INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/11/24

MAMIDOIL JETOIL GREEK PETROLEUM PRODUCTS SOCIETE ANONYME S.A.

Claimant

- against -

REPUBLIC OF ALBANIA

Respondent

Dissenting Opinion

of

Steven A. Hammond

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I. INTRODUCTION AND SUMMARY

1. I dissent from the Majority's award, most particularly in respect of its analysis of the alleged violation of Claimant's rights to fair and equitable treatment and to be free of unreasonable and discriminatory measures.

2. While I agree with the ultimate conclusion reached by the Majority in its jurisdictional analysis, as well as with certain portions of the merits discussion as reflected in the Award, I am unable to join in Sections 6.2, 6.3 and 8 of the Award.[1] I have carefully considered the text of the Award and the reasoning of the Majority reflected therein. I believe, however, that alternative legal conclusions are required by the record before us for the reasons set forth below.

3. I am persuaded that Respondent encouraged Claimant to invest substantial moneys in the Port of Durres to construct a facility for the off-loading and storage of hydrocarbons. I am further persuaded that Respondent understood that the profitability of Claimant's investment would depend on Claimant's continuing ability to provision the facility through the discharge of tankers via portside facilities. Claimant's decision to invest the approximately $8 million cost of preparing and developing the approved site came after years of high level meetings with senior government officials. When Claimant began materializing its investment, it was unaware that Respondent had engaged a consultant to investigate the possible repurposing of the Port. Several months after Respondent awarded Claimant the long sought lease, and several months after Claimant had begun to materialize its investment, Claimant rejected attempts by a local representative of the same Ministry that awarded the lease to interrupt its ongoing work. In June 2000, by which time Claimant had accomplished the construction of approximately 85% of its tank farm, Respondent effected a change in the land use regime for the port and formally ordered Claimant to suspend the investments it had been making up to that time pursuant to its "*contracted obligations.*" Claimant was subsequently allowed to finish its build out and operate its facility from August 2001 to 2009, when its right to discharge tankers at the facility was revoked in the wake of a specific undertaking by Respondent to close down Claimant's Port of Durres operation as part of Respondent's settlement of unrelated claims with a competitor of Claimant.

4. The facts summarized above are not intended to be exhaustive of the extensive record relevant to the analysis set out below. They instead provide a summary factual background to my decision to dissent from the Majority's analysis of the questions of fair and equitable and unreasonable and discriminatory treatment.

5. I concur with the Majority's observation, set out at ¶138 of the Award that:

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1. While I share in the results reached in the remaining sections of the award, there are a variety of statements in those sections with which I do not agree. To the extent such statements are inconsistent with the views expressed in this dissent, I note my exception to them here.

> *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 [is] aware that the legal and factual appreciation is intertwined . . . .*

6. I nonetheless believe that my colleagues, for whom I have every respect, have failed to sufficiently weigh the significance of certain undisputed facts before us, and have in some cases made factual determinations that cannot be reconciled with the record, particularly as it relates to the timing by which Claimant materialized its investment.

7. The Majority recognizes that "*the exact timing [of Claimant's investments] is of the essence*" (Award ¶700), but notes that

> *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.*
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> Award ¶708. *See generally* Award ¶¶695-709.

8. It is significant that throughout the "*consider[ed] period*" identified in this passage the legal regime on which Claimant relied in deciding to invest and carry out its investment remained unchanged. It was the adoption of Respondent's Land Use Plan for the Port of Durres on 13 June 2000 (CE-21), after approximately 85% of the tank farm had been built, that caused so much disruption to Claimant's operations in Albania. This undisputed fact, together with the Majority's key (and in my view incorrect) finding that Claimant "*implement[ed] the investment as from February/March 2000*" (Award ¶718),[2] have, along with the additional considerations set out below, occasioned this dissent.

9. The Tribunal's core duty is to do justice in a manner consistent with the objectives and terms of the bilateral and multilateral investment treaties here in issue, and I have concluded, after substantial and careful deliberation and a careful weighing of the record, that I cannot subscribe to the Majority's decision.

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2. *See also* Award ¶¶701, 709, 711. As discussed below, it is not correct in view of the record before us to state, as the Majority does at ¶685, that autumn 1999 was "*before the implementation of the investment.*" *Cf.* Award ¶706 where the Majority acknowledges that "*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.*"

II. THE RECORD BEFORE THE TRIBUNAL

10. Although as a general matter the Majority's recitation of the facts leading up to Claimant's decision to invest in the Durres facility is adequate, there are two aspects of that recitation that I believe ignore analytically significant aspects of Claimant's investment decision and that consequently distort the resulting legal analysis. The first of these involves the record as it relates to the Majority's statement that "*Claimant chose the location [of its tank farm in the Port of Durres] for its geographical, infrastructural and institutional convenience.*" Award ¶77. The Majority overlooks the role Respondent played in the selection of the Port of Durres as the location for the tank farm. I discuss the evidence showing Respondent's role in that regard in Section A below. The second relates to a failure to consider the full record which demonstrates that both parties understood that the investment contemplated by Claimant, in order to justify the level of investment eventually made, required a tank farm that would be serviced by the discharge of tankers. *Cf.* Award ¶¶644-45. I discuss that evidence in Section B.

11. The Majority's treatment of what it characterizes as the critical issue of the timing of Claimant's investment represents a problem of a different order. The Majority's conclusion that Claimant "*implement[ed] the investment as from February/March 2000*" (Award ¶718) is inconsistent with the record before us. Because of the overlapping chronologies relating to this issue and that of Respondent's transparency in its dealings with Claimant relating to the international consultant who recommended repurposing the port, I discuss both in Section C below. I then make observations regarding the record as it relates to: (Section D) the question of Claimant's Non-Compliance with Respondent's domestic laws concerning licensing and permitting; and (Section E) Respondent's decision to ban the carrying of oil and gas in Durres and the relationship of that decision to the *Petrolifera* settlement.

A. Respondent's role in the choice of location of the tank farm

12. The record submitted to the Tribunal establishes that Respondent encouraged and recommended that Claimant materialize its investment in the Port of Durres, where the tanker ban was later imposed. Evidence of this encouragement can in the first instance be found in the brochure described by the Majority in these terms:

> *Respondent's Ministry of Public Works and Transport (the predecessor to the Durres Port Authority) published a brochure to promote investment in the port od 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]nvestmens [sic] in the development of the infrastrcture [sic] of the eastern wharves [the area where Claimant's investment was eventually materialized] are indispensable . . . ."*

Award ¶59 (*quoting* CE-132; Cl. Rep. at paras 21-23). *See also id.* ¶¶637, 651.[3]

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3. In connection with its latter reference to the investment brochure the Majority notes:

> *650. The Tribunal has pondered the Parties' written and oral submissions. It has come to the*

13. In addition to this general encouragement put out to potential investors, the record before the Tribunal shows encouragement given specifically by senior government officials to Claimant leading up to Claimant's decision to invest millions of dollars in a facility for the discharge of oil tankers at the location eventually chosen.

14. On 30 June 1995, after "*discussions with the proper authorities in Albania*," Claimant wrote to Respondent proposing, as the Majority notes at ¶64 of the Award, three potential sites "*suitable for erection*" of a tank farm, and advised senior government officials that:

> *we are now ready to submit our proposal to your Government regarding the construction and operation of a tank farm equipped with all up to date installations and instrumentation.*
>
> * * *
>
> *At this stage* ***the key factor for finalising our estimation is to locate the exact Site for the erection of the Tank Farm****. According to our investigation, we think that the three areas marked, in preference order [i.e., Durres, Porto Romano and Vlora, respectively], on the attached map sections, are suitable for erection Sites.*
>
> *Kindly note that we have already assumed that the necessary piece of land, after being finally selected, shall be allocated to us by the Albanian Government at a nominal price. This consideration is of vital importance to our feasibility study.* ***We would, therefore, highly appreciate it if you could advise on the availability and allocation procedure of suitable land*** *pieces at these major areas and let us have your views on the implementation of the above described Project.*

CE-60 (emphasis added). As detailed below, the fact that the proposed facility was for the discharge of oil tankers was clearly set forth in the technical description that accompanied this proposal.

15. Claimant concluded its 30 June 1995 investment proposal with the observation that the "*realization of the project is certainly subject to the existence or creation of the proper*

> *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," and would continue to be so in the future.* (*Quoting* Respondent's Port of Durres Investment Brochure, CE-132.)
>
> *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.*

Award ¶¶650-651; *cf.* Sec. IB, *infra*.

legal frame for such an investment" intended to ensure "*the protection of the Investor such as return of the invested capital.*" (CE-60.)

16. Within two weeks of the 30 June proposal, Claimant's Greek counsel provided it with a memorandum dated 10 July 1995, detailing "*investment, legal, tax and accounting issues in Albania.*" CE-150. That analysis confirmed both the central problem of how property rights would figure in any eventual investment and the ongoing discussions with Ministry level contacts made in an attempt to gain clarity on that issue:

> *(b) Construction land*
>
> * * *
>
> *Foreigners are not permitted to own land except by approval of the People's Assembly (only in extremely special circumstances). If a foreigner sets up an Albanian subsidiary, under the provisions in the civil code, land for construction may only be leased for a period of time up to 30 years, and buildings for a 5 year maximum duration, although renewals are possible.* ***The price for leased land is based on criteria set by the Council of Ministers.*** *Currently, foreigners generally form an Albanian company to lease the land. When title to the land is required before investment can take place, the foreign owned company may generally form a joint venture company with the owner of the land (provided the ownership can be clearly established), enabling the land to be transferred into the company enabling the owner to receive shares.* ***I discussed your case with Minister Vrioni. I suggested to him that as the investment is sizeable he should allow the investment company to own the land by means of a special permission of the People's Assembly.*** *He argued that in the past they had granted to investors such an exceptional right, however, the latter sold the land immediately after they had been awarded title and they never pursued the investment. Therefore,* ***Minister Vrioni concluded that we should first establish our investment and after get title over the land.*** *I suggested to him that perhaps we could conclude an Agreement with the Albanian State by which we would agree well in advance that we would establish our specific investment (and describe same) and within a specific time frame the Albanian State would give us title over the land of the investment. Minister Vrioni seemed willing to accept this solution and he is now awaiting for a memo from our end. Please advise on this issue.* (Bold emphasis added.)[4]

17. Claimant's continuing attempts to advance its investment program (eventually utilizing a lease arrangement) were described in the statement of Mr. Alexandros Mamidakis:

> *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***

4. CE-150, ¶5. Although it is unclear whether Claimant's Greek counsel was in turn consulting Albanian counsel, this document clearly establishes that Claimant was receiving advice from a lawyer concerning the legal requirements for doing business in Albania. *Cf.* Award ¶151.

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 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.*

CE-59 (emphasis added).

18. This testimony is consistent with that offered by another fact witness whose testimony was tendered by Claimant, Mr. Dimitrios Gavriil, a retired shareholder of Claimant's Greek competitor, Global:

16. . . . the site at Durres which was eventually leased by Global SA . . . was recommended by . . . Mr. Gramos Pashko who at that time was financial advisor [to] the Prime Minister.

CE-131, ¶16.

19. In contrast to plaintiff's evidence on Respondent's role in the selection of Port Durres as the site for Claimant's discharge facility, Respondent produced not a single fact witness with personal knowledge of the events leading up to Claimant's decision to invest, but chose instead to challenge it as a general proposition by noting that Claimant's testimony of verbal statements by senior government officials should not be credited in the absence of written

confirmation. *See, e.g.*, Tr 231:5-15, day 1. This strategy appears to have persuaded the Majority, which notes at ¶¶408-09 of the Award:

> *408. ... Claimant's witnesses, members of the senior management and members [of] 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 the 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.*

20. I shall return (*see infra* ¶77) to the legal implications of this passage in discussing how I believe the Tribunal has applied an unfair standard of proof in reaching its conclusions.[5] The Tribunal has recognized here, as elsewhere, that Claimant was operating in a challenging, even chaotic legal environment.[6] In the absence of any attempt by Respondent to present the testimony of its own witnesses contradicting Claimant's direct evidence describing the fact of such statements by senior government officials, I part company with the Majority.

B. <u>The ability to discharge tankers at Claimant's facility</u>

21. The Majority specifically "*conclu[des] 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***

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5. Thus on the one hand the Majority acknowledges the existence of these verbal representations in general, while at the same time it ignores the specific testimony of their content, including the testimony that the Ministers of Economy and Energy "*encouraged us to apply for an approval to invest in tank farms in the port of Durres*" (CE-59, ¶8), even in light of the corroborating testimony from other Port of Durres investors.

6. *See* in this regard the Majority's observation (Award ¶61), in discussing the investment environment prior to Claimant's decision to invest, that "*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.*" *See also* Award ¶¶ 626-28, 631.

unloaded,' and would continue to be so in the future" (emphasis added). Award ¶650 (*quoting* Respondent's Port of Durres Investment Brochure, CE-132). It then renders this finding legally meaningless by concluding that the parties' common expectation has no impact on Claimant's claims since the majority "*has found no assurances and representations by Respondent in the sense of a continued availability of the port facilities for petroleum tankers.*" *Id.* ¶651. I believe that, as with the question of selection of the Port of Durres as the site for Claimant's investment, the latter conclusion ignores significant aspects of the factual record, including evidence that the parties understood that the ability to discharge tankers at Claimant's facility was essential to the viability of Claimant's investment.

22. Much of the evidence of the active pre-investment role of Respondent summarized above also demonstrates the parties' common expectation that the success of the investment would depend on the ability to discharge tankers at the facility. As the Tribunal recognizes, Claimant's investment "*proposals were based on a . . . business plan*" (Award ¶66):

> *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.*
>
> Award ¶77.

23. As already seen, Respondent's brochure sought "*[i]nvestmens [sic] in the development of the infrastrcture [sic] of the eastern wharves,*" where Claimant eventually located its discharge and storage facility on Respondent's recommendation, and specifically cautioned investors that "*they will be asked to make the necessary investments both in the infrastructure and in the superstructure*" (CE-132). The Tribunal received undisputed evidence that in pursuing its investment Claimant expressed its intention to include improvements to the existing tanker discharge facilities. Claimant's 30 June 1995 letter to the Minister of Industry Trade and Telecommunication described – as part of Stage I of its build out – mooring work at an estimated cost of $1.2 million (CE-60).[7] According to Claimant's letter to the Ministry, the facility's "*Final Capacities*" included a "***[v]essel discharging rate*** *[of] up to 1.200 cub.m./hour*" (CE-60) (emphasis added). This same vessel discharge parameter was repeated in Claimant's "Durres Depot Technical Description" submitted in November 1998 just before Respondent approved in principle the investment. *See* CE-162, Sec. 5.3; Cl. Rep. ¶70. *See also*, Kalfas Witness Statement (CE-61, ¶5) "*Durres Port was selected mainly because of the vessel discharging facilities (a pipeline connecting the tank farm with the harbor as well as the equipment and fittings attached to the tankers berthing).*"

24. The Tribunal received evidence that, even after the tank farm was constructed, Respondent understood and insisted that Claimant and other investors in the Port of Durres take responsibility for ongoing investment in the tanker-side operations as part of their investment

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7. *See also* CE-131, ¶15. According to Mr. Gavriil, whom Respondent chose not to cross-examine, in the late 1990s "*the storage facilities owned by the Albanian state were not in a proper state of operation . . . . [T]he facilities at Durres could not [prior to the new investments] receive any product by vessel from abroad.*"

obligation. In March 2001, after the Land Use Law had been adopted, Claimant was informed that:

> *the Albanian Authorities requested some additional works for the modernization of the jetty, (i.e. lighting, fire fighting etc.), in order to issue the necessary operating permits for the three companies' facilities in Durres, Albania. . . . The joint cost of all three Companies is the following . . . .*

CE-156.

25. The reality that the economic viability of Claimant's investment depended on its ability to discharge tankers at its facility was detailed by Claimant's quantum expert, Ernst & Young, who explained that:

> *39. The Company constructed a fuel storage facility in the leased area . . .* ***and renovated an existing pipeline running from the pier to the tank area****. . . .*
>
> *40.* ***As per the Management the existence of the pipeline was a crucial part of the Business Plan as it facilitated the fast and safe discharging of fuel from vessels directly to the storage facility****.*
>
> * * *
>
> *46. . . .* ***As a consequence of [the government decision banning the processing of ships transporting fuels at the Port of Durres, Claimant's] business collapsed*** *as the storage facilities were no longer able to be supplied by sea in a cost efficient way.*

CE-64 at 10 (emphasis added).

26. Ernst & Young substantiates its opinion that Claimant's business collapsed as a consequence of the tanker ban through a detailed examination of the respective costs of supplying the tank farm by road versus by tanker (CE-64, ¶¶65-93), and concludes that:

> *92.* ***If Mamidoil Albanian had switched to transport via truck in 2005, its Gross Margin would have on average been eroded by 96% making it impossible to cover operating expenses and financing costs****.*
>
> *93. Given the cost gap between the two transport methods, it is reasonable to conclude that* ***supplying the tank farm via road trucks would be irrational from a business perspective and financially non-viable****.*

Id. ¶¶92-3 (emphasis added).

27. To summarize the evidence presented by Claimant on this issue:

- The investment encouraged by Respondent included investment in the port's "infrastructure and superstructure";

- Claimant would not have invested in the Port of Durres (and perhaps not in Albania at all) had it not been able to supply the tank farm by tanker;

- Claimant made its investments in the adjacent infrastructure in order to allow its tank farm to be supplied by tanker. Other investors in the Port did the same because it was "financially non-viable" to supply a tank farm at that location by truck. Tanker supply was a *sine qua non* of this investor's decision to invest;

- Even after its adoption of the Land Use Law in June 2000, Respondent continued to insist that Claimant and its fellow investors bear the costs associated with maintaining and improving that essential infrastructure.

28. Respondent by contrast produced no fact witness on any of the issues detailed immediately above. *See infra* ¶77.

29. In the face of this record, and as discussed further below, I cannot join in a majority decision that considers the tanker supply aspects of Claimant's investment to be legally irrelevant to the question of its investment protections. As the Majority itself states in considering the unity of Claimant's investment:

> *360. 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 . . . .***
>
> Award ¶367 (emphasis added).

30. As the Ernst & Young reports make clear, the lease without the ability to discharge tankers likewise "*makes no economic sense*." The Majority cannot, without divorcing itself from the economic reality of the investment, separate Claimant's investments in the tank farm itself from its investments in site preparation, infrastructure, etc., including improvements to the pier-side facilities at the investor's expense mandated by Respondent after operations began. The Majority's attempt to split out Claimant's expectations in this way is unjustified by the record, its own logic as expressed at ¶367 of the Award, and relevant legal principles.

C. Respondent's transparency concerning the land use changes in the Port of Durres and the timing of Claimant's investment

31. Two series of events are especially critical to analyzing the legal issues relating to fair and equitable treatment and unreasonable and discriminatory measures. These involve, on the one hand, the events by which Respondent began to consider the possibility of a change in legal regime concerning land use in the Port of Durres that led to the 13 June 2000 adoption of the Land Use Plan for Durres (and Respondent's dealings with Claimant in this regard), and, on the other hand, the timing of Claimant's decision to invest and the materialization of that investment.

32. Dolzer and Schreuer observe that:

> *The investor's* ***legitimate expectations are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state.*** *The legal framework on which the investor is entitled to rely will consist of legislation and treaties, assurances contained in decrees, licences and similar* ***executive statements, as well as in contractual undertakings. . . . A reversal of assurances by the host state that have led to legitimate expectations will violate the principle of fair and equitable treatment.*** (Emphasis added.)
>
> *Tribunals have emphasized that the legitimate expectations of the investor will be grounded in* ***the legal order of the host state as it stands at the time the investor acquires the investment.*** (Emphasis added.)
>
> * * *
>
> *Transparency is closely related to protection of the investor's legitimate expectations.* ***Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework.***[8] (Emphasis added.)

33. The Tribunal considers various aspects of the timing issue (*see* Award ¶¶695-709) before it concludes in ¶708 of the Award that it 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.*

34. Each of the four events listed by the Tribunal took place prior to the change in legal regime that is here in issue, and all but the last occurred before Claimant received any indication that a consultant had been engaged to consider the repurposing of the port. Moreover, as discussed in the preceding section, the Majority has acknowledged that at least as late as September 1999, both parties had every expectation that the offloading of tankers in the Port of Durres would continue (Award ¶651).[9] In order to understand how the events that took place during these critical months between June 1999 and the change in legal regime in June 2000

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8. Dolzer & Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012) p. 145, 149 (citations omitted).

9. The Majority does not explain how it reconciles the notion that as late as September 1999 both parties had every expectation that tanker offloading would continue (Award ¶651) with the notion that "*Claimant was aware from October/November 1999 that regulatory changes and a transformation for the port of Durres were imminent.*" (Award ¶543). As discussed below, all that happened in November of that year was that Claimant was finally told of the existence of the consultant, that the consultant was due to complete his study by January 2000, and that further work should be suspended in the interim. *See* RE-15. The Majority notes that it "*is not fully aware of the chronology of the Louis Berger, Inc. study and report,*" yet remains comfortable in proceeding on the basis of what "*seems plausible*" to it. Award ¶659.

affect an appropriate FET analysis, it is necessary to examine carefully the factual record as it relates to both: (i) the manner in which Respondent dealt with international agencies and Claimant before Respondent changed its legal regime in June 2000; and (ii) the precise timing by which Claimant decided to invest and materialized its investment. Because the chronologies relating to these two issues overlap, I examine the factual record on both issues together.

35. On 17 December 1998, in an Addendum to the contract executed between the Albanian Ministry of Transport, Project Implementation Unit, and Louis Berger Int. Inc., "*[t]he [latter] company was retained to 'advise the Port of Durres Authority (PDA) on the rationalization of present land use commensurate with current port operations, and to advise on land allocation for possible future development scenarios.*'" CE-77.

36. There is no indication that the existence of this private contract or its content was made public or that Claimant was informed of its existence before the approval of Claimant's investment and the execution of the Long Term Lease Agreement. In contrast to the IDA Credit Agreement (which was ratified as Law No. 8383 and entered into force on 10 August 1998), the contents of the contract with Louis Berger were unknown to Claimant, and are even now unknown to the Tribunal.[10] Although the IDA Credit Agreement itself became part of Respondent's legal order, its contents gave no indication of intended rezoning, or imminent regulatory and policy reforms that would have restricted Claimant's ability to exploit its investment or of an eventual ban on the discharge of tankers.[11] To the contrary, the Agreement specifically refers to "the rehabilitation of berths."

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10. Moreover, the pre-July 2000 notice letters eventually provided to Claimant make no mention of Louis Berger by name and solicit no comment from or participation by Claimant in the review process. The relevant letters exhibited to the Tribunal contained the following language:

    - "*Under these circumstances, this Authority informs you 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.*" 17 November 1999, RE-15 (emphasis added).

    - "*Referring to the non-effective use of the existing premises in the Sea Port, we have requested and **work is already underway by specialized American companies** for the revision of the Master Plan of this Port.*" 15 February 2000, RE-17 (emphasis added).

    - "*However, in the course of the upcoming period, **some American specialists** are revising the master plan of Durres and referring to the contacts and consultations between both sides, it has become clear that, in accordance with that survey in the Sea Port of Durres, no sites available for fuel deposits shall continue to exist.*" 3 March 2000, RE-16 (emphasis added).

11. Schedule 2 of the IDA Credit Agreement (CE-76) set out the scope of the project in the following terms:

    The objectives of the Project are to: (a) increase the commercialization of PDA [Port Durres Authority] by establishing an autonomous port, privatizing operations, improving customs procedures, and improving operations and safety; and (b) rehabilitate PDA's infrastructure and equipment.

    The Project consists of the following parts . . . :

37. By letter dated 6 January 1999, i.e., after Louis Berger Inc. had been retained in the terms described above, the Directorate of Maritime Port of the Ministry of Public Works and Transport informed the Privatization Directorate of the same Ministry in respect of Claimant's proposed investment that "*[b]y decision of the Board of Directors No. 130, dated 12.12.1998, it [was] approved in principle the establishment of a center of fuel reservoirs accounting for a construction-mounting value of 8 million USD in a surface of 14 thousand m2 in the southern side of the existing reservoirs . . .*" and asked the Privatization Directorate to proceed accordingly. CE-13.

38. By letter dated 8 January 1999, the Privatization Directorate of the Ministry of Public Works and Transport informed the Ministry of Public Economy and Privatization that "*the Administrative Board ha[d] 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. CE-14.

39. In keeping with the December 1998 Ministerial approvals, a lease contract was executed between the Ministry of Public Economy and Privatization and Claimant's Albanian subsidiary Mamidoil Albanian on 2 June 1999. The lease contract covered roughly 14 thousand square meters of a "*free site*" in the Durres Port for the purpose of "*granting for temporary enjoyment of the facility identified in Article 1 . . . [f]or setting up a fuel storage center according to the business plan attached*" (Article 2). The lessor was "*duty 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). CE-19; RE-14.

40. Upon instruction of the Ministry of Public Works and Transport, the Durres Sea Port Authority delivered the site to Claimant's subsidiary on 1 September 1999, "*free cleared and ready for the investment of a fuel storage center, in conformity with Article 2 of this contract.*" CE-18. As the Port Directorate's letter of 17 November 1999 (RE-15) discussed immediately below demonstrates, "*the works for the construction of the fuel depots*" were sufficiently under way within six weeks of the delivery of the site to have prompted both an oral and subsequently a written demand that further work be suspended.

Part A: Port Works

The carrying out of works for: (i) the rehabilitation of berths, the breakwater warehouses and offices; and (ii) the construction of customs installations.

* * *

Part C: Technical Assistance and Training

* * *

2. The carrying out of a secondary ports study, an environmental survey and an urban transport study for the City of Tirana.

* * *

The Project is expected to be completed by 30 June 2003.

41. As explained by Nikolaos Mamidakis, the materialization of Claimant's investment began almost immediately upon the signing of the lease in June 1999:

> ***[A]fter we signed the lease agreement, we in Greece, we had the supplies of the material, we gave it to our technicians and they did the prefabricated construction, and the materials started to come ready-made, and we needed only to assemble these materials at the place, the location of the investment.***
>
> *And of course after the signing of the lease agreement we had to put the fencing around the location, and after two or three months we started to import the material and assemble this material which was prefabricated in Greece.* [12] (Emphasis added.)

42. Further evidence of the level of materialization of Claimant's investment accomplished during these early months exists in the Ernst & Young Report, which refers (at App. II, page 45) to 346,000,000 Albanian Lek booked on the balance sheets through the period ending December 1999, for "Tank Farm installations," a sum which converts to approximately 2.5 million Euros (*see* CE-64, ¶143). This entry would appear to contradict the Majority's assertion (Award ¶700) that "*the construction works, which would cost some 8 million USD, commenced in February/March 2000.*" *See also* Award ¶¶709, 719-20. While the on-site raising of the tanks themselves may not have started until the time mentioned by the Majority, the materialization of the investment through site preparation, off-site prefabrication, infrastructure improvements and planning activities were all well underway before that time. Otherwise there simply would have been no reason for the Port Authorities to make demand for the suspension of further work within six weeks of the delivery of the site to Claimant. RE-13.[13]

43. No doubt, had the Tribunal suggested at the hearing that it would attach legal significance to the extent to which Claimant materialized each piece of its unitary investment prior to November 1999, further clarity might now be available to us.[14] But Respondent's

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12. H. Tr. II, day 2:20-21 (Cross Examination of Nikolaos Mamidakis) (emphasis added). *See also* Cl. Rep. Chronology at page 20 (indicating "*[from] October 1998 onwards[:] **Foundations for the tank farm are being prepared** and a wall is raised around the leased site.*") (emphasis added).

    The Majority (Award ¶285) properly concludes 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.*" (Emphasis added.) Because the expenditures incurred to set up a local company were incurred after the approval in principal was granted but before the lease itself was executed (Award ¶80), it may fairly be said that Claimant began the materialization of its investment even before the lease was granted.

13. The Majority notes (Award ¶84) that the construction of the tank farm itself was begun in February/March 2000 under a "main" civil works contract. The record makes clear that this was not the only civil works contract, and that site preparation, laying of foundations, and off-site fabrication had all begun earlier in the project. *See also* Award ¶85 ("*the core construction period was between March 2000 and February 2001*").

14. Alternatively the same result might have been accomplished during the post-hearing phase by asking the parties to make short, focused submissions on the question of pre-November 1999 materialization of the investment.

defense on the question of timing was largely limited to cross-examination of Claimant's witnesses, excerpted above, even though there were potential witnesses, and most particularly the author of the 17 November 1999 letter, who would presumably have had detailed knowledge of the issue. *See infra* ¶77. I disagree with the Majority's approach in its handling of the timing of materialization despite the above evidence, [15] particularly in light of its separate finding that "*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.*" Award ¶706.

44. On 29 October 1999, Mr. Ilir Meta became the new Prime Minister of Albania.

45. Within three weeks of the change of administration, the Director of the Durres Sea Port Authority under the Ministry of Public Works and Transport wrote a letter to Mamidoil Albania shpk stating:

> ***Despite 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* ***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.* (Emphasis added.)
>
> ***On the contrary, we are going to recourse to the assistance of competent authority to affect forced suspension.***[16] (Emphasis added.)

As the text of this 17 November 1999 letter demonstrates, "*the works for the construction of the fuel[] depots*" were already "*continu[ing]*" at the time the communication was sent.

46. Claimant's Albanian partner and deputy general director in Mamidoil Albanian replied to the 17 November 1999 letter on 7 December 1999 by refusing to honor the suspension demand in the following terms:

> *So, Mr Director of Durres Port, it should be known that this country is regulated by laws and decisions which 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.*

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15. *See* Award ¶¶685 (autumn 1999 was "*before the implementation of the investment*"), 543:

> *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.*

16. RE-15. The plain intention of the author in stating "*on the contrary*" at the beginning of his last paragraph was to warn the recipient that "*in the event*" further work was not suspended, the local official would resort to "*competent authorities*" to force such a stoppage. As already noted, Respondent did not produce this or any other fact witness with personal knowledge of the September 1999-July 2000 period.

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.

RE-42.

47. Despite its impolitic tone, the 7 December letter, which was copied to the Ministry of Privatization and the recently elected "*Premier, Ilir Meta*," made clear Claimant's belief that: (1) its activity was protected by Respondent's legal regime; and (2) the Port Authority official who had demanded the construction suspension was acting contrary to Claimant's rights and to the presumed position of other superior "*competent authorities*." There is no indication that either of the senior government offices copied on the 7 December letter made any response, and neither they nor their subordinates offered evidence to the Tribunal.

48. Two months after the 7 December 1999 response, the Director of the Durres Sea Port Authority issued a further warning letter to Claimant, stating that given "*the preliminary meetings and consultations with*" the "*specialized American companies*," "*it seems ungrounded and irrelevant to construct terminals or deposits of fuels at the sea port*." The letter advised that Claimant "*should not undertake mounting of tankers . . . until the completion of this survey*," and noted that "*[i]nstalling them would be of financial consequences to your company*." RE-17.

49. The Louis Berger study resulted in a "Land Use Plan, Final Report" of March 2000.[17] One of the recommendations of the Plan was the transformation of Durres Port into a container terminal and the relocation of the oil tanks to a less populated area. Cl. Mem., ¶¶79-83; Cl. Rep., ¶153; Resp. C-Mem., ¶¶66-71. There is no evidence that the report was provided to Claimant at any time before the change in legal regime in June 2000 or that Claimant was given the opportunity to participate in or comment on the consultant's findings before its final report was issued.

50. In a 3 March 2000 memorandum (RE-16), the Durres Sea Port Directorate communicated with the Chairman of the Council of Ministers (with copy to Claimant) "*referring to the answer that Mr. Aleksander [sic] Mamidoki [sic] has sent to our letter [of 1 February 2000 and copied to the Prime Minister].*"[18] The memorandum referred to the revision of the master plan of Durres by "*some American specialists,*" and stated that "*it has become clear that in accordance with that survey in the Sea Port of Durres, no sites available for fuel deposits shall continue to exist*." In the same communication, the Durres Sea Port Directorate referred to a previous request for a provisional suspension of the works in the site until the completion and approval of the master plan, and informed the Chairman that the "*[w]orks are being continued and the investor is making payments, while the perspective is not safe*." The Port Directorate concluded its letter to the Council of Ministers in these terms: "***Appreciating your authority, you***

17. CE-77. The record does not indicate when in March (or later) the Report was presented.

18. Assuming the letter of 1 February is different from the 15 February letter, it was not exhibited to the Tribunal. Nor was the referenced letter from Mr. Alexandros Mamidakis.

are kindly asked to intervene *since this is a case of protection of national interests*" (emphasis added).[19] Still, the Central Authorities made no response. Nor did Respondent produce any witness with personal knowledge of these matters, including the eventual decision to enact the Port of Durres Land Use Plan.

51. On 13 June 2000, Respondent's Council of Ministers issued Decision No. 294, approving the Land Use Plan proposed by the Louis Berger Report, and authorizing the relevant governmental agencies to "*negotiate on the determination of terms of the implementation of the plan.*"[20] The Council's decision was published in the Official Gazette on 17 June 2000. RE-18.

52. By letter dated 21 July 2000, the Minister of Public Economy and Privatization and the Minister of Transport informed Claimant that the Plan of Utilization of the land in Durres Port had been approved by Decision No. 294, and stated the following:

> *[I]t 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 contracted 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.***
>
> CE-22 (emphasis added).

53. This statement – by senior officials like those who had encouraged and approved Claimant's investment a year earlier – that "*it is not foreseen that the zone in which the fuel deposits are actually located, will serve for this purpose in the future*" was the first Ministry-level indication to Claimant that what had previously been foreseen, i.e., the materialization of

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19. RE-16. This communication (like RE-15 and RE-17) displays in its letterhead the emblem of the Port Authority of Durres. *Cf.* CE-17, an authorization issued by the Ministry of Public Economy and Privatization, bearing the emblem of the Republic of Albania, and CE-29, a decision of the Council of Ministers bearing the same emblem. I consider these distinctions legally significant, because it is clear that Claimant's representative drew a distinction between the local authorities and senior officials when it rejected the initial warnings that it should discontinue work, a distinction echoed in the Majority's reasoning at ¶746 of the Award, where, in connection with Claimant's failure to follow permitting requirements, it notes that "*[t]he local branch of Government raised this issue from 2001, and the central Government insisted anew on regularizing the situation of missing permits . . . in 2003.*"

20. CE-21; RE-18. The executory language of Decision No. 294 (charging agencies "*to negotiate on the determination of terms of the implementation of the plan*") provides an interesting contrast with the language of the July 2007 Decision imposing the tanker ban, Decision 486 (CE-36) (charging the relevant agencies with "*the implementation of this decision*") and suggests that the administration was looking for flexibility in the manner and timing of the implementation of the plan even after it had been approved. *See also* CE-81 (the Prime Minister's Press Statement reprinted on 29 August 2000), discussed below.

Claimant's approved investment, would not be allowed, and contrasts with the earlier warnings by port officials that the lawful regime for exploiting Claimant's investment **might** change. This high level communication is also probative of the fact that as late as one month after the change in legal regime, the Respondent understood "*the fact that* ***based on the contracted obligations*** *[Claimant is] investing in the reconstruction or construction of new deposits.*" CE-22 (emphasis added).

54. As the foregoing indicates, the initial warnings from local port officials (RE-15) came some weeks after Albania changed Prime Minister. Claimant openly and in the strongest terms asserted its legal rights and rejected the local official's warnings. In doing so, Claimant copied the new Prime Minister and the Ministry of Privatization. There ensued multiple pointed exchanges between local authorities and Claimant's representatives, each of which were either copied or addressed directly to central government authorities who declined to intervene until enactment of the Land Use Law was announced in July 2000. As such I do not agree with the finding (Award ¶543) that "*Claimant was aware from October/November 1999 that regulatory changes and a transformation for the port of Durres were imminent.*" Indications from a local official that a "*master plan survey for the development of this Port*" was under way, coupled with an ongoing exchange of correspondence copied to central authorities challenging the local official's suspension demand cannot establish "*imminent regulatory changes.*" This is particularly true where the same central authorities that remained silent despite this correspondence: (1) had earlier approved Claimant's investment in the port and made no effort to involve Claimant in the process that led to the eventual adoption of the change in land use; and (2) acknowledged as late as July 2000 that the investment Claimant had made in the year since the lease was granted was "*based on the contracted obligations.*"

D. Respondent's invocation of permit and licensing non-compliance and its relationship to the question of compensation

55. Just one month after Claimant was advised of the enactment of the Port of Durres Land Use Plan, the newspaper "Zeri I Popullit" reprinted the following press statement by Prime Minister Meta:

> *I wish to reiterate that 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, they are legal ones, which implies that the current government, although [it] is not accountable for their signing, cannot avoid the legal and financial responsibility, regarding the obligation arising to the Albanian state due to non-observation. . . . Likewise, the government has made and is making efforts to avoid to the maximum the financial and legal obligations deriving from the suspension and termination of [Clamant's and other affected investors'] contracts, due to the master plan.***
>
> CE-81 (emphasis added).

56. The Majority limits its discussion of the significance of this language to its analysis of the permitting issue analyzed below (*see* Award ¶476), and thus does not consider the transcendant significance of what amounts to an acknowledgment by Respondent's Head of State

(i) of its obligation to compensate investors whose investments would be injured by the "*the suspension and termination of these [inherited legal] contracts*"; and (ii) of a policy to "*mak[e] efforts to avoid to the maximum the financial and legal obligations deriving from the suspension and termination*" of Claimant's contract. Given the failure of Respondent to produce a single fact witness involved in Respondent's dealings and decisions with respect to whether or not compensation would be due upon the forced relocation of the storage and discharge facility, the Majority's appreciation of this aspect of the record before us is simply not one that I can accept. *See infra* ¶77.

57. Following Respondent's suspension of construction in the summer of 2000, the reversal of the suspension after the intervention of Claimant's government, and the eventual opening of Claimant's facility in August 2001, Claimant was allowed to operate under the terms of a Temporary Trading Permit until the Durres tanker ban took effect in 2009. Early in this period, the question of an eventual relocation of Claimant's operations (and the related question of whether Claimant would receive compensation in connection therewith), was discussed by the parties. As the Majority notes (Award ¶158):

> *Claimant consistently communicated its flexibility to the government [to relocate its operations upon payment of compensation], both in 2003 when the Albanian-Greek high level working group met as well as in letters of 27 January 2003* (CE-90) *and 22 February 2008* (CE-38)*, i.e. after Respondent's decision to prohibit further landing by vessels in the port of Durres.*

58. Between 12 February and 20 March 2003, the Albanian Government convened three meetings of a working group that included government officials and the affected Greek investors in Durres to discuss the relocation of the tank farms and fuel deposits. CE-86, 87, 88; RE-41. During those sessions, Claimant's representative, Mr. Garinis, repeatedly raised the question of compensation that should be paid in the event of a forced relocation: "*[I]n the case where the problem leads to the need of transport [i.e., relocation] we will ask complete compensation for the total of investment that has been realized and the expenses of transport [relocation].*" CE-87.

59. In the next working group meeting, the representative of Respondent's Ministry of Industry and Energy observed that the companies had submitted technical documentation from the project phase, but noted that this documentation had not been approved by the competent local government bodies, and specified which elements required by Law No. 8450 had not been satisfied. The representative noted that "*the activity not as market operators, but rather for the utilisation of deposits, will only be considered legitimate when the competent bodies grant the required permits.*" RE-41. Claimant's representative replied that Claimant had "*sent hundreds of requests to the Environmental Directorate to inspect the fuel storage deposits, but we did not receive a reply,*" that "*[t]he law provide[d] that in case of a non-reply after a period of 6 months the request should be considered approved,*" and that "*it [was] unacceptable to have [their] activity suspended after only 2 years.*" *Id.* The senior representative of Respondent's Ministry of the Economy then observed that:

> *[i]t is not our subject to find the inhibitor factor, but to create the conditions to have a normal environment. . . .*

> ***The first subject we have to solve is the problem of filling out the permissions*** *that are needed for the normal exploiter of fuels . . . and for this I propose that* ***these must be clarified in an agreement that should be signed from both parts.*** (Emphasis added.)
>
> * * *
>
> *In the next meeting we will invite the specialist from the ministry of Transportation Energetic and Environment etc, for the presentation of the proper documentations for the license.*[21]
>
> *Id.*

The parties have provided no evidence that later meetings of the Working Group took place.

60. The Tribunal is asked by Respondent to assume that it was unaware that the permitting and license irregularities existed before these meetings, but there is nothing in the record to support that allegation. Instead, the only witness produced by Respondent with pre-2007 knowledge was the individual who signed the lease, who disavowed any knowledge beyond confirming that he had been ordered by his superiors to sign the lease documentation, and who was told by the state's attorney prior to the hearing what documents he should assume were in the official archive.

61. Although it is correct that the question of compliance with permits and licensing rules was reprised by Respondent over the course of the next several years, there are several aspects of those actions that lead me to take a very different view of the record from that taken by the Majority:

- A careful reading of the minutes of the Working Group convened to discuss relocation of the Greek investors from Durres, together with oral testimony from Claimant's witness present at those meetings, lead me to conclude that Respondent used the issue of permitting non-compliance as a means to postpone discussion of the question of compensation;

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21. The fact that a senior government official suggested that the various permitting controversies should be resolved by "*an agreement that should be signed from both parts,*" indicates just how the reality of the compliance issue diverged from the Majority's approach to the question of permitting formalities. (The record is devoid of any indication such an agreement was ever prepared.) Whatever the legal consequence of Claimant's conduct with respect to permitting may be, this passage from the Working Group minutes provides clear indication, corroborated by the testimony of multiple fact witnesses and the Majority's own conclusions, that Claimant was obliged to navigate an operating and legal environment in which interpretation and application of local laws was heavily dependent on the active intervention and involvement of Ministry officials. *See* Award ¶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*") and ¶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.*")

- I do not find credible Respondent's contention, unsupported by any testimony, that it had no knowledge of permitting irregularities prior to early 2003. The August 2001 Press Statement of the Prime Minister, the minutes of the Working Group, and Respondent's failure to produce a witness to support its contention all point to the alternative hypothesis;

- Despite its occasional insistence that the issue of permits be addressed, Respondent did not once take action to impose any penalty, restrict usage of the facility or, as the Majority notes, demolish Claimant's supposedly "illegal" structure (Award ¶491). The inference from this conduct is consistent with the other evidence that suggests that the permitting issue was considered by Respondent as a "hedge" against eventual claims for compensation, an inference that is particularly justified in light of Respondent's failure to produce a fact witness with knowledge of this issue.

62. For the reasons detailed in the legal analysis set out below, I conclude that the Majority's approach by which non-compliance with local permitting laws effectively precludes Claimant from establishing its investment treaty claims is inconsistent both with relevant legal principles and a fair reading of the record.[22]

E. The background and implementation of Respondent's decision to ban the discharge of tankers in Durres

63. On 10 May 2007, the Albanian Government entered into a settlement agreement with Petrolifera, an Italian petroleum company, and Petrolifera Italo Albanese Sh.A., to terminate ICC proceedings commenced by those companies. The *Petrolifera* parties sought compensation for Respondent's alleged failures to meet its responsibilities under a Terminal Concession Agreement executed in May 2004. As an express term of the *Petrolifera* settlement, Respondent undertook as follows:

> ***In order to restore a competitive level playing field*** *in full conformity with the law . . .*
>
> *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, or to cause the competent Albanian authorities or public bodies to set, by means of a Decision of the Council of Ministers and/or by any other act of the competent authorities needed to this aim, **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 to the loading, downloading, handling and storage of flammable liquids**; by the close*

22. For reasons I explain below, however, the Tribunal would not have been precluded from considering licensing and permitting non-compliance in connection with an analysis of Claimant's damages.

of the day of 31st March 2009 such activities shall be therefore transferred elsewhere or immediately ceased."[23] (Emphasis added.)

The agreement likewise provided for agreed liquidated damages of 6000 Euros a day to be assessed in the event Respondent failed to comply with this undertaking. CE-198, ¶5.3.

64. Approximately two months after the settlement, on 25 July 2007, Respondent issued Council of Ministers' Decision No. 486, ordering the "*interrupt[ion of] the activity of processing of 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.*" CE-36. As of the date on which Decision No. 486 was issued, Claimant and others had, notwithstanding the terms of Decision No. 351, been operating in the Port of Durres for almost six years. As detailed in Part III(E) below, the manner by which Respondent took action in July 2007 was inconsistent both with the policy justifications that underlay its original adoption of the Master Plan and the terms of the *Petrolifera* settlement.

65. By letter dated 22 February 2008, Mamidoil Albanian expressed its willingness to relocate to Porto Romano, but only upon payment of compensation by the Government. CE-38.

66. On 11 February 2009, after the intervention by the Greek Government, the Albanian Prime Minister issued Decision No. 154, amending Decision No. 486 and postponing the entry into force of the ban until 30 June 2009. CE-44.

67. The last vessel discharge into the tank farm at the Port of Durres took place on 25 June 2009, more than seven and a half years after operations had begun there. CE-84. On 30 June 2009, the ban on ships transporting petroleum, gas and their by-products in the Port of Durres became effective. CE-44. As late as 2010, the ultimate fate of Claimant's Port of Durres facility was still unresolved (*see* CE-202 (First Five Year Review of the Albanian National Transport Plan, Draft Final Report, Part III, June 2010)), and the record provides no indication either that the container facility originally recommended for the site had been approved (indeed the original Land Use Plan itself appears to have been replaced in 2008) or that any plans for use of the site at any time through the conclusion of the lease term in 2018 have been adopted. Cl. Mem. ¶177. Although the "*restoration of the competitive level playing field*" (identified in ¶4.2 of the *Petrolifera* settlement agreement) obliged the closing of both the ports of Durres and Shengjin to the processing of tankers, Respondent in 2011 reversed its ban with respect to the Port of Shengjin, with the result that only competitors operating in the Port of Durres remained unable to resume processing tanker vessels. CE-36, CE-45. *See also* Cl. Mem. ¶180.

68. On 1 July 2009, Porto Romano was officially opened.[24]

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23. CE-198, ¶4.2. The agreement also recited the existence of "*terminals operating 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.*"

24. Cl. Mem. ¶¶111, 176; Cl. Rep. Chronology at page 22; Resp. C-Mem. ¶¶145, 146. In Resp. C-Mem. (¶¶144-47) Respondent states:

69. Shortly after the ban became effective, Claimant concluded that its investment was no longer economically viable on an ongoing basis. The investor's commercial activity in the Albanian market was significantly curtailed, and Claimant began to wind down its Albanian operations. Cl. Mem. ¶¶184, 185; CE-120.

70. The Majority rejects Claimant's contention that the foregoing evidence shows that "*the real purpose of this [the tanker ban] was to cut off the tank farms from supply, thereby de-facto shutting them down and achieving relocation without having to pay compensation.*" It does so in my view by failing to give appropriate consideration to Respondent's failure to produce a fact witness with relevant knowledge on the very question as to which it finds Claimant's proofs unpersuasive (*e.g.*, Award ¶546) and thereby applies an unfair standard of proof on these matters. *See infra* ¶77. This is particularly so given the fact that the witness produced to discuss the *Petrolifera* settlement specifically disavowed any knowledge of the relationship of the "*long standing*" policy to implement the Land Use Plan and the decision to settle the *Petrolifera* claims.[25]

> *144. [I]n the course of 2008-2009, operators like Elda, Kastrati and even Claimant's former partner Anoil, all decided to relocate their business to Porto Romano.*
>
> *145. On 1 July 2009, the ban on the processing of ships transporting oil, gas and their by-products in the Port of Durres became effective. . . .*
>
> *146. At the same time [i.e., July 1, 2009], Porto Romano opened for operations, featuring a brand new terminal for vessels carrying oil and LPG.*
>
> *147. By that time, Rira Oil and InterGaz were already in the process of building their oil and LPG tank farms at its site. Shortly thereafter, other companies like Elda, Kastrati, Anoil, Bolvo Oil, Gega and Taci-Oil also commenced construction work and are now currently operating from Porto Romano.* (Citations omitted.)

The website referenced in Resp. C-Mem. as the basis for the last quoted statement contained the following information as of August 2014:

> *Romano-Port has built 6.5 km north of the city of Durres. Oil deposits are not predicting the activity of Romano Port. This activity will be conduced by the different importers or distributors. Currently in the area of Romano Port has built the oil tank with a capacity of 20.000 m3 and LPG tank with the capacity of 10.000 m3, respectively Rira Oil and Inter Gaz companies.* ***Are continuing work to build their deposits companies like: ELDA, KASTRATI, ANOIL, TACI – OIL.*** (Emphasis added.)

See http://www.romanoport.com.al/index.php?option=com_content&view=article&id=12&lang=en

Respondent produced no witness to testify to the timing or state of readiness of Porto Romano when it was officially opened on the very day the tanker ban took effect.

25. *See* H. Tr. III., day 3, pages 209-211 (Peka Cross Examination):

> *Q. . . . how can you say that the ban which was then implemented followed a longstanding public policy which specifically also relates to the port of Durres and Mamidoil when you don't know anything about the companies which were enacted by that ban? I don't understand this.*

71. For reasons discussed below, I believe the circumstances surrounding the *Petrolifera* settlement provide further evidence that Respondent violated Claimant's rights to fair and equitable treatment and to be free of unreasonable and discriminatory measures.

III. LEGAL ANALYSIS

72. As previously stated, I believe Claimant has established Respondent's breach of its obligations to provide fair and equitable treatment and to refrain from treating Claimant in an unfair and discriminatory matter.

73. The Majority has separately analyzed various strands of Claimant's FET claims in Sections 6.2-6.7 of the Award, and Claimant's Statement of Claim invokes separate protections for fair and equitable treatment and to be free from unfair and discriminatory conduct.

74. I preserve to a certain extent the separation of the various stands of FET analysis in this section of my dissent largely to facilitate an understanding of how and where I part company with the Majority.

75. A rigidly independent consideration of the FET elements advanced by Claimant and separately analyzed by the Majority, however, obscures the interconnected nature of the record before us, a record that demonstrates in various ways a lack of transparency and fairness in Respondent's treatment of this investor. *See Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, at ¶253 ("*[fair and equitable treatment], in the present case, cannot be interpreted as being limited to the protection of legitimate expectations and non-discrimination but covers a number of other principles which have been mentioned in a number of arbitral awards. The Rumeli award, for example, lists the following principles to be applied: transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate expectations.*").

76. As discussed below, there are instances in which I do not believe Claimant has carried its burden of establishing a specific element of the FET analysis as a separate and discrete claim, but as to which the evidence adduced by Claimant reinforces the overall record that it was treated unfairly and inequitably and in a non-transparent manner. *See, e.g.*, the discussion of

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> *A. . . . We were trying to reach a settlement agreement. My main purpose was dealing -- or let's say* ***my main job was dealing with the court. . . . we had representatives from various government agencies, as far as I remember: from the Ministry of Economy and Energy . . . with issues pertaining to what was in the port of Durres, which company was operating in the port of Durres or what consequences would be for those companies working in the port of Durres, it was them dealing with it directly, not me.*** *As I said, my job was coordination, bringing people together, discussing, putting a common position from the Albanian Government's perspective, and trying to reach a common language with Petrolifera.* (Emphasis added.)

No representatives from the additional agencies and ministry identified by this witness testified to the Tribunal.

harassment and coercion, *infra* ¶¶133-40. The need to consider the record as a whole when evaluating Claimant's FET claim is demonstrated by the award in *PSEG Global Inc. v. Republic of Turkey*, where the tribunal found an FET breach despite Turkey's absence of bad faith in changing its laws because "*[t]he aggregate of the situations*" challenged by the investor "*raise[d] the question of the need to ensure a stable and predictable business environment for the investor to operate in.*" As has happened here, the government in *PSEG Global* had "*altered [the longer term outlook for Claimant's investment] in such a way that will end up being no outlook at all.*"[26] I have no doubt that the record before us, when taken as a whole, establishes (in the words of the PSEG tribunal) "*that the fair and equitable treatment standard has been breached, and that this breach is serious enough to attract liability.*" *Id.* ¶246.

77. This is particularly so in light of the many occasions on which the Tribunal has been confronted with an absence of fact testimony on the part of Respondent. I have identified elsewhere the almost total absence of fact witnesses by Respondent who would have been able to testify on issues that are crucial to a fair evaluation of the record on fair and equitable treatment. The Majority in my view fails to account in its sifting of the evidence for Respondent's decision to present its defense largely by "*putting the Claimant to its proofs*" while forgoing the presentation of a fact witness who possessed anything other than the most marginally relevant personal knowledge of the events discussed in this dissent. This failure in my view has a fundamental impact on a proper evaluation of the broader record before us. While, as already indicated, many of the core facts in this controversy are not disputed, some clearly are, and I am concerned that the Majority's approach has required a standard of proof inconsistent with a fair and appropriate result.[27]

78. With these overarching considerations in mind, I turn to the specific aspects of the alleged breach of the FET and unreasonable and discriminatory standards.

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26. *PSEG Global Inc. and Konya Ilgin Elektrik Űretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶¶253-54.

27. *See The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶178:

> *[B]y stating the standard of proof as relative, the Tribunal means that whether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it.*

See also Vacuum Salt v. Ghana, Award 16 February 1994 at ¶45 (emphasizing the potential importance of the tribunal's ability to observe witnesses); Redfern, *The Standards and Burden of Proof in International Arbitration,* 10 Arb. Int'l. 317, 326 (1994):

> *[O]ne can question whether the arbitrator should indicate to the parties what level of proof their evidence should satisfy. I think yes, but the difficulty is that, in many instances, the question will arise at the time of the discussion of the award, when weighing the evidence provided by the parties. It is the responsibility of the arbitrator, if he foresees that the question might arise, to raise it with the parties and to give them the opportunity of arguing it, preferably at an early stage of the proceedings, before the taking of the evidence.*

A. Respondent violated Claimant's right to fair and equitable treatment by, *inter alia*, frustrating its legitimate expectations

79. As previously indicated, Dolzer and Schreuer properly base a determination of an investor's legitimate expectations on "***the legal order of the host state as it stands at the time when the investor acquires the investment***":

> *The investor's legitimate expectations are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state. The 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 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 by the host state that have led to legitimate expectations will violate the principle of fair and equitable treatment.*[28]

80. In addressing an issue that is critical here, Schreuer and Kriebaum make the following observation:

> *The purpose of protecting legitimate expectations is to enable the foreign investor to make rational business decisions relying on the representations made by the host State.*
>
> *[Tribunals] have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment.* ***The legal regime in place at the time of the investment is the starting point*** *against which the treatment of the investment by the State will be assessed by an investment tribunal to decide whether an investment protection treaty was violated.*
>
> RLA-2 (emphasis added).

81. Various tribunals have tested the legitimacy of an investor's expectations as of the time of its decision to invest:

> *365. . . . The legitimate expectations which are protected are those on which the foreign party relied when* ***deciding to invest.***[29] (Emphasis added.)

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28. Dolzer & Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012), p. 145 (citations omitted).

29. *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶365 (citation omitted) (finding violation of FET under BIT and applying different timing as to different claimants' legitimate expectations claims).

82. As indicated by the tribunal in *PSEG Global*, an investor may expect:

> *that the conduct of the host State subsequent to the investment will be fair and equitable as* ***the investor's decision to invest is based on "an assessment of the state of the law and the totality of the business environment at the time of the investment."***[30] (Emphasis added.)

83. In the earliest ICSID award to address this problem, the tribunal in *Holiday Inns v. Morocco* provided helpful guidance on the timing issue in discussing the "*unity of investment*" principle:

> *It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others.* ***It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.***[31] (Emphasis added.)

84. As the tribunal noted in *Enron v. Argentina*:

> *[A]n investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty. This particular aspect was explained by an ICSID tribunal as "the general unity of an investment operation" and by one other tribunal considering an investment based on several instruments as constituting "an indivisible whole".*[32]
>
> *The protection of the "****expectations that were taken into account by the foreign investor to make the investment****" has likewise been identified as a facet of the standard. . . . What seems to be essential, however, is 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.***[33] (Emphasis added.)

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30. *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ¶255 (*quoting Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006).

31. *Holiday Inns S.A. and Others v. Morocco*, ICSID Case ARB/72/1, Decision on Jurisdiction, 12 May 1974. Although the decision is unreported, extensive quotations and case summary may be found in Lalive, The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*)–Some Legal Problems, 51 Brit YB Int'l L 123 (1980).

32. *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶70 (citation omitted).

33. *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶262.

85. *BG v. Argentina* is to the same effect: "*The duties of the host State must be examined in the light of the legal and business framework as represented to the investor* ***at the time that it decides to invest.***"[34] (Emphasis added.)

86. After considering many of these decisions, Schreuer and Kriebaum note that:

> *The 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 one time event but is seen as a process, the identification of the relevant time for the existence of legitimate expectations becomes more difficult.***
>
> RLA-2, page 273 (emphasis added).

87. From this constellation of ideas, i.e., evaluating the State's responsibility based on "*the legal and business framework as represented to the investor at the time that it decides to invest,*"[35] the unity of investment principle, and the notion that treaty protections should extend to a process of investment in which some investor acts are fundamental, while others are merely executory – the Tribunal must establish, based on the specific record before it, at what point(s) in time the legitimacy of Claimant's expectations should be measured.

88. Even though Schreuer and Kriebaum suggest a differentiated approach that examines "*the existence of legitimate expectations held by the investor* ***at the time of each individual decision***" (RLA-2, page 273), a careful examination of why these scholars reach this conclusion demonstrates that the exercise of determining when to measure legitimate expectations is less fluid than it may seem:

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34. *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 December 2007, ¶298. *See also National Grid PLC v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008), ¶173 ("*A review of the case law shows that this standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned. Thus, treatment by the State should 'not affect the basic expectations that were taken into account by the foreign investor to make the investment.*'"). The fact that the temporal measurement of expectations should take place no later than the point at which materialization has begun is evident from the award in *Tecmed*, which identifies the investor's need to make an "***advance assessment of the legal situation surrounding its investment and the planning of its business activity*** *and its adjustment to preserve its rights.*" *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶172 (emphasis added). This idea finds its echo in ¶375 of the Award, wherein the Majority notes in connection with the question of permitting compliance:

> *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.*

35. *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 December 2007, ¶298.

> *[I]t is necessary to identify the diverse transactions and activities, which combine to constitute the investment, and to examine individually whether they were based on contemporary legitimate expectations. In other words, it is necessary to ascertain the existence of legitimate expectations held by the investor at the time of each individual decision. The* ***key issue is the actual reliance*** *on expectations which existed at the particular point in time when the relevant decision was taken.*

RLA-2, page 273 (emphasis added).

89. As this text indicates, what drives the analysis is Claimant's claim of reliance to its detriment on expectations legitimately created by the host state's action. Applying the reliance test at the time of the initial decision to invest is straightforward, but there can be no justification in logic or investment treaty arbitral jurisprudence for applying a new determination of reliance each time an investor takes the countless executory decisions necessary to materialize its investment. In the context of Schreuer and Kriebaum's identification of the importance of reliance theory, the "*decision to invest*" benchmark must prevail until such time as, based on Claimant's claims, further action by the sovereign resulted in additional investor expectations on which the investor claims it relied. Thus, the time at which legitimate expectations should be measured depends on how Claimant formulates its reliance case, and Schreuer and Kriebaum correctly suggest that a tribunal should differentiate those moments at which Claimant claims it relied on new state action to its detriment in order to test the legitimacy of that reliance based on the circumstances that existed at such time(s).

90. Although Schreuer and Kriebaum are correct that this "*differentiated approach*" may complicate matters, such is not the case here, because Claimant's reliance case is straightforward. Claimant contends that its "*[e]xpectations that [its] tank farm could be operated for 20 years in the port were legitimate [because they were] based on discussions, project approval and [the] leasing contract*," and the fact that "*Claimant invested in reliance on these expectations.*" Claimant's Opening Slide 22; Cl. Mem. ¶¶278-83. Because all of the host state acts on which Claimant's legitimate expectations case is based save one took place prior to its decision to invest,[36] there is no need to deviate from the classic test for determining the legitimacy of its expectations and its reliance thereon as of that time.[37]

91. In evaluating Respondent's counter-argument that no breach of legitimate expectations occurred, it bears repeating here *in extenso* the key passages from Respondent's Counter-Memorial, since this counter-narrative raises several inter-related issues:

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36. With respect to Claimant's contention that the issuance of the Temporary Trading Permit in February 2001 (i.e., after the decision to invest) **reinforced** its legitimate expectations, *see* n. 38, *infra*.

37. The record demonstrates that under the terms of Claimant's business plan, submitted with its request for investment approval, the investment was to occur in two phases, i.e., construction of the tank farm (an investment estimated to cost USD 8 million, to be followed at a later time with the build-out of a network of COCOs with an estimated additional investment of approximately €15 million (*see* Cl. Mem. ¶54; Kyriakos Mamidakis' Witness Statement ¶¶11, 17; Theodoros Stamatelopoulos' Witness Statement pages 7-8; and Anastasios Mavrakis' Witness Statement ¶4).

248. . . . [Claimant] proceeded with making its investment in complete disregard of the legal environment. Worse still, and in contrast to the circumstances at hand in Parkerings-Compagniet v. Lithuania, Mamidoil Albanian not only could have known that regulatory enhancements were imminent by conducting due diligence, it in fact did know. From the very outset of the construction of its tank farm it received numerous and multiple notifications and express warnings from the Government of upcoming regulatory changes affecting tank farm companies operating in the Port of Durres. Nonetheless, Mamidoil Albanian, in its persistence to secure a dominant market position at all costs and by any and all means, bluntly disregarded its obligations under Albanian law, turned a blind eye to the clear notifications and warnings it received and, instead, vigorously pressed on, rapidly mounting one illegality upon another.

249. In other words, none of the regulatory changes complained of by Claimant came "[s]uddenly and out of the blue," nor was there any lack of transparency or uncertainty as Claimant gratuitously alleges. The future was not unclear, but rather was crystal clear. From the very outset the Albanian Government had unequivocally warned and notified Mamidoil Albanian that it could not continue with its plans to construct the tank farm. In addition, it had repeatedly asked it to stop its investment and had constantly informed Mamidoil Albanian that, in the future, both the activity of storing oil, as well as the activity of processing oil, would be banned from the Port of Durres. It was Mamidoil Albanian that, despite these warnings, notifications and stop orders, consistently disobeyed and ignored the Government, blinded by its desire to secure – at all costs and by any and all means – a dominant market position.

250. Mamidoil Albanian's behavior was in fact so reckless, that even when it was requested in July 2000 to stop all further investments and construction work on the tank farm in view of the Government's newly adopted public order policy to relocate the activities of storing and processing oil in the Port of Durres for overriding safety and socio-economic reasons, it still did not stop. Instead, it pressured the Government to allow it to finish its illegal construction works and to temporarily operate wholesale activities, until the relocation of the tank farm.

251. The Government, under political and diplomatic pressure from the Greek Government, decided, by way of a good faith exception, to accommodate Mamidoil Albanian. Notably, it allowed Mamidoil Albanian - albeit at its own risk and account - to finish construction of the tank farm and granted it on 16 February 2001 a temporary trading permit to enable it to mitigate its self-inflicted losses. Claimant's assertion that, by doing so, the Government "reaffirmed" Mamidoil Albanian's "legitimate" expectation is, therefore, manifestly illfounded and non bona fide. Not only did Mamidoil Albanian know that its tank farm was constructed illegally without the required permits and approvals (which in and of itself estops Mamidoil Albanian from having "legitimate" expectations), it was also unambiguously clear and time and again reiterated that the agreed solution was only a provisional one executed under a special regime, and would only remain in place until the relocation of the tank farms in the Port of Durres.

252. Moreover, it was crystal clear that the temporary trading permit granted Mamidoil Albanian one sole right, namely the right to act as a wholesaler of oil in the Albanian market. It did not and could not legalize the illegal construction of the tank farm, nor did or could it absolve Mamidoil Albanian from its obligation to secure all the necessary other authorizations to carry out its activity.

253. Therefore, at the moment the Council of Ministers adopted Decision No. 486 in June 2007, banning oil tankers from the Port of Durres, Claimant held, at the very most, two valid rights, namely:

a. a Lease Agreement that did not give it any right other than to lease a vacant plot of land in the Port of Durres for 20 years; and

b. a temporary trading permit issued by the Ministry of Public Economy and Privatization on 16 February 2001 that did not confer any rights upon Mamidoil Albanian other than to act as a wholesaler and that, moreover, would only be temporarily valid pending the relocation of the fuel storage activity (and in any event not longer than 10 years (i.e. until 16 February 2011) absent a relocation decision).

Resp. C-Mem., ¶¶248-253 (footnotes and citations omitted).

92. This passage raises a number of issues previously discussed. Most important among them is the fact that the appropriate time for determining whether Claimant reasonably relied on expectations created by Respondent is the time at which the decision to invest was made, i.e., when the lease of land for construction of the tank farm on the basis of the accompanying business plan was executed and materialization begun. Respondent does not address in its written submission the important question of what were Claimant's legitimate expectations at that point in time, preferring instead to move its temporal focus forward: "*[Claimant]* ***proceeded with making*** *its investment in complete disregard of the legal environment*;" "*[f]rom the very outset of the* ***construction of its tank farm*** *it received numerous and multiple notifications and express warnings from the Government of upcoming regulatory changes*," etc. (emphasis added).[38]

93. In the language of *Holiday Inns*, Respondent has shifted the temporal focus away from the key moment of Claimant's "*act which was the basis of the investment*," i.e. accepting the legal obligation to build a tank farm on the basis of the business plan made part of the lease (*see* ¶39, *supra*), and focuses instead on the "*executory*" acts by which Claimant continued the materialization of its investment. This shift in my view confuses any proper analysis of Claimant's legitimate expectations.[39]

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38. As to the contrary indications in the record that materialization of the investment was already under way at the time Claimant received notice of the possible future change in land use, *see supra* ¶¶41-3.

39. That said, Respondent is correct to point out (and the preceding analysis supports the notion) that, to the extent Claimant has alleged that the later grant of the Temporary Trading Permit was an act that reaffirmed its

94. Although both parties devoted much attention to the question of when Claimant first learned of the potential change in zoning regulations at the Port of Durres, the fact remains that the "notice" events relevant to whether or not Claimant's legitimate expectations were frustrated took place after the investment had been approved and the decision to invest had been made at a time when Claimant was already executing on that approval. *See supra* ¶¶41-3. The record establishes – and the Majority accepts (Award ¶652) – that, as of the date the Lease was executed, Claimant had no knowledge that the port of Durres would one day be closed for the landing or storage of petroleum products. Indeed, the record is undisputed that, had the Claimant known otherwise, it would not have signed the lease in the first place and thereby assumed what Respondent characterized in July 2000 as "*the contracted obligations*" to build the tank farm. CE-22. *See supra* ¶17.

95. Moreover, the information of which Claimant received notice was **not a change in the legal regime**, but rather a general indication of the **possible future change** of some aspect of Respondent's legal regime that **might** have an impact on Claimant's ability to benefit from its then ongoing investment. It is common ground that Claimant was only notified of the specific and actual change to Respondent's legal regime after 21 July 2000, when: (i) it was informed of Decision No. 294 and (ii) it was instructed by the Ministers of both the Ministry of Public Economy and Privatization and the Ministry of Transport to "*interrupt[] further investments.*" CE-22. By this time much of the investment relating to the first ($8 million) phase of Claimant's investment had already been made.[40]

96. While I agree with the Majority that the Tribunal must take a "balanced" approach by considering both parties' interests when it applies the treaty provisions here in issue (*e.g.*, Award ¶¶610, 623, 635), I do not believe that the "balancing test" described in the Award at ¶734 ("*When balancing both Parties' interests, Respondent's right to conduct a public policy of consistent modernization prevails*") can be squared, on this record at least, with our obligation to enforce the treaties whose protections apply to this investment. As the Majority itself notes at ¶620 of the Award:

> *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. 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.***" (Emphasis added) (*quoting* CLA-4, page 268).

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legitimate expectations, Claimant has "*reset the clock*" under the "*differentiated*" approach, and would have the burden of establishing as of this later point in time that its legitimate expectations were then separately violated.

40. Cl. Mem. ¶74; CE-61, ¶11; Nikolaos Mamidakis' Cross Examination, H. Tr., day 2, page 20; H. Tr., day 1, pages 37-8.

97. The record before us demonstrates that materialization of Claimant's investment was under way by the time notice of the Berger study was given, that 85% of the cost of the tank farm itself was invested before Respondent changed its legal regime in June of 2000, and that the Central Government, as the "*appropriate authority*," took no timely action to: provide notice of the Berger study before the decision to invest was made and materialization begun; invite Claimant's participation or comment on the study; or challenge Claimant's explicit invocation of its legal right to proceed with further preparations for and construction of the tank farm after the local Port Director asked it to suspend work. To the contrary, the highest levels of Respondent's government acknowledged as late as July 2000 that the work Claimant had undertaken up to that time was "*based on [its] contracted obligations [to invest] in the reconstruction or construction of the new deposits.*" CE-22. As explained below, each of these elements reinforces a record by which Respondent failed to meet its obligation to provide fair and equitable treatment.

98. The legal significance of the events that occurred after Claimant's legitimate expectations had arisen, i.e., after 20 June 1999, should properly be viewed in the context of a host state that has changed – or indicates it may change – its position with respect to an investment already approved. Thus the relevant guidance should come from such decisions as *Tecmed v. Mexico*, ICSID Case No. ARB/00/2, Award, 29 May 2003, ¶¶120-121 (FET obligation under Mexico-Spain BIT violated where existing license granted to investor was subsequently revoked, even though host state's actions appeared to be consistent with national law); *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, ¶¶231-234 (change in Poland's privatization policy which led it to withdraw its consent to investor's previously approved additional investment through supplemental share purchase held to violate FET standard); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case. No. ARB/01/7, Award, 25 May 2004, ¶¶165-166 (finding that approval of an investment by the host state for a project that was against its own law constituted a breach of the obligation to treat investor fairly and equitably); and *PSEG Global*, discussed above at ¶¶76, 82. *MTD v. Chile* is of particular interest because it suggests (at ¶167) that the warnings Claimant received about potential future changes to the legal regime are properly evaluated as part of a failure-to-mitigate defense.

99. In contrast to the decisions just referenced, the Majority invokes the award in *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, where the City of Vilnius withdrew its agreement with the claimant consortium concerning the construction and operation of a parking facility after various actions by the national government and its agencies impaired the performance of the agreement. The *Parkerings* tribunal found no violation of Lithuania's obligation under the Norway-Lithuania BIT to accord the investor fair and equitable treatment.

100. Any meaningful attempt to reconcile the decision in *Parkerings* with the decisions cited above must take account of the key factual distinction between *Parkerings* and the present dispute. Unlike Claimant here, which bases its legitimate expectations claim on the representations made at the senior levels of government, including statements by the Prime Minister, and ministerial action (including the execution of a 20-year lease based on approvals by two senior ministers that specifically required Claimant to exploit the leased premises by constructing a tank farm in accordance with Claimant's business plan), the investor in *Parkerings* entered into a contract not with the central government, but with the city of Vilnius.

This key fact led the *Parkerings* tribunal to begin its legitimate expectations analysis with the following observation:

> *326. The Tribunal notes that in this case a difference has to be made between: a) the obligations of the Republic of Lithuania not to modify the law, and b) the obligations of the Municipality of Vilnius to inform and protect the Claimant against the potential economic impact of such modification on the Agreement.*[41]

101. It makes perfect sense, in the context of this key distinction identified by the *Parkerings* tribunal, to note that, had the party contracting with the local municipality wished to avoid the central government taking action to impair its investment, it could have sought explicit assurances from the central government itself. But this point of departure for the *Parkerings* analysis cannot have application to the situation faced by Claimant here, because the assurances and rights to exploit its investment over a 20-year period were obtained from the highest levels of the central government in the first place.

102. Any other reading of *Parkerings* would not only do violence to the reasoning set out in the award itself, but also make *Parkerings* an outlier. Indeed, *Parkerings'* suggestion that, in order to recover for breach of legitimate expectations, an investor must "*demonstrate that the modifications of laws were made specifically to prejudice its investment*" (*id.* ¶337), appears to be at odds with several awards that have found a breach of legitimate expectations where a host state acts in good faith. *E.g., The Loewen Group, Inc. v. U.S.A.*, ICSID Case No. ARB/(AF)/98/3, Award, 26 June 2003)), ¶132 ("bad faith" not necessary to establish a lack of fair and equitable treatment); *Occidental Exploration & Prod. Co. v. Ecuador*, Final Award, 1 July 2004 (LCIA Case No. UN3467), ¶¶185-186 ("*fair and equitable treatment*" is "*an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not*"). The *Parkerings* tribunal itself, in considering the discrimination claim advanced there, noted that "*[w]hether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State*" if the applicable treaty is silent as to such requirements. *Parkerings*, ¶368.

103. If *Parkerings* is read within the specific, clearly distinguishable context of its facts, it is in close agreement with the approach outlined above, an approach which requires a careful evaluation of whether the investor relied on valid expectations created by Respondent at the time the decision to invest was made. In the words of the *Parkerings* tribunal:

> *330. In order to determine whether an investor was deprived of its legitimate expectations,* ***an arbitral tribunal should examine ". . . the basic expectation[s] that were taken into account by the foreign investor to make investment*** *. . . ." In other words, the Fair and Equitable Treatment standard is violated when the investor is deprived of its legitimate expectation that* ***the conditions existing at the time of the Agreement*** *would remain unchanged.* (Emphasis added.)

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41. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶326.

> *331. The expectation is legitimate* ***if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment.*** *Finally, in the situation where the host-State made no assurance or representation,* ***the circumstances surrounding the conclusion of the agreement are decisive*** *to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyze the conduct of the State at the time of the investment.*[42] (Emphasis added.)

104. As the highlighted language indicates, *Parkerings* is fully consistent with the mainstream jurisprudence which measures the legitimacy of expectations as of the time at which the decision to invest is made and materialization begun, and reasons in part on the basis of a decision (*Tecmed*), where a violation of legitimate expectations was found after the host state first granted then revoked the investor's license.

105. A similar finding of breach of the FET standard is appropriate here, because, in the words of the tribunal in *PSEG Global,* while "*no investor 'may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged,' . . . the investor can still expect that the conduct of the host State subsequent to the investment will be fair and equitable as the investor's decision to invest is based on 'an assessment of the state of the law and the totality of the business environment at the time of the investment.'*"[43]

106. The record here establishes that the highest levels of Respondent's central government approved Claimant's investment in the Port of Durres, the economic viability of which was premised upon the ability to load and offload tankers at the port. At the time it decided to invest and began the materialization of its investment, Claimant (as the Majority acknowledges – Award ¶652) had no way of knowing that a fundamental change to such a

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42. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶330-31 (*citing Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003) (footnote omitted) .

43. *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, ¶255 (*citing Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, ¶¶301, 305). This passage helps to explain why a breach of FET may exist on the basis of an overall record, even though the individual actions challenged by the investor do not individually establish a violation. *E.g., El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶518 ("*A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result*"); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶566 ("*even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures*"). In such cases one must distinguish between the timing of the activity giving rise to an investor's protected interest, which for reasons already described originate with the decision to invest and the initial materialization of the investment, on the one hand, and the chronology by which, over time, the host state engages in conduct which cumulatively rises to the level of a treaty violation.

central condition of its investment would occur, and Respondent made no effort to alert Claimant to that possibility until materialization was under way. The Majority's finding that Claimant should have known that changes to its legal regime were imminent is unsupported by the record. Respondent's central authorities affirmatively encouraged Claimant's investment, then remained silent after Claimant's then recently acquired right to proceed was challenged, and finally acknowledged that the investing that had occurred up until July 2000 had been "*based on the contracted obligations*." CE-22.

107. Even if one were to assume that a change that might destroy the economic viability of the approved investment was imminent by October 1999, the failure of the central authorities to take action in light of Claimant's clear invocation of its legal right to continue with its investment notwithstanding the port director's challenge was in itself unfair and inequitable. As the *PSEG Global* tribunal explained after finding as an initial matter that claimant investors lacked legitimate expectations with respect to certain terms of their investment:

> *246. The Tribunal is persuaded nonetheless that the fair and equitable treatment standard has been breached, and that this breach is serious enough to attract liability. Short of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of negotiations with the Claimants. The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept . . . , that important communications were never looked at, . . . are all manifestations of serious administrative negligence and inconsistency."*
>
> *Id.* at ¶246.

108. I conclude that the series of actions summarized above that were undertaken by or before the senior levels of Respondent's central government over a period of years through 2 June 1999 created a legitimate expectation on the part of Claimant that it was authorized and obligated, as detailed in its business plan made part of the lease agreement, to make its investment in order to operate a tank farm for 20 years in the Port of Durres and to service those tanks with port-side discharge.

109. Subsequent to the grant of the lease, Claimant proceeded to invest approximately USD 8 million to materialize this investment based on the legitimate expectations created by senior government officials no later than 2 June 1999. To the extent lower level officials took subsequent action to challenge the ongoing materialization of the investment (actions which Claimant directly challenged as contrary to the legal rights conferred on it by the lease) (RE-42), those actions were not based on an existing change to Respondent's legal regime, but represented at most notification of a potential future change that post-dated the creation of Claimant's legitimate expectations.

110. Though the facts surrounding the notices issued by the Durres Port Authority are relevant to the Tribunal's analysis, they are properly considered, as *MTD Chile* suggests, in the context of a failure-to-mitigate defense and not, as the Majority effectively holds, as a basis for concluding that Claimant forfeited its treaty protections by insisting on the investment rights it had already received at the time the notice was received. Moreover, even assuming *arguendo*

the absence (or defeasance) of legitimate expectations beginning in the fall of 1999, Respondent's conduct in dealing with Claimant once it began to consider repurposing Claimant's investment site fell short of the standard of fair and equitable treatment because of Respondent's evident negligence in failing to act appropriately in connection with the events leading up to the change of its legal regime in June 2000 as further detailed below.

B. Respondent's failure to provide a transparent and stable legal framework for Claimant's investments

111. Claimant's core contentions on this issue are these:

> *257. . . . Respondent breached the obligation to provide a transparent and stable legal framework by not informing Claimant and Mamidoil Albanian in detail about its possible plans for Durres port.*
>
> *260. Respondent approved Claimant's planned investment on 6 January 1999 – and thus after it had retained Louis Berger to review future possible development scenarios. The Lease Contract – for a 20 year lease of property for the construction and operation of the tank farm – was concluded in June 1999, six months after Louis Berger had been retained and when the study must have been well underway. Louis Berger will not have undertaken the study without site visits to Durres.*
>
> *262.* ***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.*** (Emphasis added.)

Cl. Mem. ¶¶257, 260, 262.

112. As this exposition indicates, the key allegation here is that Respondent failed to act in an appropriate manner prior to execution of the lease in June 1999. Any discussion concerning whether Claimant acted in a manner that aggravated its damages after that point in time must therefore be considered within the context of breach of Claimant's duty to mitigate, a matter as to which Respondent bears both the evidentiary burden and the risk of "putting Claimant to its proofs" without presenting its own witnesses with contemporaneous knowledge of the June 1999 to July 2000 period. *See* ¶77, *supra.*

113. Respondent's core response to these allegations is that the claim should be denied because Claimant was guilty of performing inadequate due diligence to anticipate and react to the potential change in Respondent's legal regime which eventually occurred in June 2000. Resp. Rej. ¶¶6, 9-11, 29-51. But the record leaves no doubt that:

- Claimant was not informed of the existence of the Berger study until well after it had made its decision to invest, received approval of that investment, and began work on its project;

- Claimant was given no opportunity to participate in or comment on either the Berger study or the process which eventually led to the change in Respondent's legal regime that adversely affected its investment; and

- The information of which Claimant received notice was not a change in the legal regime, but rather general indication of the possible future change of some aspect of Respondent's legal regime that might have an impact on Claimant's ability to continue benefiting from its then ongoing and approved investment.

114. Respondent argues that Louis Berger was retained "*under the umbrella of the IDA Credit Agreement*," and that the Council of Ministers acted under that "*umbrella*" in adopting Decision No. 294 of 13 June 2000, thereby approving the new Land Use Plan for the Port of Durres. Thus Respondent contends that, when Claimant made its November 1998 request for a lease, it did not "*consider or address the imminent regulatory and policy reforms, including those in relation to the Port of Durres under the umbrella of the IDA Credit Agreement, or the studies that would be conducted in that respect*" (*see* Resp. C-Mem. ¶¶38, 39; Resp. Rej. ¶43). I cannot accept this contention. *See supra* ¶¶ 36, 114.

115. Respondent approved and executed the Long Term Lease Agreement without informing Claimant that Louis Berger had been retained or providing it with any opportunity to participate in the study or in the process that eventually led to the change in laws that so negatively affected Claimant's investment. I find persuasive Claimant's contention that it "*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.*"[44]

116. Claimant in November 1998 could not have addressed "*imminent reforms*" that would flow from a study that was not even commissioned until December 1998. Nor is there any reasonable basis for believing that the mere existence of the IDA Credit Agreement would place a diligent and informed investor on notice of "*imminent regulatory and policy reforms*" or "*studies that would be conducted in that respect,*" at least with respect to studies which might have involved a repurposing of the site where Claimant had been given the approval to invest. *See supra* ¶36. A review of the IDA Credit Agreement points to no specific indication that rezoning, or imminent regulatory and policy reforms, would likely result. Because the Tribunal has not been provided with the Louis Berger contract, one can only speculate that it was entered into in furtherance of Schedule 2 of the IDA Credit Agreement. Schedule 2 does not on its face contain language that would have given a potential investor any idea whatsoever of the eventual activity that Claimant is now accused of having neglected.

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44. Cl. Mem. ¶262. *See also* Award ¶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.*"), ¶650 ("*The Tribunal 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,' and would continue to be so in the future*" (*quoting* Respondent's Port of Durres Investment Brochure, CE-132)).

117. Respondent notes at Resp. Rej. ¶43 that:

> *Another thing that [Claimant's advisor] failed to take into account was the conclusion of the IDA Credit Agreement in 1998 and the studies relating to the Port of Durres that were being conducted under the umbrella of that agreement. These studies, and in particular* ***the study relating to the land use in the Port of Durres, would be critical for Claimant's envisaged investment*** *in the Port of Durres.*

Emphasis added. *See also* Resp. C-Mem. ¶¶39, 72.

118. Respondent's acknowledgment that the Louis Berger study "***would be critical for Claimant's envisaged investment***" (emphasis added), itself establishes the criticality of Respondent's failure to advise Claimant of the study's existence, and of the ongoing process of review undertaken in connection with the IDA Credit Agreement until many months after the decision to invest was made, approved, and acted upon.[45] Since the Berger study resulted from a private contract, it was neither public nor something which itself changed Respondent's legal order.[46] Such a change only took place with the adoption of Decision No. 294, notified to Claimant in July 2000. Before that, Claimant made it clear with its response to the first notice letter that it considered its ongoing materialization authorized by higher authorities than the Port Director, who himself warned Claimant that refusal to suspend its ongoing work on the project would prompt him to pursue an order for suspension from "*the Competent Authority.*" This is precisely what he did after Claimant copied its initial response to the Port Director's superiors in Tirana. *See* RE-15.

119. In these circumstances, to suggest that Claimant somehow forfeited its treaty protections to fair and equitable treatment by insisting on rights already established under Respondent's legal regime seems to me untenable. To the contrary, I read the relevant arbitral jurisprudence to support a finding that Respondent failed to maintain a transparent and stable legal environment for Claimant's investment in violation of Article 5(1) of the Switzerland-Albania BIT and ECT Article 10(1).[47]

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45. Even then, the terms and manner by which Claimant was advised of the Berger study well after its investment had been approved made it clear that the investor would have no input into a process that would eventually cripple its investment. *See* ¶36, *supra.*

46. There is a serious question of when and how a *potential* change of legal regime would have any impact on the legitimacy of an investor's expectations, particularly where, as here: the potential for change becomes known only after the investment has been approved and its materialization is under way; the investor is not invited to participate in the process which leads to a fundamental change in the viability of the investment; and the host state later acts in a manner wholly inconsistent with the underlying "policy" that served to justify implementation of the new norm in implementing its change of course. *See Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶128 (regulation had existed at all times relevant to investor and no *de jure* change had been made).

47. *See 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, ¶131:

120. In *MTD Equity v. Chile*, for example, the tribunal concluded that Chile had violated the fair and equitable treatment standard both by its inconsistent conduct and its lack of transparency. Had Chile disclosed prior to the investor's decision to invest that the project would violate existing local law, the investor could have made an informed decision concerning whether to invest despite the risk that the required local approval might not be received.[48] Respondent here has insisted that the Louis Berger study "*would be critical for Claimant's envisaged investment in the Port of Durres.*" Resp. Rej. ¶43. It cannot now contend that it was any less critical for Respondent to have informed Claimant of its IDA-related intentions generally and the existence and progress of the Louis Berger study specifically before it approved Claimant's investment and executed the lease. Moreover, its failure to solicit any input or participation of Claimant in the study itself is further indication of a lack of transparency.

121. In *Tecmed*, the tribunal found that the FET standard had been violated where the host state's environmental regulatory authority failed to notify the investor of its intentions, and thereby deprived the investor of the opportunity to express its position:

> *[T]he Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly.*[49]

122. The letters from the Durres Port Director provide a clear case of the very kind of legal ambiguity that the *Tecmed* tribunal found violative of the FET standard. Claimant here responded to the Port Authority warning letters with an unambiguous declaration indicating that it held the "*confident belief that [it was] acting in accordance with all relevant laws,*"[50] and copied the same senior government officials who had authorized its investment and ordered the leasing of the site to Claimant in the first place. The fact that these "*Competent Authorities*" (to use the term employed by the Port Director) took no action to intervene to clarify the situation until the Louis Berger study was adopted as a *fait accompli* after the bulk of Claimant's initial investment had been made bespeaks a lack of transparency and stability in the legal environment in which Claimant was obliged to operate. Indeed, in July 2000 the "Competent Authorities" themselves characterized Claimant's actions undertaken to move forward with the project during the year following the grant of the lease as "***based on the contracted obligations*** *[to invest] in the reconstruction or construction of new deposits.*" CE-22 (emphasis added).

> *[T]he fair and equitable standard consists of the host state's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.*

48. *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 25 2004, 12 ICSID Rep. 6 (2007) ¶163.

49. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶167.

50. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶76.

123. In the language employed by the tribunal in *Tecmed*, Respondent's conduct here was:

> *172. . . . characterized by its ambiguity and uncertainty which are prejudicial to the investor in terms of its advance assessment of the legal situation surrounding its investment and the planning of its business activity and its adjustment to preserve its rights.*
>
> *173. [Respondent's behavior] negatively affected the generation of clear guidelines that would allow the claimant . . . to direct its actions or behavior to prevent [outcomes prejudicial to its investment].*[51]

124. The record in my view supports a finding that Claimant's right to a transparent and stable legal environment was violated, and the evidence adduced by Claimant in support of that contention provides further support for the analysis set forth previously as to why Respondent failed to meet the minimum standard of fair and equitable treatment.[52]

C. The legal significance of Claimant's failure to comply with domestic permitting and licensing requirements

125. I read the Majority's analysis as imposing on Claimant a forfeiture of any right to FET protection as a result of its failure to comply fully with domestic permitting and licensing laws. This view is most succinctly stated at ¶716 of the Award:

> *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.*[53]

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51. *Tecmed*, ¶172-73. *See also CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶274-76 (holding that a stable legal and business environment is an essential element of fair and equitable treatment and finding that Argentina violated that standard when it adopted measures that entirely transformed the legal and business environment under which the decision to invest and the investment were made).

52. For the reasons expressed in this section, I also disagree with the Majority's finding that Respondent did not act arbitrarily in its treatment of Claimant. *See* Award ¶¶657, 661.

53. The fact that the Majority does not speak in the language of forfeiture does not alter the fact that a forfeiture is precisely the result it accomplishes. The Majority notes that "*the real issue*" with respect to permitting compliance "*concerns finality. [Respondent] was ready to enter into a debate about the legal framework of the investment and not repudiate it as it was.*" Award ¶493. But it is precisely because the prospect of legalization never disappeared that the Majority approach is a backward looking methodology which turns the question of when and whether Claimant obtained protected rights upside down. In concluding that it has jurisdiction (i.e., that the substantive protections of the treaties apply), the Tribunal has effectively decided, as *Saba Fakes* indicates, that the non-compliance was not of a nature to effect a forfeiture of those protections. When the Majority's illegality merits analysis is addressed in the context of the appropriate consideration of elements of

126. I disagree with the Majority's approach to the issue of illegality for several reasons, including its unwillingess to give appropriate weight and legal significance to the following:

- Claimant's alleged failings with respect to permits and licenses had no relationship to Respondent's laws on foreign investment;
- Claimant was allowed to continue exploiting its investment for years after its failure to respect domestic permitting and licensing laws was known to Respondent, during which time Respondent took no action to invoke its domestic law procedures to sanction Claimant for its non-compliance;
- Respondent's pre-arbitration invocation of its licensing and permitting statutes was at a minimum consistent with, and in my view in furtherance of, its failure to act in a transparent manner with the investor.

127. My core disagreement with the Majority on the question of permits and licenses relates to the fact that there is no evidence of a failure to comply with Respondent's laws relating to foreign investments. Indeed, Respondent's law on foreign investments was not even exhibited to the Tribunal, presumably because it is not in issue. Respondent's illegality arguments instead turn on other legislation, including its *Law on Urban Planning* and its *Law on Control and Regulation of the Construction Works*. The Tribunal acknowledges this distinction when, in the course of rejecting Respondent's jurisdictional defense based on illegality, it notes that (Award ¶¶372, 378):

> *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.* (Emphasis added.)
>
> * * *
>
> *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***

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timing in the materialization of Claimant's investment (*see supra* ¶¶79-99), I believe it becomes plain that on the question of permitting compliance the Majority has effectively concluded that Claimant had legitimate expectations subject to the subsequent condition that it comply with or cure a failure to comply with Respondent's domestic law permitting obligations. *See, e.g.*, Award ¶716:

> *. . . 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*

> ***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.*** (Emphasis added.)

128. I consider that the key distinction between contraventions of foreign investment legislation and those of other domestic laws applies with equal logic to any appropriate analysis of Claimant's FET claims. In *Saba Fakes v. Republic of Turkey,* Respondent Turkey challenged the investor's actions as having violated its legislation relating to the encouragement of foreign investment, the regulation of the telecommunications sector, and domestic competition law. Although the tribunal considered that a demonstrated violation of Turkey's foreign investment law could run afoul of the legality requirement contained in the relevant BIT, a violation of the regulations in the telecommunications sector or of competition law requirements was considered not to have implicated a violation of the legality requirement:

> *[I]t would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. . . . [D]omestic legislation beyond the sphere of [its] investment regime [should not form the basis for a host State] to escape its international undertakings vis-à-vis investments made in its territory.*[54]

129. There are clear reasons of policy and practicality that support maintaining this same distinction between non-compliance with "*norms and regulations for setting up its*

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54. *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶119. The Majority cites this same passage for the proposition that:

> *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.*

Award ¶481.

The inner link that *Saba Fakes* itself establishes relates to illegality of the investment itself, most particularly through a failure to comply with the host state's laws and procedures on foreign investments. This distinction is all the more compelling here where Art 2 of the BIT requires Respondent to "*promote investments . . . and admit such investments in accordance with its legislation.*" Here there was no failure to comply with the Respondent's investment laws, and Claimant's investment was indeed approved and admitted, as the 7 July 2000 letter from Respondent established when it acknowledged that the investment accomplished up to that date had been made in accordance with Claimant's "*contracted obligations.*" CE-22.

investment" (Award ¶378), on the one hand, and domestic permitting and licensing requirements, on the other, when approaching the question of Claimant's right to fair and equitable treatment.[55]

130. First, as a matter of policy, the Majority's approach has the impermissible effect of subordinating Claimant's public international law rights to domestic norms that have no reasoned connection to the policies that inhere in the treaties that must form the basis of this Tribunal's analysis. While in appropriate circumstances (discussed by the Tribunal in its jurisdictional analysis) a violation of domestic law may provide a substantive defense to the merits of an investor's claim, this is clearly not a case in which either local laws governing foreign investments were violated or the investment itself was otherwise illegal *in se*. Once the Tribunal concludes, as it has done in the course of its jurisdictional analysis, that the substantive provisions of the investment treaties in issue apply, it is inappropriate to subordinate those protections to domestic legal requirements. That is the very basis of the distinction identified by the tribunal in *Saba Fakes,* and the distinction applies with equal or greater force when addressing the merits of Claimant's claims. This is why an illegality defense, whether at the jurisdictional or merits phase of the inquiry, can only succeed when it goes to the very nature of the investment itself and the domestic rule in issue has the effect of making the investment inherently illegal, something which the Tribunal determined in the course of its jurisdictional analysis was not the case here. *See* Award ¶377.

131. *Saba Fakes* also points to the practical incongruities of the Majority's approach. In distinguishing the policies that inhere in foreign investment laws from those of other domestic laws, the *Saba Fakes* tribunal took specific note of the fact that "*[i]n the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation.*" *Saba Fakes* ¶119. Here the Tribunal has specifically found that Respondent took no such action (Award ¶416), but chooses not to accord that critical fact any legal significance. Instead it engages in an extended exploration of domestic permitting rules that are not part of Respondent's "*norms and regulations for setting up its investment*" (Award ¶378), even though those local laws cannot override or excuse Respondent's failure to honor its public international law commitments. This subordination of

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55. Both parties devoted substantial attention to the question of whether there had been implied acceptance by Respondent of Claimant's non-compliance. Thus the Tribunal notes that:

> *As to the general attitude of Respondent [with respect to the construction permit issue], 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. . . . 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."*
>
> Award ¶416.

While I agree that Claimant failed to comply with Respondent's domestic permitting laws, I do not believe for the reasons discussed that this amounted to a forfeiture of Claimant's treaty protections. Indeed, having found that Claimant's investments were as a matter of the Tribunal's jurisdiction within the scope of the investment treaties here in issue, the Majority's finding that there was no legal significance to Respondent's failure to enforce the licensing norms throughout the entire period of Claimant's operations is in my view unjustified.

international to domestic law is particularly unfortunate in the circumstances of this record, where Claimant operated for years in "open violation" of the very policies now deemed of such importance as to justify effecting a forfeiture of Claimant's treaty rights. The Majority takes this step despite the indications in the record that what reconciles Respondent's invocation of its permitting laws with its failure to enforce them is Respondent's attempt to derail Claimant's persistent demands for compensation. *See supra* ¶¶55-62.

D. The relevance of Claimant's allegations of a separate FET breach arising from Respondent's alleged "intimidation and coercion" to relocate the tank farms without compensation

132. Claimant contends that Respondent utilized intimidation and coercion in violation of Claimant's FET protections in forcing it to relocate its tank farm operations without compensation. Although I agree that the record before the Tribunal, as discussed below, strongly suggests that Respondent was motivated by a desire to avoid paying any compensation in connection with the relocation, I do not believe that Claimant has succeeded in establishing an independent breach of the FET standard on the basis of coercion or intimidation. The "compensation story" in my view does, however, provide additional evidence demonstrating Respondent's lack of transparency and a failure to meet the FET standard.

133. The cases cited by Claimant, and particularly the award in *Vivendi v. Argentina*, provide indication of why Respondent's actions in refusing to deal in a straightforward manner with the question of compensation for relocation should be treated under the transparency strand of the FET analysis:

> *[W]hile 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 . . . .*[56] (Emphasis added.)

134. While in appropriate circumstances state coercion and intimidation can constitute an independent FET violation, Claimant has not met its burden of proving that Respondent resorted to such tactics here. *Cf. Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶308. The fact that Respondent eventually executed its new policy in a manner inconsistent with its announced reasons for adopting Decision No. 294 does not alter the fact that its change was, in the first instance, effected without coercion or harassment. The abandonment of those justifications remains relevant, however, to Claimant's lack of transparency claim.

135. The record supports the conclusion that Respondent – like Claimant – expected when it granted Claimant a 20-year lease in June 1999 that the investment would be materialized in the terms outlined in Claimant's business plan. Once Respondent received and adopted the

56. *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, ¶7.4.31.

Louis Berger recommendations, however, it faced a clear dilemma. Although it welcomed the support of the international institution and its consultant, Respondent, in implementing the consultant's recommendations, faced the acknowledged risk of having to pay Claimant compensation for forcing it to relocate.

136. This is the clear import of the press statement by Prime Minister Meta reported by Albanian media on 29 August 2000:

> *I wish to reiterate that 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, they are legal ones, which implies that the current government, although [it] is not accountable for their signing, cannot avoid the legal and financial responsibility, regarding the obligation arising to the Albanian state due to non-observation . . . . Likewise,* ***the government has made and is making efforts to avoid to the maximum the financial and legal obligations deriving from the suspension and termination of these contracts, due to the master plan.***[57]

CE-81 (emphasis added).

137. The Prime Minister's statement provides important context for the story that can be found in the minutes of the Working Group convened to discuss relocation of the Greek investors from Durres. As the available Working Group minutes indicate (*see supra* ¶¶57-59), Claimant repeatedly raised the issue of compensation while Respondent largely ignored the issue

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57. I believe this conclusion is reinforced by statements contained in the Letter from the World Bank to the Prime Minister of Albania dated 14 July 2000 (CE-79), which states (at ¶13):

> *The mission reiterates 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.*

Although the Majority expresses uncertainty that this document is indication that Respondent's Minister told the World Bank mission that Respondent would need to identify funds to compensate Claimant for moving its site of operations (Award ¶475), this is the construction tacitly acknowledged by Respondent in its Rejoinder:

> *297. Finally, Claimant's suggestion that the purported "assurances" given in June 2000 by the former Minister of Transport, Mr. Nako, to the World Bank Supervision Mission in Albania to the effect that the Government would "identify funds to compensate the [tank farm] company for moving" from the Port of Durres, also demonstrates that the Government recognised the legality of the tank farm is entirely inapposite. This purported statement was made at a time when the Government was still entirely unaware of the fact that Claimant was "rapidly" constructing the tank farm without availing itself of the necessary permits and approvals to confront the Government with a fait accompli.* (Citations omitted.)

Resp. Rej. ¶297. As to the lack of any evidence in the record to support the statement that the Respondent was "*entirely unaware*" of permitting non-compliance prior to the Working Group meetings in 2003, *see* ¶59, *supra*.

and interposed the question of first "*regularizing the permit status*" of the Durres-based Greek companies. The record indicates that, even though this precondition was never fully met, Claimant was allowed to continue its operations with an irregular permit status for more than 6 years after the last Working Group meeting. The implication is clear: taken in the context of the overall record, the fact that the question of permits was not seriously raised again until these proceedings were under way supports the inference that the "regularization of permits" issue was used by Respondent as a defensive tactic, interposed in a non-transparent way to avoid meaningful discussion of compensation. Had Respondent wished to avoid the consequence of such an inference, it could easily have presented the testimony of a witness with direct knowledge of these events.

138. This inference is furthermore supported by the manner in which Claimant was subjected to the effects of the *Petrolifera* settlement. Rather than ordering Claimant to close its tank farm (something required by the *Petrolifera* settlement), Respondent ignored the policy justifications that underlay its original decision to adopt the Master Plan. Thus, after Respondent contractually committed itself to Claimant's competitor Petrolifera to cease its forbearance from implementing its earlier decisions concerning Durres, Respondent continued to hedge its risk of liability for relocation-based compensation by informing Claimant that it could continue to use its tank farm so long as it did not supply it by tanker. This approach, which destroyed the ongoing economic viability of Claimant's investment, allowed Respondent to claim (at the expense of its original policy goals) that Claimant's rights had not been impaired. This action was yet another step in the Government's policy, acknowledged by the Prime Minister in August 2000, "*to avoid to the maximum the financial and legal obligations deriving from the suspension and termination of [the Durres-based investors'] contracts, due to the master plan,*" (CE-81) and to satisfy the demands of Claimant's competitor, Petrolifera, as discussed below.

139. By acting in this fashion, Respondent violated Claimant's right to fair and equitable treatment. The issue of forced relocation without compensation is therefore an integral part of the transparency story, and further supports a finding that Respondent failed to meet the FET standard.

E. Claimant's independent claim that Respondent engaged in unreasonable and discriminatory action in violation of Art. 10(1) of the ECT by banning the processing of fuel tankers in the Port of Durres

140. Claimant asserts multiple theories by which it contends Respondent violated the prohibition set out in ECT Art. 10(1) against unreasonable and discriminatory conduct. I believe the record supports the Claimant's contention that Respondent violated the unreasonable and discriminatory standard by banning the processing of fuel tankers in Durres and in connection with Respondent's actions taken to implement its obligation to accomplish this result under the *Petrolifera* agreement.[58]

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58. *See* Cl. Mem. ¶308:

> *Respondent acted unreasonabl[y] and discriminator[ily] by banning the processing of fuel tankers in the port of Durres. This was unreasonable, as it did not serve a rational public purpose and*

141. While the conduct identified by Claimant as it relates to the inter-relationship between the *Petrolifera* settlement and the imposition of the tanker ban does, in the context of the overall record before us, justify a finding that Claimant's treaty protections were violated, I believe that conduct is most obviously relevant to Respondent's obligation to provide a transparent and stable legal environment.

142. Claimant's core contentions concerning unreasonable discrimination in imposing the Durres tanker ban are these:

> *150. The straw that finally broke the camel's back was . . . the closing down of the port of Durres for the processing of ships carrying oil and gas in 2009 (hereafter, "the closing-down"). It is this closing-down which forced Claimant's subsidiary to abandon its oil-trading business and deprived the company of any value. Claimant will show that:*
>
> - *The closing-down did not serve any plans for redevelopment of the port. Since the plans under the Louis Berger report had been abandoned by the time the processing of ships was prohibited.*
>
> - *Instead, the closing-down only served to fulfill a settlement agreement with Claimant's competitor Petrolifera. Respondent in 2007 agreed to end the operations of the Greek companies in the port of Durres by an executive act in order to make up for its failure to honor [the Petrolifera] concession agreement.*
>
> *151. However,* ***instead of ordering the dismantling and relocation of Claimant's tank farm – a move announced years before which would have given Claimant a claim for compensation of their initial investment from the outset – [Respondent] chose to close-down the port of Durres thus effectively putting Claimant out of business. This allowed Respondent to fulfill its contractual promises vis á vis Petrolifera whilst claiming that Mamidoil Albania's rights under the lease contract and the trade permit were not affected.*** (Emphasis added.)

Cl. Rep. ¶¶150-151 (cross-references omitted).

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was disproportionate. The purpose of the ban was not to shut down the tank farms in order to be able to build a container terminal on the leased site (see above, para. 179). Respondent explicitly contended that the ban would not affect the rights of Mamidoil Albanian under the Lease Contract and under existing permits. The ulterior motive can only have been to redirect the vessels to the newly opened oil terminal in Porto Romano. Mamidoil Albanian's activities were not shut down in order to allow for a rezoning of the port of Durres, but to favour a domestic competitor in the fuel market. Respondent cannot succeed with arguing that the public purpose was to concentrate fuel shipping traffic in only two ports – Porto Romano and Vlora. As we have set out, Respondent for 'utmost strategic reasons' exempted the port of Shengjin. Thus, in spite of its alleged plans three of the four main ports in Albania today still can be used by fuel tankers. Only Durres is banned. It is the only port in which only subsidiaries of Greek companies operated, and Respondent has no plans to use the leased areas until the Lease Contract's expiration in 2018. (Citation omitted.)

143. Respondent contends that the *Petrolifera* settlement is irrelevant to the FET analysis, because, in agreeing to implement the tanker ban as part of that settlement, Respondent was doing nothing other than implementing a policy previously adopted with the enactment of Decision No. 294 in the summer of 2000. This reasoning cannot withstand analysis for two core reasons:

- Decision No. 486 (both as enacted and as implemented) did not in fact carry out the policies embodied in Decision No. 294, but rather departed from the purposes advanced in June 2000 to justify the forced relocation of investors' tank farms, thereby reinforcing the conclusion that Respondent's principal motive was, "***to avoid to the maximum the financial and legal obligations deriving from the suspension and termination of [the Durres-based investors'] contracts, due to the master plan.***" CE-81 (reporting Prime Minister's August 29, 2000 statements) (emphasis added).

- The record in my view establishes that the Durres tanker ban was triggered by Respondent's acknowledged need to settle an ongoing arbitration with Claimant's competitor, Petrolifera. While Respondent claims that it was only agreeing with Petrolifera to implement a policy decision it had taken seven years before the settlement, the key facts remain that: (i) during those seven years Respondent had not forced the relocation during the intervening period either, and (ii) Respondent acted neither to implement its original plan nor the full terms of the settlement agreement, but chose the half measure of a tanker ban that was eventually imposed on only some of the Petrolifera competitors. The clear inference is that, but for the *Petrolifera* settlement, Respondent would have either allowed Claimant to continue as before, or, at a minimum, re-launched negotiations with the investors to resolve the compensation issue in a straightforward, transparent manner. Respondent's failure to do so provides additional grounds for a determination that Respondent breached the FET standard generally, the transparency standard specifically, and Art. 10(1) of the ECT.[59]

144. In its letter of 21 July 2000, Respondent's Minister of Public Economy and Privatization and the Minister of Transport informed Claimant that the Plan of Utilization of the land in Durres Port had been approved by Decision No. 294, and that "*[t]he plan determine[d] the displacement of the existing [fuel] deposits outside the Durres Port and the stopping of the construction of new deposits.*" CE-21, 22. As stated by Respondent in its Counter-Memorial, the Albanian Government had by this Decision "*adopted [a] public order policy to relocate the activities of storing and processing oil in the Port of Durres* ***for overriding safety and socio-economic reasons***." Resp. C-Mem. ¶250 (emphasis added).

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59. Nor do I agree with the Majority's apparent conclusion that the Respondent would have ceased forbearance, even in the absence of the *Petrolifera* settlement, once Porto Romano was officially opened. This is especially so given that the Respondent, which bore the burden of persuading the Tribunal on that issue, offered no witness to substantiate this contention, and in light of the concerns set forth in n. 24, *supra*.

145. As previously discussed, this July 2000 order that Claimant suspend further investment was rescinded in December 2000, and Claimant received the Temporary Trading Permit and commenced its Durres operations in the course of the following year. While the question of relocation was discussed during the first few months of 2003, no attempt was made to prevent Claimant from operating until announcement of the tanker ban within the time period stipulated by the *Petrolifera* settlement agreement.[60]

146. That agreement, dated 10 May 2007, provided in part that:

> *4.2 The State of Albania acknowledges that, due to its delay in the performance of the Agreements, the competitive market situation for logistics terminals in Albania is now different from the one which the Concessionaire, as the first mover, would have found in case of timely performance . . . .*
>
> *In order to restore a competitive level playing field* ***[Respondent] . . . 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, or to* ***cause the competent Albanian authorities or public bodies to set****, by means of a Decision of the Council of Ministers and/or by any other act of the competent authorities needed to this aim,* ***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.*

CE 198, ¶4.2 (emphasis added).

147. The terms of the *Petrolifera* agreement are clear: Respondent undertook as part of the settlement the obligation to cause, by the final deadline of 31 March 2009, the cessation of "*loading, downloading, handling and storage of flammable liquids*" in the Port of Durres.[61]

148. In contrast to Decision No. 294, which, as Respondent notes, implemented a "*public order policy* ***to relocate the activities of storing and processing*** *oil in the Port of Durres for overriding safety and socio-economic* reasons" (Resp. C-Mem. ¶326) (emphasis added), Council of Ministers' Decision No. 486, issued on 25 July 2007, ordered the "***interrupt[ion of]***

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60. *See also* Resp. C-Mem. ¶142 ("*Mamidoil Albanian's contractual rights under the Lease Agreement . . . remained completely intact and unaffected by the measures adopted by the Government*").

61. Moreover, the fact that Respondent in 2011 exempted the Port of Shengjin from the tanker ban for "*strong strategic reasons*" (with the result that only the Greek investors at Durres were ultimately adversely affected) reinforces the notion that the ban was an unreasonable measure granted, as the settlement agreement suggests, in order to provide competitive benefit to the Italian company. *See* CE-119 (CM decision No. 110, regarding agreement between Petrolifera and Respondent, dated 26 January 2011).

the activity of processing ships *transporting petroleum, gas and their by-products in the ports of Durres and Shengjin, within 18 months from entry in force of such decision*" (CE-36) (emphasis added). As this language makes clear, Decision No. 486 does not order the interruption of storing petroleum, gas and their by-products in the Port of Durres or require the relocation of Claimant's tank farm.

149. This distinction is confirmed by Respondent's letter dated 14 April 2010, advising Claimant that:

> *Based on th[e] legislation [in force] your company has signed on 02.06.1999 a 20-year-long leasing contract with the former Ministry of Public Economy and Privatisation; object of the contract is the leasing of a free lot located in Durres harbour (total of 13.992 m2), aiming at constructing a fuel warehouse center.*
>
> * * *
>
> *Based on the above evaluations and interpretations, the approval of DCM no. 480, dated 25.07.2007, as amended, that impedes processing of ships with naphtha, gas, etc in Durres harbor, does 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.*[62]

150. By abandoning Decision No. 294's avowed purpose of "*displac[ing] the existing [fuel] deposits outside the Durres Port and the stopping of the construction of new deposits. . .*" (CE-22) "*for overriding safety and socio-economic reasons*" (Resp. C-Mem. ¶250) – and ignoring its obligations under the *Petrolifera* settlement agreement which spoke in similar language – Decision No. 486's narrower language of prohibition can only be read as a non-transparent attempt "*to avoid to the maximum the financial and legal obligations deriving from the suspension and termination of these contracts, due to the master plan.*" CE-81.

151. In summary, Respondent's conduct in connection with imposition of the tanker ban, and the manner by which it implemented that ban and performed its obligation to do so under the *Petrolifera* settlement agreement, violated as a general matter Claimant's right to fair and equitable treatment, including its specific responsibility to provide a stable and transparent legal regime, and ECT Art. 10(1)'s prohibition against unreasonable and discriminatory measures.

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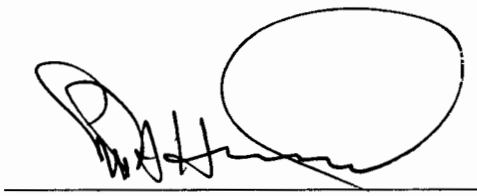
62. CE-118. This letter is also significant because it demonstrates that by 2010 – seven years after the lack of permits issue was raised during the Working Group meetings in 2003 (*see* CE-86, 87, 88; RE-41) – Respondent still did not act on any concerns of illegality or lack of permits it may have had, but instead suggested that Claimant was free to continue using the non-compliant facility so long as it did not off-load tankers in doing so.

IV. CONCLUSION

152. Although Claimant has separately pleaded various aspects of the fair and equitable treatment standard, the record before us demonstrates the wisdom of those tribunals that have examined the cumulative impact of conduct variously characterized as unfair, inequitable, non-transparent, and so forth. *E.g., PSEG Global, Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶174 (finding FET violated because of "*a cumulative lack of transparency that, short of bad faith, comes at the very least close to negligence*"); *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand* (UNCITRAL, 1 July 2009) (finding FET breach after consideration of the "*total factual matrix*"). The record here commends itself to precisely this kind of "*totality of the circumstances*" approach as it relates to Claimant's FET allegations, particularly given that several separately pleaded theories are in fact part of a consistent pattern of host state action undertaken to accomplish the relocation of Claimant's investment without compensation in furtherance of Respondent's announced policy to "*avoid to the maximum the financial and legal obligations deriving from the suspension and termination of [Claimant's contract], due to the master plan.*" CE-81. I have no doubt that the record before us taken as a whole establishes "*that the fair and equitable treatment standard has been breached, and that this breach is serious enough to attract liability.*" *PSEG Global*, ¶246.

Dated: March 20, 2015
New York, New York



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