconditions for renewing its trading license.⁴¹⁰
516. Moreover, according to Claimant, the evidence of the Respondent’s conduct shows that its claimed pursuit of public interest was but a pretext. In reality, Respondent was avoiding the payment of contractual penalties in the Petrolifera settlement agreement, and its actions did not amount to a legitimate measure, and even if they did, were unlawful as they were without compensation to Claimant.⁴¹¹
517. In sum, the expropriation was discriminatory and lacked due process.⁴¹²
518. Claimant asserts that the measures left the tank farm “*without any commercial value apart from scrap value*”, that the shares of the subsidiary “*have been deprived of any value*” and that its brand name “*suffered heavily in the Albanian market*”.⁴¹³

6.1.2 Respondent’s position

519. Respondent disputes Claimant’s arguments and presentation of the facts. Its contentions are as follows.
520. The investment in the construction of the tank farm was illegal because it was made without the necessary permits, the construction was at no moment legalized and Respondent has never waived the necessity of the permits. For these reasons, the construction cannot confer any “right” to Claimant capable of expropriation.⁴¹⁴ Respondent summarizes its position as follows:

In sum, in the absence of any “right” or “legitimate expectation” that is able to give rise to a claim, there simply cannot be a case for expropriation or breach of international law *tout court*. As the tribunal in EnCana Corporation v. Republic of Ecuador explained, one cannot claim for

⁴⁰⁹ Cl. Mem., paras. 230-231.

⁴¹⁰ Cl. Mem., para. 232; Cl. Rep., para. 255.

⁴¹¹ Cl. Rep., paras. 264-269.

⁴¹² Cl. Mem., paras. 239-240.

⁴¹³ Cl. Mem., paras. 234-236.

⁴¹⁴ Resp. C-Mem., para. 238; Resp. Rej., para. 323.

something it never had: “for there to have been an expropriation of an investment [...] the rights affected must exist under the law which creates them.”⁴¹⁵

521. The tank farm was built in full knowledge of the imminent re-zoning plans. According to Respondent, Claimant took that risk deliberately, failed to conduct any due diligence and suffers now the consequences of its own reckless decisions.⁴¹⁶
522. The only “two valid rights, namely the right to lease a site by virtue of the Lease Agreement and the temporary right to act as a wholesaler of petroleum subject to the conditions of its temporary trading license [...] remain unaffected to date”.⁴¹⁷
523. Respondent alleges that Claimant might still exploit the tank farm. Other business opportunities are available. It could even apply for a new trading license, as did its competitor Global, which received – as Claimant explicitly recognized – a new trading permit “without any problems”.⁴¹⁸
524. The requirement to maintain a security reserve could have been complied with in a number of ways. Claimant could, for instance, have used the tanks exclusively for this purpose, and it could have rented part of the space to other wholesale dealers.⁴¹⁹
525. Respondent points to these and other opportunities that remained available after the closing of port of Durres to petroleum products. If Claimant did not pursue them, it is due to its own negligence and bad business judgment, which characterizes the investment from the beginning. The resulting losses were thus not caused by expropriatory acts.⁴²⁰
526. Respondent summarizes its opinion on the alleged losses of Claimant’s investment as follows:

In sum, the fact of the matter is that Mamidoil Albanian’s rights under the Lease Agreement, as well as its rights under the temporary trading license, remained completely intact and unaffected by the measures adopted by the Government. Notably, both the plot of land, as well as the tank farm constructed thereon, albeit never approved prior or subsequent to its construction, remain in the hands of Mamidoil Albanian today, and until its expiration on 16 February 2011, Mamidoil Albanian was entitled to conduct wholesale activities on the basis of its temporary trading permit.

⁴¹⁵ Resp. C-Mem., para. 263; Respondent refers to *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, para. 184, and similarly, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

⁴¹⁶ Resp. Rej., paras. 324-335.

⁴¹⁷ Resp. Rej., paras. 319, 336-340.

⁴¹⁸ Resp. Rej., para. 339; Respondent refers to Claimant’s Reply, where it states that “the other Greek oil company optimistically filed for a renewal of the trading permit in 2011 and received one without any problems. However, they also had to deal with the fact that ships could no longer be processed in Durres and eventually shut down their operation in 2012”: Cl. Rep., para. 101.

⁴¹⁹ Resp. Rej., para. 340.

⁴²⁰ Resp. Rej., para. 341.

The same moreover applies to Claimant's shares in Mamidoil Albanian. Claimant has retained full ownership, control and use of its shares. Respondent's measures have not affected any of Claimant's rights as a shareholder, including its voting right and right to the payment of dividend. To the extent Claimant claims that its shares have lost their economic value, it must again be recalled that at the heart of this devaluation are not Respondent's acts or impugned Decision No. 486, but Claimant's fatal misconception that it could force its way into the market to obtain a dominant market presence, even in the absence of a retail network of COCO's. It was thus Claimant's own reckless business decision that condemned Mamidoil Albanian to run a largely loss-making wholesale business. In particular, and as confirmed by Respondent's Quantum Expert, the operation of a wholesale business without a retail network in the Albanian market, could in no way have been viable, even under ideal market conditions. From the moment Claimant decided in 2001 to limit Mamidoil Albanian's business to the wholesale of fuel, Mamidoil Albanian's business was doomed to economic failure.⁴²¹

527. Even if rights had been taken, it would not be an expropriation because it was a *bona fide* exercise of regulatory power aimed at the general welfare and implementing the long-standing and publicly-known decision to close the port of Durres for “*overriding socio-economic and public safety considerations*”.⁴²²
528. Respondent asserts that it is established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.
529. Respondent quotes from an UNCTAD report on expropriation, which insists that “*the police powers must be understood as encompassing a State's full regulatory dimension*” and includes “[...] *implementing control regimes through licences, concessions, registers, permits and authorizations; protecting the environment and public health; regulating the conduct of corporations; and others*”.⁴²³
530. Respondent also relies on international arbitral jurisprudence including the partial award in *Saluka v. Czech Republic* where the tribunal found:

Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. In interpreting a treaty, account has to be taken of “any relevant rules of international law applicable in the relations between the parties” – a requirement which the International Court of Justice (“ICJ”) has held includes relevant rules of general customary international law.⁴²⁴

531. It also refers to *Feldman v. Mexico* where the tribunal found:

⁴²¹ Resp. C-Mem., paras. 259-260.

⁴²² Resp. Rej., paras. 344-352.

⁴²³ Resp. Rej., para. 348; Respondent quotes from: RLA-5, page 79.

⁴²⁴ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 254-255.

At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.⁴²⁵

532. Respondent alleges that the prohibition on processing tankers in the port of Durres from 2009 was the result of a consistent economic, environmental and social policy and a “*lawful necessity*” which had its base and roots in the Land Use Plan enacted in 2000, in close co-operation and under the control of international expert advice and public international financing. The experts had warned that the transformation of the port of Durres was “*the key for economic survival*”.⁴²⁶
533. Being part of the implementation of its long-term transport sector strategy, and as the modernization of the port system was necessary and in the overriding public interest, it is “*crystal clear*” that the ban of fuel vessels from Durres was not a mere pretext.⁴²⁷
534. Respondent accepts, consistent with *Chemtura v. Canada*, that a State must act “*in a non-discriminatory manner*”⁴²⁸ but contends that the prohibition on processing tankers in Durres port concerned all companies “*without making any distinction between the nationality of the companies*”.⁴²⁹
535. Finally, Respondent asserts that even if the Tribunal found that Albania had expropriated, such expropriation would still be lawful because it served a public purpose and was non-discriminatory. The fact that no compensation was offered does not change the lawfulness of the act. It could “*merely provide the basis for a claim to compensation,*” which is doubtful in this case given Claimant’s bad faith investment.⁴³⁰

6.1.3 The Determination of the Tribunal

536. At the outset, the Tribunal must identify the facts that could serve to ground a claim for expropriation.
537. Claimant has essentially asserted that the following measures amounted to an indirect and creeping expropriation:

⁴²⁵ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 103.

⁴²⁶ Resp. C-Mem., paras. 276-283; Respondent quotes from: CE-77, page 24.

⁴²⁷ Resp. Rej., para. 350.

⁴²⁸ Resp. C-Mem., para. 269; Respondent refers to *Chemtura Corporation v. Canada*, UNCITRAL, Award, 2 August 2010, para. 266.

⁴²⁹ Resp. Rej., para. 360.

⁴³⁰ Resp. Rej., paras. 353-363.

- The regulatory changes of 2000, embedded in the new Land Use Plan, of which it was “*not aware*” before it was enacted;⁴³¹
- The “*initial pressure to relocate Mamidoil Albania’s newly built tank farm in 2000*”;⁴³²
- The Decree dated 25 July 2007 prohibiting the discharge of fuel tankers in the port of Durres, which entered into effect in July 2009, whose public policy and welfare justifications Claimant considers to be a pretext;⁴³³
- The “*refusal to renew the trading license at the end of 2010*”.⁴³⁴

538. Before determining whether these facts, individually or taken together, would amount to an expropriation, the Tribunal will have to determine whether the facts are correctly presented. This is all the more important since Claimant presents the same facts – in addition to others – to assert the further claims.

539. The Tribunal has carefully studied the file and listened to the witnesses examined during the hearing, and has come to the following conclusions.

540. With respect to the enactment of the Land Use Plan in 2000, two of Claimant’s witnesses, both senior members of its management and members of the Mamidakis family, recall to have taken note of warning letters in or around March/April 2000. That is two to three months before the enactment of the plan.

541. Claimant has further acknowledged that on 17 November 1999, Mamidoil Albanian received and had knowledge of a letter written by the port authority in November 1999 which called for the suspension of the construction of the tank farm until recommendations and decisions as to the future of the port were issued. The letter refers to verbal warnings expressed in October 1999. The general director of Mamidoil Albanian was a member of Claimant’s senior management, and the deputy general director was the local partner and minority shareholder. The deputy general director responded to the letter on 7 December 1999.

542. The Tribunal disagrees with Claimant’s contention that three members of its senior management have personally not read the letter (and subsequent letters and memoranda to the same effect) and were therefore not aware of its content. The letter and the information arrived in Claimant’s sphere of business, and the deputy general director reacted to it. The

⁴³¹ Cl. Rep., para. 250.

⁴³² Cl. Mem., para. 226.

⁴³³ Cl. Mem., para. 226; Cl. Rep., para. 267.

⁴³⁴ Cl. Mem., para. 212.

receipt of the letter and the positive knowledge by the senior management of Mamidoil Albanian are attributed to Claimant. The Albanian authorities were entitled to expect that Claimant would take note of the contents. Supposed deficiencies of internal communication are no excuse for a lack of knowledge.

543. Therefore, the Tribunal holds that Claimant was aware from October/November 1999 that regulatory changes and a transformation for the port of Durres were imminent. It is uncontested that at that time the construction of the tank farm had not yet begun, except for the cleaning of the site and the building of a fence around it.
544. With respect to the alleged initial pressure exercised by the Albanian authorities to relocate the tank farm, the Tribunal notes that Respondent's order of 17 July 2000 to interrupt the construction may have been perceived as pressure. However, the order was the starting point to negotiations between the Parties, actively supported by the Greek government, which resulted in the permission to complete the construction and in the issuance of a wholesale trading license. The Tribunal does not see how the process of taking, negotiating and revising a position can be qualified as pressure to relocate when as its result Claimant was authorized to complete the construction and operate the tank farm in Durres for approximately eight years.
545. With respect to the prohibition to discharge fuel tankers from July 2009, the Tribunal is not convinced by Claimant's appreciation and evidence to the effect that Respondent had abandoned its Land Use Plan for Durres and used environmental, social and other public policy considerations as a pretext while in reality it was only trying to escape from penalties under a settlement agreement with its competitor Petrolifera. Claimant based this assumption on the facts that the dates of the decree and the final prohibition coincide roughly with the dates of the settlement agreement, that Respondent had no objection to the operation of the tank farm until the end of the term of the lease, and that Respondent reopened the port of Shengjin although it had also be closed for so-called policy reasons.
546. The Tribunal notes that the closure of the port of Durres for petroleum vessels not only more or less coincides with the Petrolifera settlement but also with the opening of Porto Romano as the major port for petroleum products. The port of Durres was closed precisely when Porto Romano opened. To the Tribunal's mind, the parallel marks the completion of a long process of restructuring the Albanian maritime transport sector. It had been initiated by the IDA-credit and project and the resulting study by Louis Berger Inc. urging a new outlook for Durres. Other international public institutions such as the European Commission and the OPEC-Fund had contributed to the execution of the plan. One of its components was the creation of modern infrastructure in Porto Romano. It is well documented by reports established by these institutions that Albania had pursued this policy over the years. It is equally documented that Respondent has repeatedly offered

preferential sites in Porto Romano to Claimant and the other companies operating in Durres.

547. The process had taken longer than initially envisaged, but that comes as no surprise. It is consistent policy to execute a plan of reorientation of petroleum-carrying vessels once the conditions are met and the infrastructure is in place. That is what happened. Porto Romano is now the central port for petroleum products.
548. It was part of the policy as formulated in the course of the Berger study that no new investment for the operation of tank farms would be allowed in Durres. The Greek investors had obtained exceptional authorizations after negotiations assisted by the Greek government. During these years, the Greek companies enjoyed a privileged position over other international competitors such as Petrolifera, which were not allowed to profit from the existing infrastructure and advantageous location of Durres. It is understandable that these investors tried to push Albania to apply the Land Use Plan for Durres indiscriminately to all importers, including the Greek companies.
549. To the Tribunal's mind, Respondent's assurances in the settlement agreement reiterate foremost its general policy objectives, which had led it to ban Petrolifera from the port of Durres. Respondent promised to apply these objectives to all companies. That is not more than a confirmation of the pursuit of its general policy, as announced from the first articulation of the new Land Use Plan in discussions in various working groups and in a further public announcement by the Ministry of Economy, Trade and Energy, dated 6 October 2006.
550. The measure was not discriminatory against Claimant because it concerned all companies operating in Durres, and it is not discriminatory against Greek companies as a specific national group since the Greek companies had been the only ones allowed to operate in Durres as an exception after the intervention by the Greek government.
551. The Tribunal is not fully informed as to the reasons Respondent changed its plans with respect to the port of Shengjin. However, the policy objectives with respect to one port do not reflect on the soundness of policy objectives for the port of Durres, which Albania and its international partners had developed in a professional manner.
552. Finally, Respondent's assurances that it would honor the 20-year lease and not prohibit the use of the tank farm until the expiration of its term does not discredit its decision to close the port for petroleum vessels. It is the acknowledgment of the validity of a contract, which was executed before the change of policy and which Respondent is ready to perform to its term despite its lack of conformity with the new transport sector policy. It is evident to the Tribunal that Respondent would have also preferred to terminate the lease and close the tank farm in pursuit of its general policy. The fact that it decided not to go ahead with the

complete implementation of this policy and to honour its contractual obligations instead cannot be held against it.

553. However, the lease does not encompass a guarantee for vessels to unload petroleum products into the tank farm. This led to the less-than-optimal temporary situation that the implementation of the new policy for Durres had to be split into two phases, the first concerning the use of the port facilities in a strict sense, and the second concerning the site within the port area.
554. For all these reasons, the Tribunal has not seen any evidence supporting the allegation that Respondent had abandoned its Land Use Plan for Durres and used public policy considerations as a mere pretext.
555. With respect to the non-renewal of the trading license, the Tribunal notes that Claimant's presentation has evolved over time. Originally, it asserted that one of the measures contributing to the process of creeping expropriation was the "refusal" to grant the renewal.⁴³⁵ At a later stage, it asserted that it "*did not start a second application for a trading license*" because it could no longer meet the reserve requirements.⁴³⁶ Claimant accepted that it would have received the license had it applied for it.⁴³⁷
556. The Tribunal does not see how the non-application for a license by Claimant might qualify as a measure of creeping expropriation by Respondent.
557. As to the alleged impossibility to maintain a security reserve, the Tribunal disagrees with Claimant's contention. It is evident that the tank farm was there and fully usable for Claimant's purpose of depositing reserves. The fact that the reservoirs could no longer be serviced from the sea has no bearing on their storage capacity. The maintenance of the reserve stock does not depend on the constant "*possibility to refill the tanks*", as contended by Claimant⁴³⁸ but on the – uncontested – right to fill them once and for all with the quantity required for the reserve. The Tribunal does not find a causal connection between the non-application for the new trading permit and the storage capacity of the tank farm.
558. In light of these findings, the Tribunal must determine whether any or a combination of the following amount to an expropriation of Claimant's investment:
- the enactment of the new zoning plan for the port of Durres in June 2000, which had been announced to Claimant as imminent at the latest in November 1999;

⁴³⁵ Cl. Mem., para. 212.

⁴³⁶ Witness Statement of Mr. Kyriakos Mamidakis, para. 20, CE-57.

⁴³⁷ Cl. Rep., para. 101.

⁴³⁸ Cl. Rep., para. 255.

- the order of a temporary suspension of construction works in July 2000 which was lifted in December 2000 by an authorization to complete the construction and to start operations;
- the issuance of a wholesale trading license in February 2001, valid until it expired in February 2011, after Claimant had chosen not to apply for its renewal; and/or
- the prohibition to land and discharge petroleum products from vessels in the port of Durres, decreed in July 2007 and effective from July 2009.

559. Two preliminary remarks are appropriate. Claimant asserts that the measures destroyed the “*necessary stable legal framework for further investment*” as well as the initial expectation that it could operate the tank farm profitably until the expiration of the term of the lease.⁴³⁹ Claimant further contends that it does not matter that the measures have not directly taken any of its property rights because they have deprived them of all value because “*without the possibility to discharge tankers in the port the operation of the tank farm was completely uneconomical*”.⁴⁴⁰

560. Firstly, the Tribunal emphasizes that there are distinct standards of protection, with distinct requirements, under the BIT and the ECT. Damage caused by a violation of legitimate expectations, or by arbitrary measures, or by a destabilization of the legal framework, or by a lack of regulation and distortions of the fuel market may give rise to claims under either of the standards of fair and equitable treatment, or the the prohibition of discriminatory measures, or the most constant protection and security. However, they are not at the same time *per se* indicative of an illegal expropriation.

561. In order to be capable of being considered expropriatory – even indirectly – the consequences for the property must be substantiated in accordance with the specificities of the claim for expropriation. The simple allegation that (the lack of) policy measures “*made it impossible to earn any profits which could be distributed to Claimant*” does not suffice to elevate the description of conduct into the sphere of a loss of the investment. This is all the more so when, as here, Claimant did earn profit before the port of Durres was closed,⁴⁴¹ i.e. before the last of the alleged measures in the line of the alleged creeping expropriation was taken. The allegation that the lack of regulation and the distortion of the fuel market “*made it impossible to earn any profits*” is not supported by the evidence provided by Claimant.

⁴³⁹ Cl. Mem., para. 229.

⁴⁴⁰ Cl. Rep., para. 255; Cl. Mem., paras. 233-236.

⁴⁴¹ Cl. Mem., para. 230; also see CE-219.

562. Secondly, and more importantly under the circumstances of the present dispute, the BIT and the ECT expressly provide that not only the direct taking of property rights may cause expropriation but also measures tantamount to or having the effect equivalent to an expropriation. In the Tribunal’s view, this language encompasses indirect expropriation, which can be the consequence of one measure or compound measures. The Parties do not contest this principle.
563. That being said, the Tribunal has to determine whether the effect of the compounded measures amounted to an expropriation. The term “expropriation” is specific and not a synonym for damages that can be sought for the breach of other standards such as “fair and equitable treatment”, which require distinct conditions for a breach to be established.
564. In its affirmative presentation of the legal standard, Claimant relies on a number of awards, summarized above in the “Claimant’s Position”, where international arbitral tribunals held that measures that deprive an investor completely or in part of its property, or of its economic enjoyment, must be qualified as an expropriation. The termination of a free zone certificate, the revocation of a license, and unreasonable regulatory regimes are quoted as examples.
565. The Tribunal has read the cited awards carefully. Although not bound by them since binding precedent is alien to international investment arbitration, the Tribunal certainly respects and seeks guidance from legal opinions and interpretation expressed by learned colleagues.
566. The Tribunal holds that the decisive criterion for most tribunals that find expropriation is not the fact of having incurred a damage and/or the loss of value as such, but the finding – as stated in *Santa Elena v. Costa Rica* – “that the owner has truly lost all the attributes of ownership”.⁴⁴² As the tribunal in *El Paso v. Argentina* expressed in its award, which has been upheld in annulment proceedings, “at least one of the essential components of the property rights must have disappeared for an expropriation to have occurred”.⁴⁴³
567. The concept is clearly applied in *AES v. Hungary*. Claimant correctly quotes the tribunal in that case as stating that “it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value”.⁴⁴⁴ However, the

⁴⁴² *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 76.

⁴⁴³ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 245; cf. Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 22 September 2014.

⁴⁴⁴ *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 14.3.1. The Award has been upheld by the Decision of the *ad hoc* Committee on the Application for Annulment dated 29 June 2012.

tribunal goes on to state that “*the amendment of the 2001 Electricity Act and the issuance of the Price Decrees did not interfere with the ownership or use of Claimant’s property. Claimant retained at all times the control of the AES Tisza II plant, thus there was no deprivation of Claimant’s ownership or control of their investment*”.⁴⁴⁵ On this basis, the tribunal held that no expropriation had taken place.

568. The same rationale is found in the careful analysis of *Tecmed, Goetz and Middle East Cement* carried out by the tribunal in *El Paso v. Argentina*.⁴⁴⁶ It appears that in all of these awards, emphasis was laid not only on the fact that the investment lost value and the investor was deprived of benefits, but also that these effects resulted from a loss of one or several attributes of ownership.
569. The Tribunal concurs with this opinion. In its literal translation, expropriation describes a specific effect on property itself and not a damage inflicted to property. The effect can be a direct taking as it can be an indirect deprivation of one or several of its essential characteristics. These are traditionally defined by its use and enjoyment, control and possession, and disposal and alienation. If one of these attributes is affected, the resulting loss of value and/or benefit may lead to a claim for expropriation.
570. The definition of expropriation has developed over time and gone beyond the formalistic concentration on title. It encompasses the substance of property and protects the property even if title is not taken. However, a further extension into the sphere of damages, loss of value and profitability, without regard to the substance and attributes of property, would deprive the claim of its distinct nature and amalgamate it with other claims. Thus, a mere loss of value or a loss of benefits that is connected to and caused by the dissolution of at least one attribute of property, does not constitute indirect expropriation. The contrary approach would not only contradict the literal meaning of the term “ex-proprriation”, but would also be inconsistent with the clear intention of State parties when they entered into the BIT and the ECT and provided for separate standards of protection.
571. In sum, illegal conduct will not give rise to a claim for expropriation (though it may ground a different claim) if the the substance and attributes of property are left intact. Conversely, legal conduct may be expropriatory if the essence of property is touched, as set out above, and no compensation is paid.
572. The Tribunal agrees therefore with the tribunal in *El Paso v. Argentina* when it held:

⁴⁴⁵ *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 14.3.2.

⁴⁴⁶ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 249-253.

Regulations that reduce the profitability of an investment but do not shut it down completely and leave the investor in control will generally not qualify as indirect expropriations even though they might give rise to liability of other standards of treatment, such as national treatment or fair and equitable treatment.

In conclusion, the Tribunal, consistently with mainstream case-law, finds for an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of its investment. A mere loss of value, which is not the result of an interference with the control or use of the investment, is not an indirect expropriation.⁴⁴⁷

573. In applying these findings to the circumstances of the dispute, the Tribunal finds that Respondent has not expropriated Claimant's investment.
574. With the first incriminated measure – the enactment in June 2000 of the new Land Use Plan for the port of Durres – Respondent has executed part of an overall transport sector policy, which had been carefully prepared, with international professional and financial assistance, to modernize the country's infrastructure and to enforce environmental, social and economic policy goals. Claimant was aware of this when it started to construct the tank farm.
575. With the second incriminated measure – the order to suspend the construction a month after the enactment of the new Land Use Plan and the ensuing authorization to complete it as well as the issuance of the trading permit – Respondent has accommodated Claimant's request and laid the basis for a profitable operation under the circumstances, which Claimant pursued until after the closure of the port for petroleum vessels.
576. The operation was so successful that Claimant decided to buy out the minority shareholder in 2006 for a price of 1 Million USD and prepare its listing at the Alternative Investment Market (AIM) in London.⁴⁴⁸ When Claimant first suspended and later abandoned its plans to create a network of COCOs in 2001 and 2003, this decision was not motivated by the incriminated measures but "*in light of the unorthodox formation of the local market in Albania, contrary to our initial estimate, as well as the uncertain investment environment that this creates*".⁴⁴⁹ This statement documents that at the time and until the closure of the port of Durres, Claimant was far from thinking that the regulatory environment made it impossible to earn any profit. It recognized difficulties, which led it to change its strategy. This is different from a loss of any of the attributes of property.
577. Therefore, the Tribunal does not qualify these first measures as part of a process of creeping expropriation but as an appropriate enactment of public policy and a subsequent

⁴⁴⁷ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 255-256.

⁴⁴⁸ Cl. Mem., para. 66; Cl. Rep., paras. 61-65.

⁴⁴⁹ Claimant's Board of Directors Decision of 26/10/2001: CE-109; and Decision of 19 December 2003: CE-110 and RE-39.

accommodation of Claimant's interests. This view seems to be shared by Claimant's contemporaneous appreciation.

578. The third incriminated measure – the closure of the port for petroleum vessels – led, indeed, to a loss of value of Claimant's investment and a dramatic loss of benefits. It was, however, not the “*straw that broke the camel's back*” but part of the implementation of Respondent's public policy. The Tribunal is convinced that, contrary to its allegations, Claimant was aware of this future evolution when it started to spend money on the tank farm, that Respondent had never abandoned the policy, and that the continued motivation for the re-orientation and re-zoning of the port of Durres was this public policy and not the Petrolifera settlement agreement, which might have reinforced the motivation but did not create it.
579. The result of the measure was not Claimant's loss of any of the attributes of its property over the investment. Claimant remained entitled to continue to use, possess, control, and dispose of the property. It is not the Tribunal's task to evaluate business opportunities but to determine whether the dramatic losses of benefit are caused by the loss of one or all elements which constitute the essence of property. The Tribunal holds that this is not the case and that Respondent neither directly nor indirectly expropriated Claimant's investment.
580. The Tribunal therefore rejects the claim for expropriation.

6.2 Fair and Equitable Treatment

581. Article 10.1 of the ECT provides:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.

582. The BIT does not explicitly provide the standard of fair and equitable treatment. Claimant asserts that Respondent has conceded in the context of another investment treaty claim that the standard applies irrespective of a MFN-clause and contends that this is its general practice.⁴⁵⁰ Respondent has not expressly denied the assertion. It has answered in substance that Claimant had no legitimate expectations⁴⁵¹ and that no denial of justice occurred under Article 10.1 of the ECT.

⁴⁵⁰ Cl. Mem., paras. 243-244, with a reference to the *Pantechniki v. Albania* case.

⁴⁵¹ Resp. C-Mem., para. 243.

583. Based on the Parties' positions, the Tribunal hereinafter determines whether Respondent violated the standard of fair and equitable treatment as formulated in Article 10.1 ECT.

584. Claimant asserts that Albania:

- has failed to provide a stable and transparent legal framework;
- has failed to respect legitimate expectations;
- has failed to abstain from exerting pressure; and
- has denied Claimant justice.

585. The Tribunal will follow the structure of Claimant's presentation in its analysis.

6.2.1 The provision of a stable and transparent legal framework

6.2.1.1 Claimant's position

586. In its Memorial and in its opening statement during the evidentiary hearing, Claimant asserted that "*Albania failed to provide a transparent and stable legal framework to Mamidoil Albanian*".

587. In its development of the legal standard, Claimant relies on *Tecmed v. Mexico* where the Tribunal stated:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.⁴⁵²

588. Claimant is aware of the criticism of the *Tecmed* award and adds that the principle to provide a stable and transparent legal framework and administrative process is undisputed. This includes the necessary respect for due process, procedural propriety and the obligation

⁴⁵² *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; also *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/03, Award, 12 November 2008, para. 151.

to “give proper advance notice in respect to any measures that may affect the investment”.⁴⁵³

589. In this respect, Claimant quotes *Waste Management v. Mexico*, where the tribunal held:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimant if the conduct attributable to the State and harmful to Claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic and exposes Claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety— as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.⁴⁵⁴

590. Claimant alleges that neither Respondent’s legal framework nor its administrative application fulfilled the requirements of transparency and stability. It contends that “[e]ven for a country in transition, the legal framework was exceptionally unstable, unclear and contradictory”.⁴⁵⁵ In particular, Respondent breached its obligation:

- When it did not inform Claimant about possible plans for the port of Durres, which started to emerge with the conclusion of the contract with the international consultant under the IDA credit in December 1998, i.e. before the approval of the investment plan of 6 January 1999 and the execution of the lease contract in June 1999, and which finally led to the Land Use Plan of June 2000. “Claimant would not have entered into the Lease Contract – through its subsidiary – had Respondent acted openly and transparently about its future plan. No reasonable businessman invests several million USD into a project the legal future of which is uncertain”,⁴⁵⁶
- When it reduced the minimum storage capacity in 2002 which opened the market for “floods of competitors” that were no longer under the obligation to invest millions in a tank farm, and re-increased it in 2008, shortly before Claimant’s subsidiary stopped its business;⁴⁵⁷
- When it decided “to completely and finally shut down the port of Durres” without ever having ordered Claimant to relocate the tank farm or specified the conditions of relocation, although the trading permit was limited for that reason;⁴⁵⁸
- When it did not specify what permits would be needed and what would be their requirements.⁴⁵⁹

⁴⁵³ Cl. Mem., para. 254.

⁴⁵⁴ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (the Tribunal has added the omitted part of the sentence).

⁴⁵⁵ Cl. Mem., paras. 242-271; H. Tr., day 1, pages 70-75.

⁴⁵⁶ Cl. Mem., paras. 262 and 257-264.

⁴⁵⁷ Cl. Mem., paras. 157-160 and 265-266.

⁴⁵⁸ Cl. Mem., para. 269.

6.2.1.2 Respondent's position

591. Respondent refutes Claimant's arguments and contends as follows.

592. Respondent states that “[i]t is an uncontroversial and well established principle of international law that States are not liable to pay compensation for bona fide, non-discriminatory measures that are taken in the interest of the general welfare”. No State can be prevented from adjusting the body of its laws and regulations, institutions and infrastructure to meet evolving economic, political and social conditions and necessities, as long as the measures are not arbitrary or discriminatory.⁴⁶⁰

593. Respondent relies on *Saluka v. Czech Republic*, where the tribunal held:

It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.⁴⁶¹

594. Respondent argues that if Claimant had wanted to be protected against such changes, it could have negotiated for and concluded stabilization clauses. It failed to do so and must bear the consequences. This corresponds to the findings in *Parkerings v. Lithuania*, where the tribunal had held, in light of the uncertainties after the collapse of the communist system:

In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.

By deciding to invest notwithstanding this possible instability, Claimant took the *business risk* to be faced with changes of laws possibly or even likely to be detrimental to its investment. Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.⁴⁶²

595. Respondent contends that it was obvious that profound regulatory and infrastructural changes were imminent and unavoidable in Albania during the period of transition, not least in the transport sector prominently including the orientation and organization of the

⁴⁵⁹ Cl. Mem., para. 271.

⁴⁶⁰ Resp. C-Mem., para. 267; Resp. Rej., para. 347.

⁴⁶¹ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 255.

⁴⁶² *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 335-336.

seaports. The changes were indispensable for the sustainable economic development of Albania. They were crucial to overcome the country's previous isolation, facilitate its integration into the international market and trading system, implement sound environmental policy, and introduce safety standards for the ports' dilapidated infrastructure.⁴⁶³

596. Claimant not only must have been aware of the imminent reorientation of the port of Durres but was also explicitly informed along these lines before it started to implement its investment.⁴⁶⁴
597. Respondent never made any representation that Claimant would be authorized to use the port of Durres for discharging vessels carrying petroleum products for the totality of the term of the lease contract but, on the contrary, informed Claimant before its investment that this would not be the case.⁴⁶⁵

6.2.1.3 The Determination of the Tribunal

598. Claimant has categorized possible breaches of the fair and equitable treatment standard in four classes of cases, including the obligation to provide a stable and transparent legal framework and administrative process, both figuring in Article 10.1 of the ECT. The further classifications concern legitimate expectations, undue pressure and the denial of justice.
599. The classes of cases have developed in reaction to the fact that the terms "fair" and "equitable" are generic and vague. They offer no straightforward guidance to their application and must be interpreted to fit the circumstances of each particular dispute. It makes sense to classify them in this way since it seems evident that a lack of stability and transparency of the legal framework, the frustration of legitimate expectations, the exercise of undue pressure or a denial of justice may be considered unfair and inequitable. Still, it is important to keep in mind that the classification does not exonerate the Tribunal from its duty to determine whether, for instance, a given instability is at the same time unfair and inequitable.
600. Some authors have argued that the vagueness of the terms is not an inconvenience but, on the contrary, the secret of the success of the concept:

⁴⁶³ Resp. Rej., paras. 348-351.

⁴⁶⁴ Resp. C-Mem., para. 249; Resp. Rej., paras. 326-329.

⁴⁶⁵ Resp. Rej., para. 333.

The irony is that the substantial interpretative uncertainty inherent in the meaning of treatment that is *unfair and unreasonable* may well be one of the reasons for its successful adoption.⁴⁶⁶

601. Be that as it may, the Tribunal agrees with the ad hoc committee in the *MTD v. Chile* annulment decision that “*the vagueness inherent in such treaty standards such as ‘fair and equitable treatment’ [should not] allow international tribunals to second-guess*”.⁴⁶⁷
602. Rather, the Tribunal is bound to give meaning to the vague terms using the guidance provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969. Accordingly, it will interpret the terms “*in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose*”. (Article 31.1). However, it would widen the criteria of interpretation if it found that this approach would lead to “*manifestly absurd or unreasonable*” results (Article 32 (b)).
603. The Tribunal has looked for and found assistance in awards and decisions that the Parties have submitted. However, this assistance is not only limited by the fact that international arbitral tribunals are under no obligation to rely on precedents, but also by the lack of a *jurisprudence constante*.
604. Tribunals have tried to give meaning to the terms by circumscribing them with other terms such as ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’, ‘idiosyncratic’, ‘a manifest failure of natural justice in judicial proceedings’ and a disregard of ‘procedural propriety’.⁴⁶⁸
605. Laudable as these efforts are, they add only limited precision and concretization. They seek to refine abstract concepts, although – as correctly stated in *Lemire v. Ukraine* – “[t]he evaluation of the State’s action cannot be performed in the abstract”.⁴⁶⁹
606. It is therefore not surprising that tribunals have sought to specify the meaning by trying to find inspiration in the purpose and objective of the treaties. One of the often-quoted statements is the *Tecmed* standard as presented by Claimant in paragraph 587 and as applied by *MTD v. Chile*.⁴⁷⁰ The tribunal in that case arrived at that statement in assessing the purpose of investment protection treaties to promote and protect international investments. It found that the purpose leads to an obligation of the States to have their

⁴⁶⁶ CLA-4, page 263.

⁴⁶⁷ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 108.

⁴⁶⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 303-308; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, para. 98.

⁴⁶⁹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 285.

⁴⁷⁰ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 115.

policy and conduct guided by a proactive approach to protection and promotion of the investor and its investment.

607. As recognized by Claimant, the *Tecmed* and *MTD* approach has come under criticism. In the *MTD* annulment decision, the *ad-hoc* Committee found:

According to Respondent, “the *Tecmed* programme for good governance” is extreme and does not reflect international law. [...]The Committee can appreciate some aspects of these criticisms. For example the *TECMED* Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations [...] is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.⁴⁷¹

608. In *Lemire v. Ukraine*, the tribunal insisted that “[t]he evaluation of the State’s action cannot be performed [...] only with a view of protecting the investors rights”.⁴⁷²

609. In *Saluka v. Czech Republic*, the tribunal found as follows:

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.

Seen in this light, the “fair and equitable treatment” standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors.⁴⁷³

610. In a first step to its assessment of the fair and equitable standard, and in light of the controversial debate among tribunals, the Tribunal affirms that the vagueness of the terms does not entitle tribunals to create a new standard of international law in disregard of the terms of the applicable treaties, generic as they may be.

611. The interpretation is guided by the Vienna Convention on the Law of Treaties, and starts with the ordinary meaning of the terms of a given treaty, before a tribunal considers their context and the object and purpose of the treaty. Generally speaking, investment treaties

⁴⁷¹ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 108; the opinion is positively referred to in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 600.

⁴⁷² *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 285.

⁴⁷³ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 300-301.

aim at the stimulation of cross-border investment in order to foster economic relations between the treaty partners and economic development in the partner countries.

612. The Tribunal finds it helpful to stress that the standard broadly applies to investments that are made in the territory of the host State. The standard creates the obligation under international law to exercise sovereign power in a way which is not atypical, surprising or specific to the treatment of foreign investors. In fact, the policy of the modern State encompasses a general responsibility to provide long-term physical and social infrastructure such as public transport, including sustainable port facilities, in the general interest, as well as to create and maintain public services and a judiciary that does not deny justice.
613. The standard is thereby oriented to predictability of the legal system and to due process. Modern history in general and recent Albanian economic history in particular demonstrate that both inadequate over-regulation and under-regulation may lead to crises that hinder economic development and the creation of common wealth.
614. Policy in the general interest has to take the variety of social and economic interests into account, so that individual interests can be safely pursued. It is in this perspective that the Tribunal subscribes to findings in arbitral awards according to which the obligations of States under investment protection treaties cannot be appraised with only a view to the protection of foreign investors' rights. The fair and equitable standard brings foreign investors into the normative sphere of rational policy in the general interest. It is not meant to favor the investors' interests over other economic and social interests. In fact, a one-sided policy of favoring one social group over another may have the opposite effect than the one intended. An exclusive focus on the protection of foreign investment would entail the dangers, as stated by *Saluka*, that States would be dissuaded from protecting foreign investment and, at the same time, access to public goods and services would be impeded. Both may be detrimental for foreign investors in the long run.
615. The international legal standard of fair and equitable treatment guarantees the investors' even-handed access to a State's public services and infrastructure, maintained in the general interest. Sustainability through stability and transparency are part of these services in a broad sense.
616. These general findings lead the Tribunal to another criterion for the assessment of a stable and transparent legal framework as part of the fair and equitable standard.
617. Economic, social, environmental and legal circumstances and problems are by their nature dynamic and bound to constant change. It is indispensable for successful public infrastructure and public services to exist that they are adaptable to these changes. Accordingly, State policy must be able to evolve in order to guarantee adequate

infrastructure and services in time and thereby the fair and equitable treatment of investments. The legal framework makes no exception.

618. The Tribunal is reassured of its view by findings of other arbitral tribunals. Claimant has introduced *AES v. Hungary* into the proceedings where the tribunal found:

The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.

Therefore, to determine the scope of the stable conditions that a state has to encourage and create is a complex task given that it will always depend on the specific circumstances that surrounds the investor's decision to invest and the measures taken by the state in the public interest.

In this case, however, the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur.

[...]

In these circumstances, absent a specific commitment from Hungary that it would not reintroduce administrative pricing during the term of the 2001 PPA, Claimants cannot properly rely on an alleged breach of Hungary's Treaty obligation to provide a stable legal environment [...]. This is because any reasonable informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the time.⁴⁷⁴

619. In a similar vein, the tribunal in *Lemire v. Ukraine* stated that the State's obligation to offer a stable and predictable legal framework must be balanced against other legally relevant interests such "*as the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors*".⁴⁷⁵ In *Saluka v. Czech Republic*, the tribunal affirmed:

No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.⁴⁷⁶

620. The necessity of balancing is clearly expressed in legal literature:

The interpretation of fair and equitable treatment must take into account legitimate public interests in regulating investments to achieve national objectives and the enforcement of laws.

⁴⁷⁴ *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 9.3.29, 30, 31, 34; similarly *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, paras. 331-332.

⁴⁷⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 285.

⁴⁷⁶ *Saluka Investments, B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 305.

At the same time, it must be recognized that the express purpose of IIA's is to promote and protect investments and that fair and equitable treatment must be read in that context.⁴⁷⁷

621. It is in this sense that even when legislative changes seem legitimate, they must not have the character of a continuous oscillation and unpredictability.⁴⁷⁸
622. Before turning to a balanced application of the standard to the circumstances of the case, the Tribunal needs to address two more criteria, which are important for its general assessment.
623. The first criterion concerns the question of whether the specific situation of Albania is of relevance for the interpretation of the fair and equitable standard in general and for the obligation to provide a stable and transparent legal framework in particular. The question arose in *Parkerings v. Lithuania* where the tribunal held:

In the view of the Tribunal, Claimant [...] was without doubt aware that the business environment [...] were not certain. In fact, it would have been foolish for a foreign investor in Lithuania to believe, at that time, that it would proceed on stable legal ground, as considerable changes in the Lithuanian political regime and economy were undergoing.

[...]

In principle, an investor has a right to a certain stability and predictability of the legal environment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment to adapt to the potential changes of legal environment.

[...]

In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.⁴⁷⁹

624. Legal doctrines makes a similar reflection, albeit for a different claim, taking the view that each State has to exercise an objective minimum standard of due diligence that is linked to the circumstances within the State in question:

⁴⁷⁷ CLA-4, page 268.

⁴⁷⁸ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 250.

⁴⁷⁹ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 306, 333, 335.

In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.⁴⁸⁰

625. The Tribunal believes that these considerations are pertinent in the present circumstances. At the relevant time, Albania had just overcome a highly repressive and isolationist communist regime where the rule of law, administrative procedures, and independent judiciary had been destroyed and where environmental and social protection were irrelevant to the process of policy making. In addition, Albania had lived through a severe economic and financial crisis, which brought it to the brink of the complete collapse of its State structures. To avoid a bigger catastrophe, foreign troops had to intervene. Claimant knew the country well and had managed to establish business relations with the *ancien régime*. When it decided to invest, it was aware that the country was in a dilapidated situation, with its infrastructure run down and with its legal framework, regulation and independent justice absent and with no stability. As Claimant has stated, “[e]ven for a country in transition, the legal framework was exceptionally unstable, unclear and contradictory”.⁴⁸¹ It was obvious that the country was trying to get on its feet and build the rule of law and democratic institutions. It had made some initial steps to provide an infrastructure that would allow private investors, national as well as international, to pursue structured and sustainable business activities.
626. The Tribunal holds that these circumstances matter. An investor may have been entitled to rely on Albania's efforts to live up to its obligations under international treaties, but that investor was not entitled to believe that these effort would generate the same results of stability as in Great Britain, USA or Japan.
627. This is partly the case because the governance was weak, as vividly described by Claimant's legal expert, Prof. Dobjani.
628. It is also so because Albania had to build a basic, modern infrastructure such as transport and port facilities practically from scratch and with extremely limited resources. Albania had to draft new laws and start to implement them. It had to build a modern State administration, again with limited internal and financial resources. Under the circumstances, it had to rely on international expertise and financial assistance.
629. Both aspects, the heritage of the past as well as the overwhelming necessities of the present and future, must be taken in consideration when determining the obligation to provide a stable and transparent legal framework. In fact, it would have been irrational in 1998/1999 to insist that Albania maintained the stability of its legal framework, proceedings and

⁴⁸⁰ CLA-4, page 300.

⁴⁸¹ Cl. Mem., para. 247.

general conditions as a *status quo* because this would have condemned the perpetuation of an inadequate system that was still deeply entrenched in communist traditions. The Tribunal concurs with *Saluka v. Czech Republic*, where the Tribunal held that “*expectations, in order to be protected, must rise to the level and reasonableness in light of the circumstances*”.⁴⁸²

630. The argument leads to another, interrelated problem. This concerns the relevance of Claimant’s conduct prior to and during the execution of the investment and its relevance to the establishment of the threshold for finding a violation of the FET standard, both with respect to legitimate expectations in general and to the stability and transparency of the legal framework in particular.
631. In *Biwater v. Tanzania*, the tribunal had held that “*countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct*” must be taken into account to determine the threshold of violation. Legitimate expectations are limited when “*an investor itself takes on risks in entering a particular investment environment*”.⁴⁸³
632. In *Lemire v. Ukraine*, the tribunal equally insisted that it had to take “*the investor’s conduct in the host country*” and in particular its “*duty to perform an investigation before effecting the investment*” into consideration, not as an element for the mitigation of damages but for the evaluation of the State’s conduct.⁴⁸⁴
633. In the same vein, the tribunal in *MTD v. Chile*, after having stated – in line with *Tecmed* – that the State had an obligation of proactive protection of the investment, affirmed as follows:

This conclusion of the Tribunal does not mean that Chile is responsible for the consequences of unwise business decisions or for the lack of diligence of the investor. Its responsibility is limited to the consequences of its own actions to the extent they breached the obligation to treat Claimants fairly and equitably. The Tribunal will now address the alleged Claimants’ lack of diligence and of prudent business judgment raised by Respondent.

The BITs are not an insurance against business risk and the Tribunal considers that Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance

⁴⁸² *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 304 (emphasis in original); also *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 99, and *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 81-82.

⁴⁸³ *Biwater Gauff (Tanzania) Limited. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 601.

⁴⁸⁴ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 285.

of the required development permits, are risks that Claimants took irrespective of Chile's actions.⁴⁸⁵

634. The Tribunal concurs with these findings. They reflect the specificities of the fair and equitable standard, which protects investors against a certain conduct, namely unacceptable and inappropriate changes of conditions and circumstances by the State. The investor is entitled to rely on the stability and transparency of the legal framework. However, the obligation of the State does not dispense the obligation of the investor to evaluate the circumstances. Reliance has at its prerequisite diligent inquiry and information. The investor has to understand the content and the context of the law and the administrative practice. Put differently, the standard is addressed to both the State and the investor. Fairness and equitableness cannot be established adequately without an adequate and balanced appraisal of both parties' conduct.
635. The Tribunal will now assess the facts of the case under these principles.
636. Claimant made its first visit to Durres and other ports of Albania in 1991. This was at a time when the Greek-Albanian BIT had entered into force and when the Albanian Government had started to implement a policy of welcoming foreign investment by promulgating a new foreign investment law and by advertising investment opportunities, notably in a brochure on the port of Durres which promoted investment.⁴⁸⁶
637. From 1994, Claimant vetted initial investment proposals. One was sent by fax to Mr. Artan Servani, a person who is not further identified,⁴⁸⁷ and another one by letter to the Minister for Industry, Trade and Telecommunication.⁴⁸⁸ Both proposals referred to the ports of Durres, Porto Romano and Vlora but indicated a preference for Durres. There was no written response to these proposals.
638. Claimant's witnesses testified unanimously that during their inquiries and investigations, regular meetings were held with high-ranking political officials of the Albanian government, including Ministers of the Economy, of Industry and of Energy as well as the Prime Minister. They assert that during these meetings they regularly received encouragement and support, and that Albanian partners urged them to apply for investment approval in the port of Durres.
639. The course of these preliminary interactions between Claimant and Respondent were described by Mr. Alexandros Mamidakis in his witness statement in the following terms:

⁴⁸⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 167, 178.

⁴⁸⁶ CE-132.

⁴⁸⁷ CE-135.

⁴⁸⁸ CE-60.

6. Based on a twenty year business plan, which we considered very reasonable, and numerous talks with government officials, we felt confident to invest in Albania. Initially we wanted to purchase land for our operations, but such an opportunity did not materialize. Alternatively, we looked at leasing a site for a planned tank farm.

7. The authorities recommended Durres as an investment site and assured us that the market conditions would soon improve (see meeting below with the Minister of Economy and the Minister of Energy). The site was previously also used for fuel tanks by the formerly state-owned petrol company. The port of Durres was our first choice as it not only offered the necessary general infrastructure but also a pipeline for the unloading of ships that was specifically built for the operation of tank farms. At the meetings, there was no alternative investment site discussed.

8. One of the meetings was held with the Minister of Economy (Mr. Anastas Angjeli) and the Minister of Energy (Mr. Bufi) in 1998. Present at the meeting was also Mr. Kalfas (Technical Consultant for Claimant) and Mr. Nikolaos Mamidakis (Managing Director). In this meeting, both Ministers encouraged us to apply for an approval to invest in tank farms in the port of Durres and assured us that the market conditions would soon improve and that the necessary licenses for the operation will be granted. [...] At these meetings, we also discussed our plans to establish an extensive retail-network. This included buying out existing petrol stations and also setting up new stations. Both Ministers were eager to convince us to invest in Albania. We applied to have our investment approved. After receiving the "go-ahead", we signed a lease agreement and about half a year later we began the construction of the oil tanks.⁴⁸⁹

640. The Tribunal has no reason to doubt that the meetings were cordial and encouraging and that Albanian partners expressed their positive attitude to foreign investment in general and to Claimant's investment in particular. However, Claimant has not presented any evidence in writing pointing to a specific commitment, no letter of intent, no agreed minutes, not even an internal memorandum or a letter reacting positively to the investment proposals made in 1994 and 1995.

641. In addition, when Claimant submitted its request to the Minister of Economy and Privatization on 3 July 1998 to approve the investment in Durres, it again received no answer. It took a reminder of the request some four months later, on 10 November 1998, and additional two months until Claimant received, on 6 January 1999, a six-line approval "in principle" signed by the Director of the Directorate of the maritime port under the Minister of Public Works and Transport.⁴⁹⁰ Claimant's legal expert, Prof. Dobjani has characterized the approval in principle as a statement meaning "*why not*" or "*it can be done, we are not against it*".⁴⁹¹

642. The Tribunal agrees with the view that

[t]he legal framework on which the investor is entitled to rely consists of legislation and treaties, assurances contained in decrees, licenses, and similar executive statements, as well as

⁴⁸⁹ CE-59.

⁴⁹⁰ CE-13.

⁴⁹¹ H. Tr., day 4, page 134.

contractual undertakings. Specific representations play a central role in the creation of legitimate expectations. Undertakings and representations made explicitly or implicitly by the host state are the strongest basis for legitimate expectations. A reversal of assurances that have led to legitimate expectations will violate the principle of fair and equitable treatment.⁴⁹²

643. However, assurances must be made if they are to be legally relevant. This is not a frivolous matter as it may have important consequences. The person to whom an assurance is to be imputed must be aware of the consequences of his or her actions, and the person who wants to rely on it must reasonably discern the commitment. A representation, even by conduct, must therefore amount to a clear and identifiable commitment, which is attributable to the person who makes the representation, and which is reasonably conveyed to the addressee. The Tribunal agrees with *Continental v. Argentina* and *El Paso v. Argentina*, where the tribunals found that “[p]olitical statements [...] create no legal expectations”.⁴⁹³
644. In the present case, the interaction between the Parties consisted of investment proposals of varied precision in 1994, 1995 and 1998, of which only the last proposal received a very general positive reply, without any detailed assurance, as well as meetings evidenced by witness statements of members of Claimant’s senior management which do not contain any substantive commitment. In the Tribunal’s view, this does not amount to specific representations and undertakings to assure the stability of the legal framework with specific reference to Claimant’s investment.
645. Some six months after the approval in principle, on 2 June 1999, the second document on which Claimant bases all its trust was issued, i.e. the lease agreement for a free site in the port zone of Durres for a period of twenty years. The site was handed over to Claimant on 1 September 1999, “for the investment of a fuel storage center”.⁴⁹⁴
646. The Tribunal finds that the contract and the conditions of transfer of the site as documented in the minutes are crucial and binding documents. They oblige Respondent to respect the term of the lease and to allow the storage of petroleum products as well as their use.
647. Claimant has argued that:

this [the lease contract] did not only include the expectation that it could build and operate the tank farm as planned for 20 years in the port of Durres; it of course also included the expectation that the tank farm could be delivered by ships. You will not find any explicit written document saying so, but tank farms are not built in ports by chance; they are built in ports because tankers arrive at port, and Durres was explicitly selected for its pier.

⁴⁹² Dolzer & Schreuer, *Principles of International Investment Law* (2d ed. 2012), page 371.

⁴⁹³ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 378; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 261.

⁴⁹⁴ CE-18.

648. The Tribunal does not share Claimant’s view. The lease contract is for a nominal monthly rent of 83,952 LEK. It specifies the purpose of the lease as “*setting up a fuel storage center according to the business plan attached*”. The business plan, in turn, does not mention the use of port facilities for tankers. The wording and meaning of these clauses and text taken together do not allow an interpretation that implicitly includes the right to discharge petroleum vessels in the port. The common intention of the parties to create such an important right and obligation for such a long period cannot be deduced on implied terms. It would have been made explicit, as a specific and detailed right and with probable repercussions on the calculation of the rent. For these reasons, the lease contract did not extend to the use of the port facilities.
649. The fact that Respondent was under no contractual obligation to keep the port open for Claimant’s vessels does not answer the question whether Respondent had an obligation under the FET standard to provide stability of the port regime and use for the period of the lease contract.
650. The Tribunal has pondered the Parties’ written and oral submissions. It has come to the conclusion that at the time of the request for and approval of the construction of the tank farm as well as the execution of the lease contract and the transfer of the site, i.e. until September 1999, both Parties believed that “[a]t the port of Durrës all sorts of goods, minerals, fuels, cements and other bulk articles are loaded and unloaded,”⁴⁹⁵ and would continue to be so in the future.
651. In applying its finding on undertakings, the Tribunal has found no assurances and representations by Respondent in the sense of a continued availability of the port facilities for petroleum tankers. There are no “decrees, licenses, and similar executive statements” to this effect nor can any conduct by Respondent be identified that may be interpreted as a representation. As stated, the terms of the lease contract do not allow the implication of terms that encompass the use of the port.
652. However, the Tribunal has no reason to doubt that Claimant believed in 1998-early 1999 that the Government had no plans to change the policy inherited from the previous regime and to modernize its maritime transport infrastructure for environmental protection and economic efficiency, and that it would not close the port of Durres for petroleum vessels.
653. The Tribunal has also no reason to doubt that Respondent had no such plans at the time. The Albanian Government had certainly embarked upon a transition to market structures, modernization and improvements of the country’s infrastructure, but specific plans to break with the past and transform the seaports of Durres, Porto Romano and other cities were most probably not on its mind.

⁴⁹⁵ Text of the promotion brochure for investments in the port of Durres, published in the early 1990ies.

654. Various international reports and governmental statements reveal that transport infrastructures in general and maritime transport infrastructures in particular were dysfunctional and severely run down. Concrete solutions, recommendations for a new orientation of public policy and the translation of these initiatives into national policies emerged only when international experts such as Louis Berger Inc., retained in December 1998 under an IDA credit, started to conduct systematic analyses and to elaborate comprehensive transport sector plans. The European Union provided other plans.
655. One such plan was the “Albanian National Transport Plan”, supported by the European Commission, and another more-specific one was the “Land Use Plan” for the port of Durres, which Louis Berger, Inc. presented in March 2000. The Albanian Government discussed the latter plan both with its international partners and internally. As a result, it rendered “Decision No. 294, dated 13 June 2000 for Approval of Plan Land Use in the Port of Durres”.⁴⁹⁶
656. The Tribunal has no doubt that this plan has remained in force until today. Its implementation took time, perhaps more time than expected, partly because the costly and complex infrastructure for petroleum products in Porto Romano had to be created from scratch. Difficulties and delays notwithstanding, Albania, with the ongoing expert support and financial assistance of international donors, has pursued a consistent policy of transport sector and regulatory reform including the Land Use Plan for the port of Durres. This is evidenced, to the Tribunal’s satisfaction, in various reports and reviews established by the Government and various international agencies such as the World Bank and the European Commission. The reports relate at the same time that the policy change had positive impacts for economic development and environmental protection.
657. The Tribunal holds that it was within the realm of Respondent’s sovereign power to adopt the Land Use Plan for Durres, change the zoning regulations and prohibit the unloading of petroleum cargo. The measures pursued a legitimate objective of public policy, were carried out in a transparent way, were proportionate and not arbitrary, and did not lead to unreasonable instability, as developed below.
658. At the relevant time, Claimant was aware that the country’s infrastructure was in a very bad state and that its regulatory system was completely inadequate. Albania had to overcome the heritage of its isolationist communist system in order to achieve a normal economic, social and ecological development. Conscious of its weaknesses, Albania asked international development agencies for advice and assistance to formulate a coherent public policy for the transport sector. It received the advice, reviewed it, made it its own evaluation and implemented policy with positive long-term results, which taken together

⁴⁹⁶ CE-21.

improved the general investment environment and the protection of investments in Albania.

659. The Tribunal is not fully aware of the chronology of the Louis Berger, Inc. study and report. After the execution of the contract, the experts started their work in early 1999 to submit a final report and recommendations in March 2000. It seems plausible that after having collected the necessary data, they started to draft a first set of recommendations, which they shared informally with Albanian officials. The evidentiary record shows that long before these recommendations were finalized, the port authorities approached Claimant and the other investors that had an interest in Durres. They strongly advised them to suspend their investments until the official results of the study were known and policy measures were taken. The port authority wrote a first letter to this effect on 17 November 1999. The letter refers to prior oral notifications. The Tribunal has no reason to assume that this statement is incorrect. The Tribunal sees this as efforts to act transparently in the preparation of its regulatory adjustments for a modern infrastructure.
660. The Tribunal finds that Respondent has made various efforts to attenuate the consequences of its legitimate policy choices for Claimant. When Claimant received the first warnings about the possible transport policy and land use changes, it had not yet started to construct the tank farm. Claimant's statement that only "*when nearly all of the money was sunk into the bottom, government came and said, 'Well, we are sorry, but we now have completely different plans for Durres'*"⁴⁹⁷ is not correct. Further, in order to accommodate Claimant's interest, it suspended the implementation of the Land Use Plan, allowed the termination of the construction of the tank farm and the landing, and permitted the discharging of petroleum tankers until 2009, the date of the opening of the petroleum port in Porto Romano. During that period, Claimant operated its tank farm profitably. At the same time, Respondent repeatedly offered preferential treatment in offering Claimant a site in this new port. The implementation of the Land Use Plan did not "*entirely transform and alter the legal and business environment under which the investment was decided and made*", as was the situation found by several tribunals in the context of the Argentine crisis.⁴⁹⁸ Respondent rather pursued the modernization of its economy and transport sector in a gradual way. The Tribunal takes the view that, even where certain shortcomings may have existed in Respondent's "good governance", as described by Professor Dobjani, Claimant's legal expert,⁴⁹⁹ Such shortcomings do not amount to a violation of the obligation to provide a stable and transparent legal framework.

⁴⁹⁷ H. Tr., day 1, page 73.

⁴⁹⁸ The quote is from *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 275.

⁴⁹⁹ H. Tr., day 4, page 118.

661. The Tribunal further finds that Respondent did not treat Claimant arbitrarily when adopting the Land Use Plan in 2000 and closing the port for tankers in 2009. The measures did not affect Claimant alone but all companies operating in Durres. It is true that these were only Greek companies. However, this was because Greek operators had received preferential treatment after an intervention of the Greek Government in July 2000. No other investor had received a permission to operate in Durres after the Land Use Plan had been adopted. The fact that only Greek investors were affected by the closure of the port in 2009 is therefore not an expression of discrimination of one nation, but the consequence of the fact that they had previously obtained a privileged position.
662. Finally, the Tribunal finds that the policy and regulatory changes were not in violation of the obligation to provide stability of the legal framework. With respect to the elaboration, adaption and implementation of the Land Use Plan, Respondent has not enacted a multitude of regulations, and there has been no back and forth of ever-changing and contradictory norms or administrative processes. Respondent has, after consultation and reflection, decided to pursue a legitimate public policy for the port of Durres. The decision process as well as the implementation were guided by a long-term perspective and not by erratic considerations. Changes at the implementation stage did not change the content of the policy or the zoning plan. They were a response to difficulties in the field and had repercussions for that period only.
663. For these reasons, the Tribunal rejects Claimant's assertion that Respondent violated its obligation to provide a stable and transparent legal framework when (a) it changed the Land Use Plan for the port of Durres in 2000 and (b) prohibited petroleum tankers to land and be discharged at the port in 2009.
664. In its Memorial, Claimant asserted a further violation of the obligation to provide a stable and transparent legal framework based on Respondent's reduction of the minimum storage capacity in 2002 from 3000 m³ to 300 m³ followed by an increase back to 3000 m³ in 2008.
665. Claimant alleges that the reduction "*did not serve any legitimate purpose*".⁵⁰⁰ At the same time, it contends that the new regulation "*made it very easy for small local companies and individuals to engage in the wholesale trade*".⁵⁰¹
666. Respondent rejects these arguments and submits that the regulatory measures were aimed "*to enhance market competition*" and not at Claimant.⁵⁰²
667. Only limited evidence has been presented to the Tribunal on this issue. The Tribunal has difficulties to understand why the measures led to wholesalers not adhering to the

⁵⁰⁰ Cl. Mem., para. 267.

⁵⁰¹ Cl. Mem., para. 159.

⁵⁰² Resp. C-Mem., paras. 245-246.

minimum reserve requirement, as contended by Claimant.⁵⁰³ Was this the consequence of the Government measure or simple disregard of the law? Whatever the answer might be, and notwithstanding the scarcity of evidence, the Tribunal finds that opening the market to small local competitors is a legitimate public policy objective.

668. The measure opened a niche where large traders like Claimant would not operate, and it created opportunities of free competition. The measure might be considered experimental and at the margin of the market. In any event, the Tribunal has no means to appraise the overall result since Claimant has not provided any evidence to this effect. The Tribunal recognizes, however, that the introduction of the measure was transparent and that the measure remained in effect for five years. It seems to have been revoked in 2008 because of European requirements, and perhaps also because the desired policy effect had not materialized. The Tribunal does not characterize two changes in policy in the course of five years as evidence of instability of the legal framework.
669. For these reasons, the Tribunal rejects Claimant's assertion that Respondent violated its obligation to provide a stable and transparent legal framework when it decreased the reserve requirements in 2002 and increased them again in 2008.
670. In its Memorial, Claimant has asserted a further violation of the obligation to provide a stable and transparent legal framework, namely that Respondent failed to provide information to Claimant about the requirements for an environmental license and the construction permits.⁵⁰⁴
671. In the section of this Award concerning jurisdiction, the Tribunal dealt extensively with the different permits and licenses at issue. It has found that the various laws were transparent and clear, both for the procedures to follow and for the authorities to address. The Tribunal has also expressed its view that Claimant had a duty of due diligence to inquire about the law applicable for the permits, and it was established during the hearing that legal advice was available in Albania. Claimant's position that "*we don't need a lawyer*" is not acceptable.⁵⁰⁵
672. The Tribunal is aware that, during the period of Claimant's investment, the Albanian Government was still struggling with the consequences of the communist system and the severe financial crisis it had gone through afterwards. That said, even assuming a weakness of governance, this did not relieve Claimant of the obligation to pursue its own investigation, to the contrary. It was easy to understand the requirements for the application for the construction site permit and the construction permit under the Laws on Urban

⁵⁰³ Cl. Mem., para. 159.

⁵⁰⁴ Cl. Mem., para. 271.

⁵⁰⁵ Oral testimony of Mr. Kalfas, H. Tr., day 2, page 127.

Planning. These requirements, including the forms to be used for the applications, were transparent and remained consistent despite the enactment of a new law in 1998. Claimant has not tested the application of the law by Albanian authorities since it did not make proper applications.

673. As to the environmental permit, the “Law on Environmental Protection” of 2002 maintained the application procedures of its predecessor law of 1993. That is well documented by the fact that Claimant received the license, after a number of inspections and exchanges of correspondence, based on the original application, which predated the 2002 law.
674. The Tribunal does not discount the imperfections of the Albanian administration and the related lack of communication. However, these do not amount to a violation of the requirement of a stable and transparent legal framework in the context of the issuance of licenses and permits. This is because the legal texts were stable and transparent. In one case, Claimant decided not to act according to the law, and in the other case, it applied for a license according to the law and received it.
675. For these reasons, the Tribunal rejects Claimant’s assertion that Respondent failed to provide a stable and transparent legal framework when it introduced the new Land Use Plan for the port of Durres in 2000, when it changed the minimum reserve requirements in 2002 and again in 2008, when it closed the port of Durres for petroleum tankers in 2009, and when the issue of permits arose in 1999.

6.2.2 Legitimate expectations

6.2.2.1 Claimant’s position

676. Claimant also asserts that Respondent violated the FET standard by failing to respect Respondent’s legitimate expectations.
677. Claimant insists, based on *Tecmed v. Mexico* and *Saluka v. Czech Republic*,⁵⁰⁶ that the protection of the investor’s legitimate expectations is a fundamental and dominant element of the host State’s obligation to provide fair and equitable treatment.
678. Claimant presents its position as follows:

The underlying purpose of protecting an investor’s legitimate expectations is to enable a foreign investor to make rational business decisions in reliance on the legal framework as

⁵⁰⁶ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 301-302.

provided by the host state, as well as on the host state's representations and undertakings. As has been shown above, such representations and undertakings include representations by executive organs, in legislation, treaties, decrees, licenses, permits and contracts. An arbitrary reversal of such undertakings amounts to a violation of the fair and equitable treatment standard.

From the above, it follows that under international law and the BIT a host state is not allowed to frustrate the legitimate expectations of an investor by taking decisions and applying procedures that would damage an investment which was made on the basis of such legitimate expectations. If it nevertheless does so, it has to pay compensation.⁵⁰⁷

679. In support of its position, Claimant quotes *CME v. Czech Republic*, where the tribunal found that the State:

breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.⁵⁰⁸

680. Claimant also cites *Thunderbird v. Mexico*, where the tribunal held that when

a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.⁵⁰⁹

681. Claimant contends that Respondent's actions created a legitimate expectation on the part of Claimant. Respondent approved the investment, as detailed in its business plan, as well as the operation of the tank farm for 20 years in the Port of Durres. Although neither the lease contract nor the business plan explicitly refers to filling of the reservoirs by vessels, this was obviously part of the engagement based on the context, the wording of the lease contract and earlier correspondence. The unloading of tankers was an integral part of the business plan. Moreover, Claimant's expectations were re-affirmed when Respondent allowed the termination of the construction in December 2000.

682. Claimant asserts that Respondent breached its legitimate expectations, which resulted from Respondent's assurances on three occasions that Claimant "*was entitled to use the tank farm for 20 years as planned*". Contrary to the representations, (1) Respondent informed Claimant in June 2000 "*that it would in future no longer be allowed to operate the tank farm in Durres port*", (2) it granted only temporary permits and (3) it prohibited the discharge of fuel vessels beginning in 2009.⁵¹⁰

⁵⁰⁷ Cl. Mem., paras. 275-276.

⁵⁰⁸ *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award and Separate Opinion, 13 September 2001, para. 611.

⁵⁰⁹ *International Thunderbird Gaming Corporation v. Mexico*, ad hoc, UNCITRAL, Award, 26 January 2006, para. 147.

⁵¹⁰ Cl. Mem., paras. 283, 285, 286, 287.

6.2.2.2 Respondent's position

683. Respondent refutes Claimant's arguments and, in addition to the submissions summarized under paragraphs 586 to 590 of this Award, makes the following contentions.
684. Given the political, economic and social situation in Albania and the circumstances of the transition to an open-market system and integration into the international trade, Claimant had no legitimate reason to expect that the use of the port of Durres would remain unchanged for the total term of the lease contract. Claimant was only entitled to rely on the terms of the contract. At no time has Respondent questioned the validity of the contract, and it continues to respect its terms.
685. In particular, Respondent has never made any representation that Claimant would be authorized to use the port of Durres for discharging vessels carrying petroleum products for the totality of the term of the lease contract. On the contrary, Respondent informed Claimant as early as autumn 1999, before the implementation of the investment, that this would not be the case.⁵¹¹
686. The closing of the port for ships was not discriminatory. On the contrary, the authorization to operate in Durres was a privilege extended to Claimant and the other Greek companies for the first eight years of its operation. All other petroleum importers had not been allowed to settle in Durres in anticipation of the master plan, and the closing established an equal playing field in the execution of this plan.⁵¹²
687. The closing of the port was not arbitrary because it was motivated by the concern for protecting an overriding general interest.⁵¹³
688. In light of the agreement brokered in 2000 by the Greek government, Claimant was entitled to expect that it could remain in Durres until completion of the construction works in Porto Romano, terminate the construction of the tank farm, operate the tank farm, and fill the tanks by tankers until that time. It could further expect that the terms of the trading license would be honored. These expectations were fully respected and honored until 2009 "*to a point that others started complaining*".⁵¹⁴
689. Claimant has neither applied for nor received the licenses and permits which were indispensable for the legal construction and operation of the tank farm. "*Claimant never asked the Government to waive any of the necessary authorizations and approvals [...], acted illegally and must for this reason in and of itself be precluded from relying on any*

⁵¹¹ Resp. Rej., para. 333.

⁵¹² Resp. C-Mem., paras. 261-262, 282; Resp. Rej., paras. 358-360.

⁵¹³ Resp. C-Mem., paras. 277-281.

⁵¹⁴ Resp. C-Mem., H. Tr., day 5, pages 218-220.

expectations whatsoever, as illegality cannot give rise to a right, let alone a claim".⁵¹⁵ Indeed, Respondent neither waived nor forfeited its right and duty to insist on these permits prescribed by law to protect important public interests, nor did it make representations that it would not apply the law.

690. In this connection, it was Claimant's duty of due diligence to find out what permits were needed.⁵¹⁶

6.2.2.3 The Determination of the Tribunal

691. A first issue has already been treated: The Tribunal has not found explicit representations by Respondent assuring Claimant that it would be authorized to land and discharge tankers in the port of Durres.

692. In the same vein, the Tribunal finds it to be evident that Respondent did not assure Claimant that it would not need to comply with the legally prescribed licenses and permits.

693. Therefore, the Tribunal must examine Respondent's conduct and other circumstances that could justify the legitimacy of Claimant's alleged expectations.

694. Given the timeline of Claimant's investment, the intervention of the international donors and consultants, and Respondent's decision and actions, the Tribunal has first to determine whether there was a point at which legitimate expectations could have been created.

695. In broad terms, the Tribunal holds that legitimate expectations can only arise at the time the investment is made. Investors base their plans on circumstances and conditions as they find them, and they can only rely on conditions as they exist at that period. These factors can legitimately be taken into account when weighing the environment of the investment decisions. Subsequent developments are speculative and to be left out of this consideration. This extends as much to improvements in the legal and regulatory environment as to unpredictable deteriorations in the same.

696. Arbitral tribunals confirm this opinion. As expressed by the tribunal in *AES v. Hungary*, "*This rule that legitimate expectations can only be created at the moment of the investment, has been supported by several ICSID tribunals*".⁵¹⁷ Likewise, in *Duke Energy v. Ecuador*, the tribunal found that "*to be protected, the investor's expectations must be legitimate and*

⁵¹⁵ Resp. C-Mem., paras. 243 and 207-211; Resp. Rej., para. 323.

⁵¹⁶ Resp. Rej., paras. 330-333.

⁵¹⁷ *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.8.

reasonable at the time when the investor makes the investment”,⁵¹⁸ and in *LG&E v. Argentina*, the tribunal determined that “[i]n addition to the state’s obligation to provide a stable legal and business environment, the fair and equitable treatment analysis involves consideration of the investor’s expectations when making its investment in reliance on the protections to be granted by the host state”.⁵¹⁹ In the same vein, the *Tecmed v. Mexico* tribunal assessed what fair expectation Claimant might have “[u]pon making its investment”.⁵²⁰

697. In most cases, arbitral tribunals are not preoccupied with distinguishing between the time when the investor decides to invest and the time when it actually effects the investment.
698. In *Duke Energy v. Ecuador*, the tribunal first explained, “the legitimate expectations which are protected are those on which the foreign party relied when deciding to invest” and continues to state that it must be those at the time when the investor makes the investment.⁵²¹ In *Enron v. Argentina*, the tribunal found “that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest” to conclude thereafter that the decisive time was when the investment was “decided and implemented”.⁵²² The *Tecmed v. Mexico* tribunal took care to specify that the expectations existed at the time “when the agreement commenced to be performed”,⁵²³ and the *AES v. Hungary* tribunal found it crucial to determine when Claimant “actually began to invest in (spend money on)” the investment.⁵²⁴
699. The Tribunal notes that the instant case is distinct from the cited matters because in those cases the investor had decided to invest and had effectuated the investment by the time the host State took measures in alleged violation of legitimate expectations, which allegedly existed both at the time of decision to invest and when the investor began to spend money.
700. The present case is different insofar as the exact timing is of the essence. Claimant made its concrete decision to invest and requested the respective approval in June and November

⁵¹⁸ *Duke Energy Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340.

⁵¹⁹ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 6 October 2006, para. 127.

⁵²⁰ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 157.

⁵²¹ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 365 and 340.

⁵²² *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, paras. 262 and 264.

⁵²³ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 160.

⁵²⁴ *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.13.

1998; Respondent approved the investment in January 1999; the Parties executed the lease agreement in June 1999, with the site transferred in September 1999; the construction works, which would cost some 8 million USD, commenced in February/March 2000, were suspended in July 2000 with a completion rate of 80-85%, and were terminated in late 2000. In October/November 1999, Respondent informed Claimant that policy changes with respect of the use of the port of Durres were underway and strongly advised Claimant to suspend the works. In July 2000, Respondent ordered the termination of the works, based on the Decision of June 2000 to change the character of the port.

701. Given the specificities of this particularly narrow timeline, the Tribunal has to determine precisely whether there was a moment when legitimate expectations may have been created and would be owed protection.
702. The Tribunal understands that an investment is a long process and cannot be reduced to a specific point in time. The present case documents this statement perfectly: almost ten years passed between Claimant's first investigations in 1991 to the construction of the farm in 2000. The Tribunal agrees with *Schreuer* and *Kriebaum*, who state that “[t]he realization that an investment is often not a single right or an isolated transaction but a combination of rights and an integrated process of transactions is important also for the timing of the legitimate expectations upon which investment decisions rely. If the investment cannot be reduced to a onetime event but is seen as a process, the identification of the relevant time for the existence of legitimate expectations becomes more difficult”.⁵²⁵
703. The Tribunal has pondered the different arguments that could be used to pinpoint a precise moment for the emergence of the expectations. It believes in general that it has to take the objective of the standard into account. The standard has developed to protect an investor against unpredictable, unfair and unreasonable policy measures. At the outset, this impliedly recognizes a State's legitimate interest and right to change conditions reasonably for public policy purposes. Both aspects have to be balanced when establishing the right point in time during a long and complex process from when a State is restricted in the use of its sovereign power and the investor is protected.
704. While it remains difficult to arrive at an exact measurement, this reflection helps in a first stage to eliminate certain periods. It would evidently burden the potential host State disproportionately to protect expectations that the potential investor might have during first brainstorming activities and early field visits, such as Claimant's, with no precise plan in mind. Even when a precise plan is established, it would still not be reasonable to protect expectations related to the plan if the potential host State has not taken note of the plan and approved it. The reason is that during this period the potential investor retains its freedom

⁵²⁵ RLA-2, page 273.

and flexibility and is able to react to policy changes without material losses, while the potential host State has not yet expressed any commitment.

705. An argument can be made that once both parties have come to an agreement about the future investment, the expectations are properly defined and created, and the State is bound to respect them. This is certainly the case when the State has made representations as to the stability of specific conditions. It is less evident when no such representations exist, as is the present case. When weighing both parties' interests, it seems obvious that the potential investor still retains a considerable degree of flexibility and is able to desist at no or limited costs, while the State is asked to protect an investment that has not yet materialized.
706. The situation changes dramatically when the investment is actually made. At that point in time, the investor loses its flexibility and depends on consistent conduct of the host State, while the State is then limited in its ability to exercise its sovereign power in a way that deviates unreasonably from its previous conduct and changes the conditions on which the investor was entitled to rely. In fact, the actual implementation of the investment is more than a pure execution of a prior decision but rather is part of a continuous process and its accomplishment.
707. Therefore, the Tribunal finds it difficult to fix a precise point in time within a long process of decision-making and implementation. Rather, the evolving and gradual nature of the process has to be taken into consideration with an objective to balance both parties' interests. That leads to the necessity of a concrete appraisal of these interests when judging the host State's measures. The investor's flexibility is reduced the more it commits funds to implementation, and the gradual loss of flexibility increases the legitimate expectation of stability and protection, while the State, although retaining its right and duty to pursue public policy objectives, is obliged to respect the legitimate expectations by pursuing the objectives consistently, coherently and predictably.
708. In light of these considerations, the Tribunal will determine, in the context of specific measures, whether the approval of the investment in January 1999, the execution of the lease contract in June 1999, the transfer of the site in September 1999 and the construction of the tank farm in February/March 2000 created legitimate expectations. Rather than pointing to a precise day or hour as the decisive moment when expectations may have come into existence, the Tribunal finds that it is more appropriate to consider a period as a whole delimited, on the one hand, by the transfer of the construction site in September 1999, and on the other hand, by the start of the construction in February/March 2000. Claimant received the first warning notices while expectations were still not crystallized; the issuance of the new Land Use Plan and the order to suspend the construction occurred later and therefore fall outside this period.

709. The Tribunal has to determine the existence of legitimate expectations in relation to two types of State conduct.
710. The first issue concerns whether Claimant was entitled to legitimately expect at any moment between the approval of the investment in January 1999 and the construction of the tank farm in February/March 2000 that it would be dispensed from applying for and receiving the construction site permit, the construction permit and the exploitation permit.
711. Claimant's legal expert unambiguously answered a related question during an exchange in cross-examination:
- Dr. Gharavi: Mr Dobjani, just to follow up on the question and answer exchange with Mr Hammond, I trust you are not suggesting that tomorrow I can go to your country, build a tank farm without the permits, and if nobody catches me and finds out that I do not have the permits then I am okay, my operation would be legal? You're not suggesting this, correct?
- Mr. Dobjani: Of course not. I don't think you should ask me that question at all in fact.⁵²⁶
712. In confirming its jurisdiction, the Tribunal ascertained that the complete absence of application for the construction site permit and the construction permit and the incomplete application for the exploitation permit as well as the absence of these permits were illegal according to the Law on Urban Planning and the Law on Control and Regulation of the Construction Works. It equally found, after hearing both expert witnesses on Albanian law that the permits pertain to important economic, social and environmental objectives and cannot be dismissed lightly.
713. These findings notwithstanding, the Tribunal affirmed its jurisdiction because after the construction of the tank farm, Respondent did not draw the consequences it could have drawn. Rather, it offered to help with the legalization of the situation after the receipt of the necessary application from Claimant.
714. This conduct has no bearing on the determination of the legitimacy of Claimant's expectations, which may have arisen at any time between the approval of the request for the investment and the construction of the tank farm. The conduct post-dates the totality of the investment process. It is left out of consideration when ascertaining the expectations.
715. It is possible that at some point in time, Claimant started to hope that Respondent would not insist on the permits. However, this expectation cannot have existed when it built the tank farm in 2000. On the contrary, Claimant had announced in its request of 3 July 1998 that "[f]ollowing this approval, we will continue our job for [...] getting the respective

⁵²⁶ H. Tr., day 4, page 136.

permits for the accomplishment of the works".⁵²⁷ Respondent did not signal that it would waive this requirement by its behavior or in the approval letter or any other document.

716. Therefore, the Tribunal finds that the construction and the operation of the tank farm did not comply with Albanian law and were illegal. In the circumstances, Claimant is not entitled to rely on the perpetuation of its activities in illegal circumstances and cannot claim a violation of legitimate expectations with respect to the illegal operation of the tank farm. This finding is consistent with the Tribunal's earlier view that it has jurisdiction to hear the claims, given that Respondent had shown its willingness to consider a legalization once the respective applications were made. Absent such legalization, however, Claimant could not legitimately expect that it could continue its activities in Albania despite their illegality.
717. The second issue concerns the closing of the port of Durres for petroleum vessels from 2009. The Tribunal must determine whether Claimant was entitled to rely on the continued use of the port to fill the reservoirs until the term of the lease contract expired.
718. Again, the Tribunal will examine whether there is a time at which legitimate expectations may have been created. The exact moment is crucial because, between the approval of the investment in January 1999 and the transfer of the site in September 1999 on the one hand, and the implementation of the investment as from February/March 2000 on the other hand, Claimant received notices that a new Land Use Plan was under consideration and that the port of Durres might be closed for tankers.
719. The Tribunal is conscious that Claimant as well as Respondent, at the time of executing the lease and transferring the site in 1999, had proceeded on the assumption that the port would remain open for the transport of petroleum products. Claimant relied on this assumption, prepared the site and undertook the construction works beginning in February/March 2000.
720. At the same time, Claimant had not yet started to spend the 8 million USD, the cost of the construction of the tank farm. Claimant's affirmation that "[n]o reasonable businessman invests several million USD into a project the legal future of which is uncertain"⁵²⁸ is belied by Claimant, indeed, spending the money when it was aware that the legal future of the port of Durres was uncertain.
721. When Claimant received the first requests in October/November 1999 to suspend the works until the Government had made a final policy decision on the future of the port, under the advice of their international consultants, it had still a great deal of flexibility and

⁵²⁷ CE-15.

⁵²⁸ Cl. Mem., para. 262.

would not have suffered significant financial losses had it suspended the preparatory works. There is no doubt that Claimant would have had to return to a planning process that it had thought was closed. With Durres encumbered by the uncertainty of its future orientation, it would have had to re-consider alternatives such as Vlora and Porto Romano. It may have incurred additional time and – in the short run – lost opportunities in the emerging Albanian economy. It is, however, not excluded that it would have profited from the improved Albanian infrastructure in the medium and long term.

722. The improvement and modernization of such run-down and dysfunctional infrastructure was at the heart of policy preoccupations and planning priorities of the Albanian Government and their international development partners. They were legitimate and serious. They were communicated at a time when the suspension of the investment was still financially not too burdensome.
723. In the balancing of the Parties, the Tribunal believes that it has to give weight to the legitimate interest of the Albanian Government to modernize the infrastructure in the general interest, which ultimately encompasses all foreign investors' interests. This is because Albania had just emerged from a long period of communist stagnation, isolation and post-communist crisis. Both private investment and public infrastructure were needed at the same time, with some jostling effect.
724. When weighing both interests under the circumstances, the Tribunal finds that it must take Claimant's continued flexibility into consideration as well as Respondent's public policy imperatives. It is not true that – as alleged – Respondent changed its mind without warning when most of the money was sunk. Respondent informed Claimant, warned Claimant and reasonably requested a suspension of the works. By determining whether the construction of the tank farm by Claimant created legitimate expectations, the Tribunal must give meaning to these warnings.
725. Even if the Tribunal had found that legitimate expectations had plainly arisen when the investment was approved, the lease contract executed and the site transferred, and the warnings had come too late to have an impact, it would still need to determine whether the closing of the port violated Respondent's obligation to respect Claimant's expectations.
726. Other arbitral tribunals have found that the revocation of a license or the prohibition of a previously authorized activity or the withdrawal of an approval to invest breached the host States' obligation to respect the investors' expectations. The *Tecmed v. Mexico* tribunal found that the investor was entitled to rely on a license and that its revocation violated the obligation to respect its legitimate expectations even if national law authorized the State to

revoke a license.⁵²⁹ In *Eureko v. Poland*, the withdrawal of a consent to invest further was equally considered such a violation.⁵³⁰ The same result was reached in *MTD v. Chile* where the tribunal found that the revocation of an approval to invest frustrated legitimate expectations.⁵³¹

727. The above-mentioned awards have no direct relevance for the dispute at hand. The Tribunal notes that in all these cases the host States' actions targeted the investment itself and not the business environment. Transposed to the present case, the equivalent of the revocation of a license would have been the termination of the lease contract. The Tribunal has no doubt that Claimant had legitimate expectations that Respondent would not revoke the contract, and indeed Albania did not revoke the Lease contract. However, this is not the issue since the use of the port facilities is not part of the contract. The Tribunal has already rejected Claimant's allegation that the right to fill the reservoirs by ship was implied in the general rights under the lease.
728. Claimant could have negotiated an extension of the scope of the lease to the port facilities, or it could have requested a guarantee for their use during its term. It chose not to do so.
729. Moreover, as the Tribunal has already noted, Respondent did not make any representations or gave assurances that the port's use would remain unchanged.
730. Consequently, the Tribunal has to determine whether Claimant had a legitimate expectation to access the port as part of the general conditions and circumstances at the time of the investment which Respondent was bound to maintain.
731. As stated, the Tribunal has to balance Claimant's expectations and the State's right to regulate in the public interest. It is generally accepted that there must be more on Claimant's side than the subjective hope that nothing will change for the worse. The Tribunal agrees with the determination in *PSEG Global* that "*Legitimate expectations by definition require a promise of the administration on which Claimants rely to assert a right that needs to be observed*".⁵³² The promise may be implicit, and it encompasses the obligation to act consistently, diligently, even-handedly and transparently. However, the promise must exist and be identifiable under the circumstances in order to transform a subjective hope into objective expectations.

⁵²⁹ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 120-121.

⁵³⁰ *Eureko B.V. v. Republic of Poland*, Ad hoc, Partial Award, 19 August 2005, paras. 231-234.

⁵³¹ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 165-166.

⁵³² *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 241.

732. The Tribunal finds that the Albanian policy, supported by the international donor community and expert advice, is consistent and beneficial for investors and consumers in the long run. It had and has the objective of leaving the communist heritage of maritime transport infrastructure behind, rehabilitating and modernizing the port facilities of Durres with respect to environmental protection and in view of increased passenger and merchandise operations, and building modern petroleum-handling facilities in Porto Romano.
733. The implementation of this policy, which includes the closure of the port of Durres in 2009, does not offend a sense of propriety. In a different context, the Tribunal has already expressed its view that the fact that this decision accommodated the interests of competitors that had been barred from Durres from the beginning does not change this appreciation.
734. Even if Claimant did not expect this development to happen, it is not legitimate to insist that the old structures be perpetuated. When balancing both Parties' interests, Respondent's right to conduct a public policy of consistent modernization prevails. In any event, as explained above, Claimant was given repeated warnings about the change in Albania's policy.
735. The Tribunal therefore finds that Claimant had no legitimate expectations that it would be allowed to operate the tank farm in disregard of its obligation to apply for and obtain basic and important permits and licenses; nor could Claimant legitimately rely on the possibility of discharging petroleum vessels in the port of Durres for the total term of the lease contract. Both aspects have to be considered together. They reinforce each other. During the period ranging from the transfer of the site to the construction of the tank farm, Claimant may have hoped that the new policy would not affect it and that it may operate the tank farm without applying for and obtaining the required permits, which are determinative to the legality of the operation. At the same time, hope must not be confounded with legitimate expectation. When Claimant started to construct the tank farm, it could not legitimately expect that it would be allowed firstly to operate it without the permits and secondly to discharge tankers in Durres port when it was clear that the port would no longer operate. Consequently, Respondent did not violate its obligation to respect Claimant's legitimate expectations.

6.2.3 The alleged exertion of pressure

6.2.3.1 Claimant's position

736. Claimant asserts that the exertion of a State's pressure on an investor in order to achieve the renegotiation or rescission of an investment violates the obligation to provide fair and equitable treatment.

737. Claimant relies on a number of arbitral awards where the principle was clearly acknowledged. In *LG&E v. Argentina*, the tribunal held:

Argentina also has acted unfairly and inequitably in forcing the licensees to renegotiate public service contracts, and waive the right to pursue claims against the Government, or risk rescission of the contracts. Even though the Gas Law provided for the renegotiation of public service contracts, in practice there was no real renegotiation, but rather the imposition of a process.⁵³³

738. In similar terms, the tribunal in *Vivendi v. Argentina* reached the conclusion that

... while it would have been entirely proper for a new government with a different policy perspective on privatisation to seek to renegotiate a concession agreement in a transparent non-coercive manner, it is clearly wrong (and unfair and inequitable in terms of the BIT) to seek to bring a concessionaire to the renegotiation table through threats of rescission ...⁵³⁴

739. Claimant contends that Respondent “*prohibited the discharge of fuel tankers in Durres port*” when it realized in 2007 that Claimant “*would only agree to the relocation if it was compensated for frustrated investments and relocation costs*”. Respondent refused to offer compensation and “*used its governmental power to try and force Claimant's tank farm out of Durres*”.⁵³⁵

⁵³³ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 137.

⁵³⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.3; similarly: *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 450; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 163; *PSEG Global Inc. and Konya Ilgin Elektrik Āæretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 247, 252.

⁵³⁵ Cl. Mem., paras. 293, 292, 297.

6.2.3.2 Respondent's position

740. Respondent rejects/disputes Claimant's position. It asserts that the closing of the port of Durres was a *bona fide* regulatory measure taken for the general public welfare that had been announced since the initial adoption of the Land Use Plan for Durres in 2000.⁵³⁶
741. Moreover, Respondent never ordered Claimant to relocate to Porto Romano nor did it prohibit the use of the tank farm. Therefore, according to Respondent, there was no reason to exercise any pressure to achieve the relocation. Claimant decided not to apply for a new trading license and thereby provoked the end of feasibility of the investment.⁵³⁷

6.2.3.3 The Determination of the Tribunal

742. The Tribunal does not see in what way Respondent exercised "*coercion and harassment*"⁵³⁸ and forced Claimant to renegotiate the terms of its investment or to rescind it.
743. The contradictory positions of the Parties with respect to possible compensation for the costs of relocation of the tank farm to Porto Romano were clearly expressed from the beginning of the relevant period and never changed.
744. In one of the warning communications dated 15 February 2000, i.e. at around the time the construction started, Respondent reiterated its request to suspend the works on the reservoirs because "[i]ninstalling them would be of financial consequences to your company".⁵³⁹ Respondent defended this position consistently and transparently until the last communication on the issue in 2009.
745. During the same period, Respondent announced that it would close the port of Durres. The Land Use Plan of June 2000 contains this announcement, and the negotiated compromise of December 2000 foresaw that Claimant was authorized to discharge ships in Durres until the facilities in Porto Romano were completed. None of these documents refers to a duty of relocation. Rather, Respondent repeatedly offered Claimant a privileged site in Porto Romano for the eventuality that it would relocate but confirmed at the same time that it would not force Claimant to abandon the tank farm in Durres. On the contrary, it authorized Claimant to fill the reservoirs from the port as long as Porto Romano was not in operation. The Tribunal considers this a fair treatment under the circumstances.

⁵³⁶ Resp. C-Mem., paras. 275-282.

⁵³⁷ Resp. Rej., paras. 337-339.

⁵³⁸ *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 450.

⁵³⁹ RE-17.

746. The issue of missing permits is of no relevance in the present context. The local branch of Government raised this issue from 2001, and the central Government insisted anew on regularizing the situation of missing permits during a meeting of a working group on relocation in 2003. This conduct cannot be qualified as an exercise of coercion. Respondent reminded Claimant of its legal obligation, and Claimant, as developed in the previous section, had no legitimate expectation that the issue would be abandoned.
747. On the contrary, Claimant decided to spend the money for the construction of the tank farm despite the warnings. It expressed its willingness to relocate if Respondent was ready to compensate it for the costs of relocation. The Tribunal does not see a legal basis for such a claim.
748. In the Tribunal's view, the position of both Parties could not be clearer and more transparent. Both Parties maintained their positions, both were conscious of the each other's point of view, and neither could convince the other to change its position. Respondent did not coerce Claimant to change its mind.
749. The Tribunal therefore rejects Claimant's assertion that Respondent treated it unfairly and inequitably through the exercise of pressure to relocate the tank farm without compensation. The Tribunal notes, in addition, that Claimant never relocated its business in any event.

6.2.4 Denial of Justice

6.2.4.1 Claimant's position

750. Claimant asserts in its Memorial that Respondent "*also committed a denial of justice*".⁵⁴⁰ In its Reply, it explains that "*errors in judgments constitute a breach of the fair and equitable treatment standard' in terms of denial of justice if they amount to a 'clearly improper and discreditable' decision or include a 'clear and malicious misapplication of the law'*".⁵⁴¹ It quotes from *Mondev v. USA*, which provides:

The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that [the provision on fair and equitable treatment in treaties for the protection of investments] is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and

⁵⁴⁰ Cl. Mem., para. 298.

⁵⁴¹ Cl. Rep., para. 278.

discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.⁵⁴²

751. It also refers to *Pantechniki v. Albania*, where the tribunal found that only errors of a degree which no “*competent judge could reasonably have made*” constitute a denial of justice.⁵⁴³

752. Claimant explains further that it “*is generally acknowledged that denial of justice requires that the investor first exhausts local remedies as this concept refers to the incapability of the whole host state’s judicial system to provide the foreign investor with fair and equitable treatment*”.⁵⁴⁴

753. Based on this analysis, Claimant develops its

position that the Supreme Court judgement [sic] is improper and discreditable [sic], a judgement [sic] which no competent judge could reasonably have ever made. Claimant’s legal expert testifies that under Albanian law there had been two legal venues to claim reimbursement of unjustifiedly [sic] paid taxes. The incriminated Supreme Court judgement [sic] surprisingly changed this jurisprudence on which Claimant’s subsidiary had relied. It resulted in Mamidoil Albanian having lost all legal remedies against the unjustified taxation, being equivalent to an expropriation of those funds.⁵⁴⁵

754. Finally, Claimant informs the Tribunal that it made an application to the European Court of Human Rights (ECHR) in 2009, complaining about arbitrariness of and discrimination by Albanian court decisions because “[t]he Supreme Court has decided that this case enters within the administrative jurisdiction, so denying the applicant to receive a fair trial by a civil tribunal”.⁵⁴⁶ The ECHR has not yet dealt with the application and has not served it on Albania.⁵⁴⁷

⁵⁴² *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 Award, 11 October 2002, para. 127.

⁵⁴³ *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 94; the Claimant refers also to the following awards: *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paras. 102-103; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 132; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, para. 278; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 192.

⁵⁴⁴ Cl. Rep., para. 275.

⁵⁴⁵ Cl. Rep., para. 279.

⁵⁴⁶ CE-215.

⁵⁴⁷ Cl. Rep., para. 273.

6.2.4.2 Respondent's position

755. Respondent first refuted Claimant's claim "*of nothing more than a 5-line paragraph in the Memorial*" as unspecific and unsubstantiated.⁵⁴⁸
756. It later developed its position by arguing that Claimant's assertions are unfounded because they do not meet the generally acknowledged high standard for a successful claim for denial of justice, which comprises two considerations: "*First is the fact that the fair and equitable treatment standard is not an invitation to tribunals to review or to second-guess decisions made by host State courts. Second is the fact that a State's liability for breaching the fair and equitable treatment standard by denying justice to an investor will only be engaged if and when all remedies within the relevant judicial system have been exhausted*".⁵⁴⁹
757. In addition to the arbitral awards cited by Claimant, Respondent relies on several other arbitral awards in support of these two considerations.
758. Citing *Arif v. Moldova*, Respondent reiterates the warning that "*international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts*".⁵⁵⁰
759. Respondent insists that it is generally accepted that the threshold for denial of justice is high and subjected to "*an extreme test*".⁵⁵¹ This standard is only met when the incriminated court decision is "*clearly improper and discreditable*" and "*displays 'a wilful disregard of due process of law, [...] which shocks, or at least surprises, a sense of judicial propriety'*",⁵⁵² when "*the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions*".⁵⁵³
760. As to the second consideration, Respondent relies on *Arif v. Moldova*, where the tribunal held that "*as long as the judicial system is not tested as a whole, the fair and equitable standard is not violated via a denial of justice [...]. The State is not responsible for the*

⁵⁴⁸ Resp. C-Mem., paras. 284 and 285-288.

⁵⁴⁹ Resp. Rej., para. 370.

⁵⁵⁰ *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 441.

⁵⁵¹ *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 94.

⁵⁵² *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127.

⁵⁵³ *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 445.

*wrongdoings of an individual judge as long as it provides readily accessible mechanisms which are capable of neutralizing such judge.”*⁵⁵⁴

761. Respondent contends, in applying the standard, the decisions of the Supreme Court and the Constitutional Court of Albania have not denied justice to Claimant. On the contrary, when the Supreme Court overturned the decision of a first instance court that had accepted to hear a claim for the reimbursement of allegedly overpaid tax duties, it strictly applied Albanian law. According to Respondent, the Supreme Court correctly found that the claim was not ripe because Claimant had failed to follow the mandatory procedures of Article 249 of the Customs Code, according to which administrative procedures necessarily precede civil court proceedings. Respondent relies on the detailed legal expert opinion by Mr. Viktor Gumi. Along with Mr. Gumi, Respondent rejects Claimant’s legal expert opinion of Prof. Dr. Mariana Semini, who opined that Claimant had a choice to bring either a civil law claim for unjust enrichment before the civil courts or a tax claim before the administrative courts.
762. Respondent further contends that the Constitutional Court correctly rejected Claimant’s claim because it found that the Supreme Court had not violated any constitutional provision and had correctly applied the law.
763. Respondent finally asserts that Claimant has not exhausted national Albanian remedies. As indicated by the Supreme Court, it is still free to follow the appropriate administrative proceedings before bringing the claim to the courts.

6.2.4.3 The Determination of the Tribunal

764. The Tribunal confirms – in agreement with generally accepted jurisprudence and doctrine, which is not contested by the Parties – that a claim for denial of justice must not be confounded with an appeal against decisions of national judiciary. The Tribunal is not a super-appellate court. It has no competence to muse over the question of whether the majority of the Albanian Supreme Court was right when it overturned a decision of a first instance court, whether the first instance court had better reasoning or whether dissenters within the Supreme Court had the better reasoning. The Tribunal is also not a super-constitutional court with competence to correct the Albanian Constitutional Court’s application of the Albanian constitution. As correctly explained by Claimant, the standard of denial of justice in international law does not protect against possibly wrong decisions

⁵⁵⁴ *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 443; also: *Pantehniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 96-97; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 76; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 303.

of a court but against “*the incapability of the whole host state’s judicial system to provide the foreign investor with fair and equitable treatment.*”⁵⁵⁵

765. The Tribunal has studied the cited decision of the Supreme Court, the first instance decision and the decision of the Constitutional Court, as well as the opinions of the legal experts, who were not called for cross-examination during the hearing. The Tribunal understands that Albania – like many other civil law countries – distinguishes between civil courts and administrative courts. It further understands that in situations where a private physical or legal person complains under public law about the conduct and decisions of the administration, it has to address its claim first – again like in many other civil law countries – to the administrative body and its hierarchy. In Albania – again like in many other countries – tax law is part of the body of public law.
766. In the domestic proceedings, Claimant labeled its claim for the reimbursement of allegedly overpaid tax duties as a claim for unjust enrichment under the Civil Code. The court of first instance and the dissenting minority in the Supreme Court found that the claim was a civil law claim. The majority of the Supreme Court found that Claimant was not free to label its claim in this way, qualified the claim as a public law claim under the Customs Code, and decided that the mandatory pre-trial administrative procedure contained in the Customs Code was applicable. It went on to dismiss the claim because Claimant had not respected this procedure. The Constitutional Court did not find a violation of the constitution based on this series of events.
767. Claimant’s legal expert opined that the Supreme Court’s decision surprisingly deviated from previous case law according to which Claimant would have had an option of bringing the claim either before the civil court without a pre-trial administrative procedure, or before the administrative courts. She has not provided case materials in support of this opinion. In her view, the Supreme Court has denied Claimant justice. Respondent’s legal expert has opined that an option exists only under specific circumstances and that these circumstances are not met in the case at hand. He opined that the Supreme Court applied the law correctly and produced another decision of the Supreme Court that confirms this opinion. In his view, the Supreme Court has not denied justice and has acted in strict application of the law.
768. The Tribunal deems that it is not its role to make a final judgment over the disputed Albanian legal questions. Both legal experts have given reasoned opinions. The Supreme Court was divided over the correct answers. Both the majority and the dissenting minority have presented reasons for their decision and opinion. It is not the Tribunal’s role to take

⁵⁵⁵ Cl. Rep., para. 275.

sides. It has also not been given evidence to determine whether the Supreme Court deviated from former court practice.

769. However, a review of the material before it and a careful reading of the Supreme Court's decision enabled the Tribunal to conclude that it is not clearly improper, discreditable or in shocking disregard of Albanian law. The judgment is reasoned, understandable, coherent and embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures.

770. Therefore, the Tribunal rejects the claim for denial of justice.

771. Having dealt with all asserted sub-heads of claim under the FET standard, the Tribunal summarizes its finding by stating that Respondent has not violated its duty to provide fair and equitable treatment.

6.3 Unreasonable and Discriminatory Measures

772. The Albanian-Greek BIT does not provide for compensation against unreasonable and discriminatory measures.

773. Claimant bases its claim in this respect on Article 10.1 of the ECT, which provides that:

... no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.

774. As mentioned, Respondent has not objected to Claimant's reliance on the ECT as a basis for its claims and has answered in substance to Claimant's assertions. At the same time, it has taken the view that the ECT does not protect Claimant's investment because that investment is illegal.⁵⁵⁶

775. Having determined that the latter question is one of merits, the Tribunal will, based on the Parties' positions, determine whether Respondent violated its obligation not to impair Claimant's investment by unreasonable and discriminatory measures as formulated in Article 10.1 of the ECT.

6.3.1 Claimant's position

776. Claimant asserts that the standard is closely connected to the FET standard and that it is sufficient for a breach of obligation to occur when the measure is either unreasonable **or** discriminatory. Measures are unreasonable when "*they do not serve a rational purpose or*

⁵⁵⁶ Resp. C-Mem., para. 290.

are disproportionate” and are discriminatory when they treat a foreign investor and (local) competitors unequally.⁵⁵⁷

777. Claimant relies on *Saluka v. Czech Republic*, where the tribunal found:

The standard of ‘reasonableness’ has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is associated; and the same is true with regard to the standard of ‘non-discrimination’. The standard of ‘reasonableness’ therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of ‘non-discrimination’ requires a rational justification of any differential treatment of a foreign investor.⁵⁵⁸

778. Claimant alleges a significant violation of the standard by three distinct measures.

779. Firstly, Claimant contends that Respondent taxed the import of petroleum products unreasonably by assessing fictitious quantities in accordance with the bill of lading and not with the accurate shore outturn quantities. The difference in quantity is between 1 and 2%. This practice contradicted European law and international practice. Claimant suffered great material losses, repeatedly complained about this illegal practice and finally brought the dispute to Albanian courts where its valid claims were rejected.⁵⁵⁹

780. Secondly, Respondent acted unreasonably and discriminatorily when it closed the port of Durrës. The measure was not taken in pursuit of a rational public purpose; it was not meant to shut down the tank farm to build a container terminal, as Respondent contends, but was in fact aimed at favoring a local competitor and was taken to force tankers to unload in the new oil terminal in Porto Romano.⁵⁶⁰

781. Thirdly, Respondent acted unreasonably and discriminatorily when, beginning in 2008, it allowed local refineries and traders to sell lower quality diesel on the market than that which international traders were allowed to sell. The measure favoured the sole local refinery, which was in the process of privatization. The Constitutional Court invalidated the measure because it created a monopoly to the detriment of other operators.⁵⁶¹

6.3.2 Respondent’s position

782. Respondent refutes Claimant’s arguments as completely unsubstantiated, confused and unsupported by evidence. Claimant does not elucidate what taxes were overpaid, does not document any of the payments, evaluates the alleged damages at 1.4 million Euros at times

⁵⁵⁷ Cl. Mem., paras. 304 and 312.

⁵⁵⁸ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 360; for the ECT: CLA-5, page 109.

⁵⁵⁹ Cl. Mem., paras. 307 and 124-135; Cl. Rep., paras. 283 and 186-189.

⁵⁶⁰ Cl. Mem., para. 308.

⁵⁶¹ Cl. Mem., paras. 309-310 and 164-169; Cl. Rep., para. 284.

and at 360,000 Euros at others, and suggests at the same time that the claims have already been “*secured*”.⁵⁶²

783. Respondent contends further that the State has the sovereign power to decide on taxation and is not bound either by international practice or by European Directives, since Albania is not a member of the EU.⁵⁶³
784. With respect to the closing of the port of Durres for ships, Respondent has consistently asserted that it was the implementation of a long-standing policy decision that strictly served the public interest and did not privilege any competitor.
785. With respect to the diesel quality measures, Respondent alleges that they were only in force for 6 months until their invalidation by the Albanian Constitutional Court. Claimant has not proven that they significantly impaired its investment in such short period. Claimant’s allegations are unsubstantiated in liability and damage. In addition, according to Respondent, the measure was reasonable and not discriminatory. The Constitutional Court did not find otherwise, because the invalidation was based on the fact that only a law could introduce the resulting restriction of economic freedom and not – as was the case – a Decision of the Council of Ministers.⁵⁶⁴

6.3.3 The Determination of the Tribunal

786. The Tribunal understands that the imposition of import taxes based on fictitious amounts in bills of lading, and not on quantities actually discharged, favours the State over the taxpayer. It is not in line with international practice and contradicts a European Directive. In fact, one of the tasks of the EU Customs Assistance Mission to Albania was to bring the Albanian customs regime closer to European and international standards.
787. The Tribunal notes however that Albania is not an EU Member State and is therefore not bound by EU law. Further, the head of the EU Mission to Albania confirmed in 2005 that the customs authorities “*can legally use six different methods to calculate the value of goods for custom purposes*”.⁵⁶⁵ The fact that a tax is based on fictitious amounts is not unusual in tax law. The practice was already in place when Claimant started investing. The legal system might have been outdated and one-sided, oriented to favor the generation of tax revenues. That is a problem to be addressed in the reform of tax policy. If the State defines reasonableness of the tax law by the maximization of revenue, it is entitled to do

⁵⁶² Resp. C-Mem., para. 301; Resp. Rej., paras. 402-406.

⁵⁶³ Resp. C-Mem., para. 301; Resp. Rej., para. 407.

⁵⁶⁴ Resp. C-Mem., paras. 302-303; Resp. Rej., paras. 408-411.

⁵⁶⁵ CE-203.

- so. The approach does not amount to unlawfulness under international law, and the Tribunal has no authority to replace the State's policy rationale by its own.
788. The measure was also not discriminatory because it was evenly applied to all importers. The fact that some importers tried to circumvent it by falsifying the bill of lading does not change this conclusion.
789. If Claimant believes to have overpaid taxes under Albanian law, the proper remedy would have been to bring claims under Albanian law before the administrative authorities and courts. According to Claimant's witness Kyriakos Mamidakis, this is, indeed, what Claimant did. He testified that "[m]ost of these cases (*on extra tax and customs obligations*) have been brought to the court and decided in our favor".⁵⁶⁶ The Tribunal has no competence to hear these claims as long as justice is not denied, and the Tribunal has found that this was not the case.
790. For these reasons, the Tribunal holds that the tax measures do not amount to an unreasonable or discriminatory measure under international law.
791. With respect to the closing of the port of Durres to petroleum tankers, the Tribunal has already developed its opinion that the State's conduct bore a reasonable relationship to some rational policy. The rationality was not animated by plans to build a container terminal but by the desire to implement a rational master plan for the port of Durres as part of a general transport sector strategy. The government's intention to re-orient tankers to Porto Romano is not an expression of irrationality but fits into the overall rationality of that policy. Finally, the closure did not favour a local competitor because it concerned all importers of petroleum products.
792. For these reasons, the Tribunal holds that the closing of the port of Durres does not amount to an unreasonable or discriminatory measure under international law.
793. With respect to the changes of the diesel quality, whose standards the Albanian Government gradually raised, the Tribunal accepts that the measure was driven by rational policy decisions.
794. While Decision No. 147, dated 21 March 2007, reduced the sulfur content of diesel to 10 mg/kg from 1 January 2011,⁵⁶⁷ Decision No. 1110 dated 30 July 2008 extended the period for this obligation for diesel that was refined in Albania from "*crude oil, extracted from the sources within the Republic of Albania*" and marketed in Albania, by one year, until 1 January 2012.⁵⁶⁸ Decision No. 52 dated 14 January 2009 abrogated Decision No. 1110 and

⁵⁶⁶ CE-57, para. 18.

⁵⁶⁷ CE-39.

⁵⁶⁸ CE-40.

replaced most of its content specifying that only one local refinery, AMRO S.A.,⁵⁶⁹ would benefit from the temporary alleviations under certain conditions. At the same time, AMRO was authorized to refine and market a lower diesel quality until 31 December 2009, which other operators were not allowed to import. During that period, AMRO was privatized. The Constitutional Court determined that the special regime for AMRO restricted free access to markets as promised by Albania in the Stabilization and Association Agreement with the European Union, and restricted the economic freedom of competitors, which could only be done by law. It invalidated Decision No. 52 by a decision dated 24 July 2009.⁵⁷⁰

795. The Tribunal finds the government's policy to reduce the sulfur content in diesel gradually to be rational and reasonable. It also accepts that the decision to distinguish temporarily between international traders and the local trader marketing refined Albanian diesel bears the rationality of often-practiced industrial policy. The government's decision allowed the refinery of national crude oil, which operated under the *ancien régime*, to adapt to modern market conditions and competition. The Tribunal presumes that the Government was motivated by the intention to save a traditional national industry and employment. Such a policy, not unique to Albania, bears some rationality and is reasonable as long as the period of transition is relatively short, thus ensuring that the national privilege takes the interests of international competitors into consideration. It is noteworthy in this context that the final conditions were established by the proper functioning of the Albanian legal system, namely by checks and balances between the executive and the judiciary.
796. In the present case, the Albanian Government had decided to grant the local refinery temporary protection from international competition for one year. By decision of the Constitutional Court, this period was reduced to six months. The Tribunal believes that such a period is neither extravagant nor unreasonable. Although it prejudiced all international fuel operators for a short time, the Tribunal holds that, in the Albanian context, such a situation does not exceed the limits of acceptability.
797. The measure concerned all traders that did not operate a refinery at the same time. Similarly situated competitors were thus treated equally. The differing treatment was owed to AMRO's activity of refining locally extracted crude oil. The Tribunal holds that the differentiation was rational for a short period and does not amount to discrimination under international law.
798. The Tribunal therefore holds that Respondent's measures to calculate customs on quantities indicated in the bills of lading as provided by law, to close the port of Durres for tankers and to temporarily privilege a local refinery by differentiating between diesel qualities have not reached the level of unreasonableness and discrimination under

⁵⁶⁹ CE-42.

⁵⁷⁰ CE-114.

international law. Accordingly, Respondent did not violate its obligation under Article 10.1 of the ECT.

6.4 The Provision of Most Constant Protection and Security

799. The Albanian-Greek BIT does not provide for recovery against the failure to provide protection and security.
800. Claimant bases its claim on Article 10.1 of the ECT, which provides that “*investments shall also enjoy the most constant protection and security*”.
801. Respondent has not objected to Claimant’s reliance on the ECT as a basis for its claims, and has answered in substance to Claimant’s assertions. At the same time, it has taken the view that the ECT does not protect Claimant’s investment which was made is illegal.⁵⁷¹
802. Having determined that the latter question is one of merits, the Tribunal will, based on the Parties’ positions, determine whether Respondent violated its obligation to provide the most constant protection and security to Claimant’s investment, as formulated in Article 10.1 of the ECT.

6.4.1 Claimant’s position

803. Claimant contends that “*Respondent deprived Claimant’s investment of the necessary protection and security by failing to enforce its legal framework, especially regarding fuel smuggling, tax evasion and fuel adulteration.*”⁵⁷²
804. It asserts that the standard extends beyond mere physical safety and security and that “*the protection required must be broader.*” It relies on *Vivendi v. Argentina II*, where the tribunal found:

If the parties to the BIT had intended to limit the obligation to ‘physical interferences’, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.⁵⁷³

⁵⁷¹ Resp. C-Mem., para. 290.

⁵⁷² Cl. Mem., paras. 318, 115-123 and 161; Cl. Rep., paras. 287-293 and 170-185.

⁵⁷³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.15; similarly: *CME Czech Republic BV (The Netherlands) v. Czech*

805. Claimant acknowledges that fuel smuggling and quality adulteration already existed when it invested but contends that the situation worsened from 2003 since the Government was incompetent and unwilling to make serious efforts to combat it. Formal adherence to international organizations and institutions did not change the practice in substance. Respondent recognized these facts in theory but nevertheless let the events occur. It is common knowledge that officials above the ministerial level were implicated in smuggling and adulteration and enriched themselves. They allowed local competitors to declare fuel as being in transit, when in reality they sold it on the local market or declared lower quantities and qualities. Both schemes were common and used to avoid taxes.
806. According to Claimant, repeated requests to improve the situation by concrete measures of control and prohibition of certain practices, such as loading fuel from vessels to trucks, remained unanswered, and even the EU Customs Assistance Mission endorsed the illegal practices that gave rise to smuggling. In its 2004 Report on the Stabilization and Association Agreement, the EU acknowledged that “*smuggling and trafficking continues to be a serious problem*”.⁵⁷⁴
807. All of these actions allegedly caused serious distortion to the fuel market and led to significant losses to honest operators like Claimant.⁵⁷⁵

6.4.2 Respondent’s position

808. Respondent refutes Claimant’s arguments on law and on fact. It insists that

[i]t is an undisputed principle under international law that the obligation to provide full protection and security is not absolute, and does not imply a strict liability on behalf of the host State. Indeed, a significant number of international tribunals have considered that customary law merely requires the State to exercise due diligence under the standard of protection and security, explicitly rejecting the application of strict liability. Importantly, the standard does not protect foreign investments against every possible loss of value that may occur.⁵⁷⁶

809. Respondent relies on *Tecmed v. Mexico*, where the tribunal found that “*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it*”,⁵⁷⁷ and on *Electrabel v. Hungary*, where the tribunal, referring to *El Paso v. Argentina* where the tribunal held:

Republic, UNCITRAL, Partial Award, 13 September 2001, para. 613; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 303.

⁵⁷⁴CE-209, page 22.

⁵⁷⁵Cl. Mem., paras. 116-123; Cl. Rep., paras. 173 and 170-185.

⁵⁷⁶Resp. C-Mem., para. 307; Resp. Rej., para. 417.

⁵⁷⁷*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 177; similarly: *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No.

The case-law and commentators generally agree that this standard imposes an obligation of vigilance and due diligence upon the government. [...] It should be emphasised that the obligation to show “due diligence” does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is “reasonable” or “due,” depends in part on the circumstances.⁵⁷⁸

810. In addition, Respondent asserts that the standard concerns primarily the physical integrity of an investment. It refers to *Saluka v. Czech Republic*, where the tribunal held that it is essentially limited to cases in which “*the foreign investment has been affected by civil strife and physical violence*”, and is “*not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force*”.⁵⁷⁹
811. In applying the standard to the present case, Respondent alleges that Claimant was fully aware that Respondent was “*emerging from economic chaos and facing considerable challenges*”⁵⁸⁰ when it made its investment. Further, Claimant’s decision to suspend and then abandon its plans to develop its own retail network was apparently not influenced by the smuggling and related activities because it was taken in 2001, whereas Claimant started to complain about smuggling in 2003. Finally, Claimant paid 1 million USD in 2006 to acquire the minority participation in its Albanian subsidiary “*which does not give rise to the slightest suggestion of a business crippled because of a ‘distorted fuel market’*”.⁵⁸¹
812. Moreover, Claimant has not alleged physical harassment by State authorities or third parties. For the purposes of the full protection and security, it is not enough to claim to have suffered financial losses.⁵⁸²
813. Respondent does not deny that smuggling and related activities were serious problems in Albania as well as in the neighboring countries and in the region. However, it claims to have made significant, consistent and internationally coordinated efforts to combat

ARB/87/3, Final Award, June 27, 1990, para. 48; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 164.

⁵⁷⁸ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.83; similarly: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 179 and 181; *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 81.

⁵⁷⁹ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 483 and 484; similarly: *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 258-259; *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 287; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 663.

⁵⁸⁰ Resp. Rej., para. 433.

⁵⁸¹ Resp. Rej., para. 415; Resp. C-Mem., para. 315.

⁵⁸² Resp. Rej., para. 420.

smuggling and tax evasion. It points to the national Customs Code that was amended in 1999 to create an Anti-Smuggling Directorate to lead the fight against smuggling. It further points to the “Agreement on Deployment of Naval Assistance in the Customs Sector”, concluded with Italy, which led to the reorganization of the customs department with the assistance of the Italian “Guardia di Financia”.⁵⁸³

814. Respondent further requested assistance from the European Union, which deployed the Customs Assistance Mission (CAM-A) in 1997 that helped to develop a viable and modern customs service. CAM-A was renamed in 2006 as the EU’s “Customs and Fiscal Assistance Office” (CAFAO). At the time it was phased out in 2008, it was internationally acclaimed for “*achieving valuable results in terms of revenue collection, prevention of smuggling and corruption and reinforcement of the service.*”⁵⁸⁴
815. Moreover, Respondent signed the “Convention of the Southeast European Law Enforcement Center” (SELEC), where it co-chairs the “Anti-Fraud and Smuggling Taskforce”, and created, with the assistance of UNCTAD, the national operation ASYCUDA to combat smuggling, tax evasion and fuel adulteration.⁵⁸⁵
816. Respondent contends that the various national and concerted international measures bore fruit and were consistently praised. By 2000, CAM-A had described Albania in 2000 as “*the leading country in the region for its anti-smuggling ability and intelligence*”.⁵⁸⁶ In 2006, the European Commission noted:
- There has been significant progress in the strengthening administrative and operational capacity for customs. In 2005 the Customs Administration collected 108% of target revenue. This positive trend was confirmed in the first half of 2006. [...] Some progress can be reported as regards the customs service’s role in fighting organised crime, drugs and smuggling. The Customs maritime branch is being reactivated and some patrol boats have entered into service. Cooperation between police and customs has been strengthened and several effective actions have taken place. A joint force with the police is now operational.⁵⁸⁷
817. Likewise, in 2013 the British ambassador confirmed after a visit to Durres that he was “*impressed with what I have seen of the arrangements at Durres for port security, customs and immigration controls*”.⁵⁸⁸
818. Respondent concludes that “*the Republic of Albania has made all reasonable efforts to combat smuggling and tax evasion in the Albanian market and has in any event largely*

⁵⁸³ Resp. C-Mem., paras. 316-319; Resp. Rej., paras. 422-427.

⁵⁸⁴ Resp. C-Mem., paras. 317-318; Resp. Rej., paras. 424-428; Respondent quotes from “EU Assistance in Albania Activities”.

⁵⁸⁵ Resp. C-Mem., para. 319; Resp. Rej., paras. 429 and 423.

⁵⁸⁶ Resp. C-Mem., para. 318; Resp. Rej., para. 426.

⁵⁸⁷ RE-64.

⁵⁸⁸ RE-66.

satisfied its due diligence obligation under international law”. Respondent has purportedly protected and secured Claimant’s investments, as well as those of other importers, under difficult circumstances and despite its limited resources. The fact that it uncovered a petrol fraud scheme is a further demonstration of its diligence. In these circumstances, there can be no successful claim against Respondent since the standard is not one of strict liability.⁵⁸⁹

6.4.3 The Determination of the Tribunal

819. The Tribunal first notes that the obligation to provide constant protection and security must not be confounded with the obligation to provide fair and equitable treatment. The distinction between the standards in treaties such as the ECT is of relevance. It would violate the principles of treaty interpretation under the Vienna Convention on the Law of Treaties to confuse the meaning of protection and security with that of a fair and equitable treatment.
820. The Tribunal concludes therefore that both claims have to be examined separately. The fact that the Tribunal rejected the FET claim does not imply the rejection of the claim for a violation of protection and security.
821. The Tribunal refers to a *jurisprudence constante* according to which the standard of constant protection and security does not imply strict liability but rather obliges States to use due diligence to prevent harassment and injuries to investors. The measure of due diligence is conditioned by the circumstances. The Tribunal further concurs with *Electrabel v. Hungary* that due diligence does not oblige the State to “*prevent each and every injury*”.
822. When applying these delimiting principles to the facts of the case, the Tribunal finds that Respondent has not violated its duty under international law to use the due diligence that it was able to use under the specific circumstances to protect and secure Claimant’s investment.
823. The Tribunal is conscious of the fact, which Respondent does not contest, that smuggling, fuel adulteration and tax evasion were serious problems in Albania as well as in the region at the time when Claimant made its investment. Claimant acknowledges that it was aware of this situation. It was part of the general business environment and investment conditions. Claimant decided to make its investment under these conditions of insecurity. Smuggling, fuel adulteration and tax evasion existed prior to the investment, and therefore were not specific to Claimant’s investment. It is therefore not correct to allege that the problem distorted the conditions of the investment after it has been made.

⁵⁸⁹ Resp. C-Mem., para. 320; Resp. Rej., para. 433.

824. General insecurity was also a consequence of weak government structures and institutions at the time of the investment. Albania was confronted with the general duty to confirm itself as a State and build efficient institutions to combat criminality in general and smuggling, fuel adulteration and tax evasion in particular. This is all the more so since the incriminated activities particularly prejudiced Respondent itself. In fact, the Tribunal has some difficulty in understanding in what way tax evasion by third parties injured Claimant's investment at all. While Claimant might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Respondent would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment.
825. In this regard, Claimant submits that the situation deteriorated after 2003. It has presented the expertise of the private consultant AIOG that states that fuel smuggling and fuel adulteration increased after 2003, though it has not presented any evidence to support this statement. AIOG further states that the fuel market in Albania as a whole increased considerably after 2000 and that the quantity of imported fuel increased considerably during this period.⁵⁹⁰ The latter statement corresponds to the statements made by both Parties' experts on damages. They confirm that Claimant's sales of diesel and other petroleum products increased considerably after 2001.⁵⁹¹ AIOG has not indicated in what way the alleged increase in smuggling was related to the general increase of consumption and imports or how it prejudiced Claimant as well as other importers, particularly as they were able to increase their market share. The Tribunal is not fully convinced by AIOG's opinion.
826. Moreover, in addition to increasing its market share, Claimant increased the import of fuel. It decided in 2006 to buy the minority participation for a considerable price even if the buy-out was to clear the way for an international listing. Given these facts, the Tribunal has difficulty in ascertaining how smuggling and related activities caused injury to Claimant.
827. Further, Respondent has described an impressive number of nationally and internationally coordinated efforts to combat smuggling, fuel adulteration and tax evasion. It has provided enough evidence to convince the Tribunal that the policy pursued with these measures was consistent and seriously targeted. The Tribunal has read reports and statements from international agencies and observers who attested serious efforts and improvements. In this connection, Claimant has indicated that one of these institutions, the EU Customs Assistance Mission, endorsed illegal practices giving rise to smuggling. The Tribunal does not accept this insinuation as true, particularly as it is not evidenced.

⁵⁹⁰ CE-55.

⁵⁹¹ CE-220, page 53; First Expert Report of Mr. Grant Thornton, page 17.

828. In sum, the Tribunal finds that on one hand Claimant was able to operate successfully in Albania until the closing of the port of Durres and that in 2006, Claimant had a general appreciation of Albanian development sufficient to convince it to invest a considerable amount into shares; on the other hand, the Albanian Government pursued a national policy of combatting smuggling and reached out to international partners to assist it in this objective. Given these circumstances and the related evidence, the Tribunal accepts that Respondent made serious efforts to overcome the serious situation of smuggling, fuel adulteration and tax evasion that existed when Claimant made its investment.
829. Therefore, the Tribunal recognizes Respondent's due diligence in its general customs policy and in its specific measures. Under the prevailing circumstances, it has not breached its obligation under Article 10.1 of the ECT to constantly protect and secure Claimant's investment.

7. COSTS

830. On 22 April 2014, Claimant submitted the final statement of its costs and expenses. They amount to 902,603.58 Euro, including fees for legal representation, expert fees and costs of travel, translation and courier services.
831. On 22 April 2014, Respondent likewise submitted its final statement of costs and expenses. They amount to 528,453.40 Euro, including fees and expenses of external and internal counsel, expert fees and costs of travel and translation.
832. Each Party seeks the reimbursement of its fees and expenses as well as the reimbursement of the advances paid to ICSID and requests the Tribunal to make an order to this effect. In addition, Respondent asks the Tribunal to order Claimant to pay interest at a reasonable commercial rate as from the date of the award. Neither Party has explained why it considers it appropriate to deviate from the provisions of Articles 9 and 10 of the BIT.
833. Neither Party expressed a desire to comment on the other Party's statement of costs.⁵⁹²
834. Article 61.2 of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules mandates that the Tribunal make a decision on costs. In doing so, it has wide discretion in its determination and allocation.
835. At the same time, the Tribunal notes that Article 10(2), by reference to Article (9) of the BIT, provides that each Party shall bear the costs of the arbitrator it has appointed as well as the costs of its representation, whereas the costs related to the chairman and other costs are to be borne in equal parts by both Parties. The Tribunal is bound to apply these

⁵⁹² H. Tr., day 5, page 283.

provisions of the BIT which is the applicable law in the present case. It does so with conviction because it finds that the distribution of costs resulting from the provisions is fair and appropriate under the circumstances.

836. The fees and expenses of the Tribunal and the administrative fees incurred by ICSID are the following (in USD):

Tribunal's Fees and Expenses

Prof. Dr. Rolf Knieper – 180,383.96
Mr. Steven A. Hammond – 292,486.97
Dr. Yas Banifatemi – 146,834.79

ICSID's Administrative Fees – 128,000

ICSID's Expenses – 97,284.74

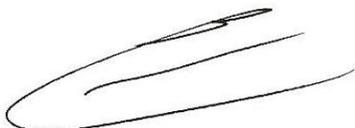
837. By application of Article 10(2) by reference to Article (9) of the BIT, Claimant is responsible for USD 495,321.32 and Respondent is responsible for USD 349,669.14 of the fees and expenses.
838. Claimant has paid costs and fees amounting to USD 649,925 whereas Respondent has paid costs and fees amounting to USD 199,910. Respondent must therefore reimburse Claimant the amount of USD 149,759.14, representing the amount of Respondent's fees and expenses paid by Claimant.

8. DISPOSITIVE PART

839. The Tribunal, by majority, decides as follows:

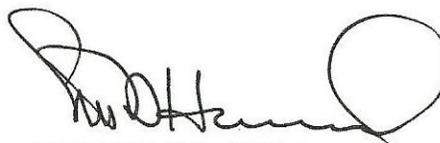
- a) The Tribunal has jurisdiction over Claimant's claims.
- b) The Tribunal rejects, on their merits, the entirety of Claimant's claims.
- c) By application of Article 10(2) and Article (9) of the BIT, Respondent must reimburse the Claimant the amount of USD 149,759.14.

Subject to the attached Dissenting Opinion



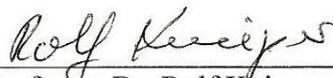
Dr. Yas Banifatemi
Arbitrator

Date: 24 March 2015



Mr. Steven A. Hammond
Arbitrator

Date: 21 March 2015



Professor Dr. Rolf Knieper
President

Date: 26 March 2015