

Arbitration under the Rules of the International Centre for Settlement of
Investment Disputes

ICSID Case No. ARB/07/21

BETWEEN

PANTECHNIKI S.A. CONTRACTORS & ENGINEERS (GREECE)

Claimant

And

THE REPUBLIC OF ALBANIA

Respondent

AWARD

Tribunal:
Jan Paulsson
(Sole Arbitrator)

Representing Claimant:

GVM Law
Panayotis Glavinis
Konstantinos Markoulakis
Alexandra Koutoglidou

Pantechniki S.A.
Edward Sarantopoulos

Representing Respondent:

State Attorney General
Eduard Halimi

State Attorney's Office
Ledina Mandia

Derains Gharavi
Lazareff
Hamid Gharavi
Julien Fouret
Nabil Lodey

ICSID Secretary to the Tribunal: Martina Polasek
Administrative Assistant to the Tribunal: Craig Chiasson

Date of Dispatch to the Parties: 30 July 2009

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INTRODUCTION

1. A contractor's road work site in Albania was overrun and ransacked by looters during severe civil disturbances in March 1997. It is estimated that two-thirds of the country's adult population had lost much of their savings to Ponzi schemes in which government officials were said to be complicit. Waves of rioting battered the country. Hundreds of people were killed. The government fell. Disorder was everywhere – particularly in the southern region where the work site was located. Neither public nor private security forces could withstand the onslaught of looting. The contractor's site at Bushtriza was in a remote location. The nearest police station was distant. The contractor's on-site private security personnel were overwhelmed. What equipment could not be stolen was destroyed.

2. The contractor is the Claimant here. Each of its two contracts contained a provision to the effect that the Albanian Government's General Road Directorate accepted the risk of losses due to civil disturbance. The Claimant sought recoupment of losses in excess of US\$4.8 million. (Losses valued in Albanian Lek are disregarded for the sake of simplicity.) The Resident Engineer made a lower evaluation of some US\$3.1 million. A special commission was then created by the General Road Directorate. This commission valued the Claimant's loss at US\$1,821,796. The Claimant says it accepted this amount in the interest of good relations. The Minister of Public Works (who supervises the General Road Directorate) wrote to the Minister of Finance requesting payment of the amount established by the commission. The Minister of Finance refused. He explained that his Ministry "cannot carry out the obligations of Ministries or other Institutions as a result of their contractual relations" unless funds are approved for that purpose by the Council of Ministers. More than ten years later no payment has been made.

3. The Claimant brought a case against the Ministry of Public Works in an Albanian court in May 2001. It states that it did so in the expectation – raised by comments of the Minister of Finance – that this would be a mere formality to facilitate the approval of payment. But the Albanian courts have not given the claim a cordial reception. The Court of Appeal of Tirana ruled that the contractual provision referred to above was a nullity under Albanian law because it purported to create liability without fault. The Claimant filed an appeal to the Supreme Court but subsequently abandoned

that avenue because of its professed belief that it cannot get a fair disposition of its claim there.

4. Instead the Claimant today invokes the protection of the Albania-Greece bilateral investment treaty of 1991 (the *Treaty*).¹

5. Familiar legal questions arise. Does this case involve an “investment” permitting recourse to ICSID? Did the Claimant’s actions before the Albanian courts foreclose arbitration under the BIT? Was there a denial of justice? Did Albania violate the duty of full protection and security? Or the duty to accord fair and equitable treatment?

THE PARTIES

6. C.I. Sarantopoulos S.A. is a Greek company listed on the Athens Stock Exchange. It was the original contractor. Pantechniki S.A. Contractors & Engineers is also a Greek company listed on the Athens Stock Exchange. Pantechniki absorbed C.I. Sarantopoulos S.A. in 2002. Unless one or another of these entities is considered individually they are referred to indistinctly as the *Claimant*.

7. The Respondent is the Republic of Albania (*Albania*).

THE TRIBUNAL AND THE PROCEDURE

8. The Claimant submitted a Request for Arbitration to ICSID on 1 August 2007 and proposed that a sole arbitrator be appointed to decide the dispute. On 8 October 2007 Albania informed ICSID of its agreement with the Claimant’s proposal. On 28 November 2007 ICSID informed the Parties of its appointment of the Sole Arbitrator in accordance with the Parties’ joint instructions. (The Parties had identified two individuals to ICSID and requested that the Centre select one of them for appointment.)

9. There is no need to recapitulate correspondence with counsel. Procedural orders have been reduced to writing and need not be described here.

¹ The Claimant had initially also relied on the Albanian Law on Foreign Investment of 1993. The Claimant’s concluding oral submission made clear that it finally chooses to pursue its claim on the Treaty alone. (“Absolutely, in all respects, jurisdiction and substance.” T:Day 2:5:17-18.)

10. The principal written submissions were:

- (a) The Request for Arbitration of 1 August 2007 (*Request*).
- (b) The Claimant's Memorial of 31 March 2008 (*Memorial*).
- (c) Albania's Counter Memorial of 8 September 2008 (*Counter-Memorial*).
- (d) The Claimant's Statement of Reply of 8 November 2008 (*Reply*).
- (e) Albania's Rejoinder of 16 January 2009 (*Rejoinder*).

11. Albania raised jurisdictional objections which were joined to the merits. A hearing took place in Paris on 11 and 12 May 2009. The following witnesses testified:

- Pinelopi Dourou for the Claimant;
- Edward Sarantopoulos for the Claimant;
- Ingrid Shuli for Albania; and
- Eralda Çani for Albania.

FACTUAL BACKGROUND

12. In the summer of 1994 the Claimant was selected after an international tender for works on bridges and roads in Albania. Two contracts (the *Contracts*) were concluded by the General Road Directorate and the Claimant:

- Contract No 4 (Elbasan – Cafasan road) dated 18 August 1994 (*Contract 4*); and
- Contract No 6 (Mamurasi – Miloti road) dated 14 October 1994 (*Contract 6*).

13. The Claimant commenced work promptly after signature of the Contracts. The works were interrupted by several days of riots in March

1997. Violent incidents led the Claimant to abandon its work site and to repatriate its personnel. Armed bands stole everything that could be carried away and destroyed almost everything they left behind. This broad narrative is unchallenged by Albania.

14. On 29 May 1997 the Claimant submitted a claim for compensation amounting to a total of US\$4,893,623.93. On 1 October 1997 the Resident Engineer appointed by the World Bank (within the framework of his contractual duties) evaluated the Claimant's damages at US\$3,123,199 (plus about 107 million Albanian Lek).

15. Subsequent to the Resident Engineer's evaluation a special commission was created by the General Road Directorate (the *Special Commission*). On 21 January 1998 the Commission valued the Claimant's losses at US\$1,821,796 (plus about 26 million Lek). The Claimant explains that it accepted the Special Commission's calculation because it was engaged in another project in Albania and desired "good co-operation" with the Government.

16. On 3 February 1999 the General Road Directorate wrote to its supervising Minister of Public Works as follows (with a copy to the Claimant):

"The Resident Engineer and one Commission of the General Road Directorate, after the necessary verification about the claim of the company, come to the conclusion that the company C.I. Sarantopoulos S.A. must be reimbursed for losses for the amount: 1,821,796 USD and 25,890,356 Lek.

This result has been presented to the company C.I. Sarantopoulos S.A. and was accepted from her representatives as a final and global solution to the problem of reimbursement of the damages according to the contracts

You are requested to take a final decision"

17. On 26 April 1999 the Minister of Public Works wrote to the Minister of Finance as follows (without a copy to the Claimant):

"The events of March 1997, had caused to [the Claimant] damages in machinery, equipment and in

the site. Based in contractual clauses this responsibility falls on the „Employer“ (Albanian side).

The General Road Directorate together with the Supervisor and the Contractor have established the amount of damages and agree about this amount that the Employer stay responsible

Since the Ministry of Public Works and Transport have not in the possession funds to complete the contractual obligations, we are asking that your Ministry deal with the claim of the Company for the completion of the contractual obligations.”

18. The Claimant alleges that the letters of 3 February and 26 April 1999 amount to a “settlement agreement” with respect to the Claimant’s claim for compensation and in the amount calculated by the Special Commission. Albania rejects this characterisation.

19. The Claimant naturally pressed its claim following the Special Commission’s evaluation. On 11 May 1999 the Minister of Finance informed the Claimant by letter of his refusal of payment in the following terms:

“According to the Albanian Legislation, the Albanian state does not take over to pay off the damages that various persons have suffered, because of the riots of March 1997. We also make it clear that on base of legal acts in force, the Ministry of Finances can not carry out the obligations of Ministries or other Institutions as result of their contractual relations. For this reason the Ministries or other institutions are given funds from the state budget at its approval. The unforeseen cases can be fulfilled only by the special fund of Ministers“ Council.”

20. Completion certificates for both Contracts were issued in 1999.

21. The Claimant commenced litigation in the Albanian courts against the Ministry of Public Works on 31 May 2001 on the basis of the alleged settlement agreement. The Claimant says that it did so because the Minister of Finance orally advised Mr Edward Sarantopoulos (who was in charge of the Claimant’s international business) to take that course. The Claimant makes clear that its intent was not to “open up the dispute which had already

been settled”; it was rather seeking “an enforceable court decision which it was told was required for the agreed compensation to be disbursed.” The Claimant asserts (through Mr Sarantopoulos) that it was led to believe that such a favourable judgment would be a rapid formality.

22. Albania denies that any of its officials encouraged the Claimant to initiate Albanian court action with such expectations.

23. The Tirana District Court dismissed the claim on 4 July 2006. The Claimant appealed to the Court of Appeal of Tirana on 14 July 2006.

24. On 3 November 2006 the Claimant notified the Ministers of Public Works and Finance and the Prime Minister of Albania that it had a claim against the Republic of Albania under the Treaty. The Claimant wrote that in accordance with Article 10 of the Treaty it had a right to submit a claim to ICSID arbitration in the event that the dispute could not be settled amicably within a reasonable period of time not exceeding six months.

25. On 5 July 2007 the Court of Appeal dismissed the Claimant’s case. The Claimant promptly appealed to the Supreme Court of Albania.

26. On 1 August 2007 the Claimant filed its Request for Arbitration.

27. The Claimant stated in the course of the ICSID hearing (and confirmed in writing on 6 June 2009) that it was abandoning its challenge before the Supreme Court.

THE CLAIMS

28. The Claimant submits that:

- (i) Albania failed to accord full protection and security to the Claimant’s property in Albania.
- (ii) Albania failed to ensure the Claimant fair and equitable treatment.
- (iii) Albania failed to honour an obligation to pay to the Claimant agreed compensation for its losses.

- (iv) *Alternatively* the Claimant suffered a denial of justice before the Albanian courts.
- (v) The Claimant is entitled to monetary recovery as a result of these failures of compliance with the Treaty.

29. Albania challenges ICSID jurisdiction and the admissibility of the claims. It moreover denies them on the merits.

JURISDICTION AND ADMISSIBILITY

30. Albania initially questioned Pantechniki's right to bring any claims to ICSID arbitration but in the Rejoinder accepted its standing as the corporate successor of C.I. Sarantopoulos.

31. Albania's remaining threshold objections have been expressed in a number of ways but essentially fall under two categories:

- (i) the Claimant has not made an investment entitling it to invoke the ICSID Convention;
- (ii) the Claimant has disqualified itself under Article 26 of the ICSID Convention by pursuing two remedies simultaneously before ICSID and the Albanian courts; at any rate the claims are inadmissible because the Claimant has disregarded the "fork-in-the-road" provision of the Treaty.

These objections will be considered in turn.

(i) A qualifying investment?

32. The Claimant must demonstrate that it has made an investment in Albania in order to rely on the protections contained in the Treaty.

33. Article 1(1) of the Treaty provides:

"1. „Investment“ means every kind of asset and in particular, though not exclusively, includes:

- a) movable and immovable property and any other property rights such as mortgages, liens or pledges.
- b) shares in and stock and debentures of a company and any other form of participation in a company.
- c) loans, claims to money, or to any performance under contract having a financial value.
- d) intellectual and industrial property rights, including rights with respect to copyrights, trademarks trade names, patents, technological processes, know-how, and goodwill.
- e) rights conferred by law or under contract with a Contracting Party, including the right to search for, cultivate, extract or exploit natural resources.”

34. The Claimant asserts that the BIT falls within the category of treaties that define investments broadly and that its investment was manifest in:

- the supply of services and materials;
- the contribution of equipment and construction management;
- the mobilisation of the appropriate human and capital resources for the purposes of performing the Contracts; and
- the entitlement to compensation deriving from the above.

35. The Claimant appears easily to qualify under the explicit terms of Article 1(1) of the Treaty. The difficulty arises under Article 25(1) of the ICSID Convention:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”.

36. What does “an investment” mean here? Other ICSID tribunals have hesitated. A number of tribunals have struggled with what has become

known as the “Salini Test” (by reference to the award in *Salini v. Morocco*). This appears to be a misnomer. It is not so much a test as a list of characteristics of investments. The *Salini* award identified five elements as “typical” of investment but made clear that the absence of one could be compensated by a stronger presence of another. The resulting wide margin of appreciation is unfortunate for the reason articulated succinctly by Douglas:

“If the fundamental objective of an investment treaty is to attract foreign capital, then the concept of an investment cannot be one in search of meaning in the pleadings submitted to an investment treaty tribunal that is established years, perhaps decades, after the decision to commit capital to the host state was made.”²

Douglas proposes a formulation (“Rule 23” in his Diceyan propositional mode) which excludes two of the *Salini* elements as unacceptably subjective: “a certain duration” and “contribution to the host state’s development”. Recent cases and commentary suggest that Douglas’s Rule 23 may well encapsulate an emerging synthesis. It reads: “The economic materialisation of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.” My own analysis is at any rate as follows.

37. Numerous states have concluded BITs which define investments capaciously. Many of these BITs purport to give access to arbitration under the ICSID Convention. The question that has vexed a number of tribunals is whether the ICSID Convention itself contains an autonomous and more restrictive definition which closes the door irrespective of such BITs.

38. Paragraph 25 of the Report to the Executive Director of the World Bank reflects the problem:

“... consent alone will not suffice to bring a dispute within [ICSID] jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.”

² *The International Law of Investment Claims* 190 (2009).

39. Does this mean that the word “investment” as used in Article 25(1) of the Convention requires objective features that cannot be varied by agreement? Textually the answer need not be affirmative. Article 25(1) defines two other types of limitations which suffice to show that “consent alone will not suffice”. The first is that the dispute must be *legal*. The second is that it must involve a Contracting State and a national of another Contracting State. Both of these limitations are conscious institutional boundaries established by the founders of ICSID. It stands to reason that these constitutive limitations cannot be ignored by those who would intrude into a system not designed for them or for their problems.

40. This observation satisfies the notion that “consent alone will not suffice”. There appears to be no explicit requirement that the absence of an investment (in some meaning specifically developed for the purposes of the ICSID Convention) should also defeat purported consent.

41. Indeed in the context of BITs the notion of an autonomous investment requirement would be of a different nature than the “legal dispute” and “Contracting States” requirement. It would deny Contracting States the right to refer legal disputes to ICSID if they have defined investments too broadly. One may wonder about the purpose of such a denial. If the words of the Convention nevertheless said so that would of course be decisive. But there is no such express limitation. The drafters of the Convention decided not to define “investments”. Does this mean that the matter is left to the determination of states?

42. For ICSID arbitral tribunals to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it.

43. It comes down to this: does the word “investment” in Article 25(1) carry some inherent meaning which is so clear that it must be deemed to invalidate more extensive definitions of the word “investment” in other treaties? *Salini* made a respectable attempt to describe the characteristics of investments. Yet broadly acceptable descriptions cannot be elevated to jurisdictional requirements unless that is their explicit function. They may introduce elements of subjective judgment on the part of arbitral tribunals (such as “sufficient” duration or magnitude or contribution to economic development) which (a) transform arbitrators into policy-makers and above all (b) increase unpredictability about the availability of ICSID to settle given disputes.

44. It may be objected that some types of economic transactions simply cannot be called “investments” no matter what a BIT may say; one cannot

deem a person to be 10 feet tall. The typical example given is that of a “pure” sales contract. There is force in the argument. Yet it may quickly lose traction in the reality of economic life. It is admittedly hard to accept that the free-on-board sale of a single tractor in country A could be considered an “investment” in country B. But what if there are many tractors and payments are substantially deferred to allow cash-poor buyers time to generate income? Or what if the first tractor is a prototype developed at great expense for the specificities of country B on the evident premise of amortisation? Why should States not be allowed to consider such transactions as investments to be encouraged by the promise of access to ICSID?

45. The monetary magnitude of investments cannot be accepted as a general restriction. It was considered but rejected in the course of preparing the ICSID Convention. Any State might of course adopt a policy of never giving its consent to ICSID arbitration with respect to investments below a certain magnitude. (The expense of ICSID arbitration at any rate constitutes an important practical obstacle to small claims; there need be no fear of crashing floodgates.) But other States may precisely want to benefit from the aggregate investment flows of attracting the small to middle sized businesses which have contributed so notably to the development of economies such as those of Germany and Italy. This is *their* policy choice; not that of ICSID arbitrators.

46. In the end the best outcome might be a consensus to the effect that the word “investment” has an inherent common meaning. This would avoid unintended conflicts among treaties. Such an inconsistency would be striking in the case of BITs which give the investor a choice between arbitrations under the ICSID Convention and other rules. A special paradox could arise under treaties which allow UNCITRAL arbitration only until the States-party become members of ICSID. That would mean that investors’ protection may suddenly narrow as a result of an uncertain future event. This is not a fanciful hypothesis; the Treaty in this very case envisages such an abandonment of the UNCITRAL option once the States-party have acceded to the ICSID Convention.

47. Douglas’s Rule 23 proposes an inherent common meaning. It would perhaps lead to useful and proper distinctions. An example might be the contrast between residences and rental properties. But it is not my task to make general pronouncements about an emerging synthesis intended to resolve all controversies. My only duty is to determine whether in this case there was an investment that satisfied both the Treaty and the ICSID Convention.

48. To conclude: it is conceivable that a particular transaction is so simple and instantaneous that it cannot possibly be called an “investment” without doing violence to the word. It is not my role to construct a line of demarcation with the presumption that it would be appropriate for all cases. But I have no hesitation in rejecting this jurisdictional objection in the present case. Albania does not come close to being able to deny the presence of an investment. Albania cannot and does not dispute that the Claimant committed resources and equipment to carry out the works under the Contracts. Its own officials have accepted that materiel committed to infrastructural development was brought by the Claimant to Albania and lost there.

49. The Claimant’s Project Manager (Ms Pinelopi Dourou) testified vividly about the shortage of materiel and skilled personnel in Albania at the time. She said that everything from cement to guardrails had to be imported from Greece. She easily countered Albania’s attempt to minimise the Claimant’s work as mere repairs rather than true construction by describing the work required to rehabilitate roads built during the Italian presence in Albania in the 1940s. There is no need to use one’s imagination to list the possible risks associated with the Contracts; one need only consider what actually happened. The Contracts envisaged aggregate remuneration to the Claimant of some US\$7 million. The expectation of a commercial return is self-evident. The objection is unsustainable.

(ii) Impermissible pursuit of the same claim in two fora?

50. Albania asserts that the claim is impermissible under Article 26 of the ICSID Convention which provides as follows:

“Consent of the parties to arbitration under this Convention shall unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

51. The Claimant has pursued its claim for recovery of losses incurred in the March 1997 events before the Albanian courts at three levels. The relevant chronology of events has been set down in Paragraphs 21-27 above.

52. Albania says that Article 26 of the ICSID Convention does not permit the Claimant to consent to ICSID jurisdiction while pursuing the same matter before the Albanian courts. Albania insists in particular that

the Claimant's appeal to the Supreme Court of Albania after filing the Request for Arbitration is incompatible with Article 26.

53. Albania moreover objects that the Claimant has breached the fork-in-the-road provision (Article 10(2)) of the Treaty which reads as follows:

“If such disputes cannot be settled within six months from the date either party requested amicable settlement the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal”

54. The Claimant responds that Article 26 does not prevent it from filing a Treaty claim with ICSID while a contract claim (albeit based on the same factual background) is pending before a domestic court. The Claimant reasons that Article 26 of the ICSID Convention does no more than exclude the possibility that any “other court – including the Albanian Courts” would consider claims under the Treaty.

55. The Claimant argues that Article 10(2) does not apply because: (i) the Claimant's resort to the Albanian Courts was not a choice within the meaning of Article 10(2) of the Treaty; and (ii) the dispute before the Albanian Courts and the dispute before ICSID are not the same dispute.

56. The second of these two arguments overlaps in substance with the debate about Article 26 of the ICSID Convention. I will deal with this matter presently. But first I will consider the rather unusual argument described under (i) in the preceding Paragraph. The Claimant considers that it should not be considered to have “chosen” the avenue of the Albanian courts because its decision to do so was the product of improper influence; the Minister of Finance at the time (Mr Anastas Angjeli) deceived Mr Sarantopoulos by causing him to believe that he (the Minister) would welcome a pro forma court judgment to justify payment to the Claimant. Mr Sarantopoulos testified as follows:

“I met several times with the Minister of Finance at the time, Mr A Angjeli, who instructed me, citing for political reasons, to refer the issue to the Albanian courts as a necessary requirement for the payment of the agreed amount, namely in order for the government to be able to invoke the court judgement to justify why the Albanian State had to pay such compensations to CIS. I was led to

believe that such reference to the Albanian courts was a mere formality and its positive outcome a certainty. Based on such reassurances, CIS embarked in what proved to be a legal marathon lasting more than 6 years, faced with a concerted stonewalling of the Albanian administration and judiciary.”

57. Mr Sarantopoulos said he remembered Mr Angjeli to have said this:

“Your case is crystal clear. We owe you the money but I would suggest to you to go to the Albanian courts. I would need this decision from the courts ... because it would be ... more easy to have a decision from the Albanian courts to avoid having any issues from the newspapers, from the television, this kind of a discussion”.

58. Mr Angjeli is no longer Minister of Finance. He provided a witness statement but did not appear for questioning at the hearing. The gist of his written statement is as follows:

“I indicated to Mr. Sarantopoulos that if he wished to attempt to obtain pecuniary reliefs, he would need to refer the matter to the Albanian Courts. Nothing more.”

59. I am untroubled by any issue as to the weight to be given to this written statement of a person who could not be questioned. The reason is that Mr Sarantopoulos’s own evidence in this respect is inherently implausible. Mr Sarantopoulos impressed me as an able businessman unburdened by rosy illusions as to the ways of the world. He would surely have understood that the Minister was eluding him – not making a promise. He may have *hoped* that the Albanian courts would give him a quick favourable verdict. He may have *hoped* that such a verdict would have loosened the Ministry’s purse. He may have been prepared to *wager* that the prospects of following this avenue were sufficiently appealing to forego the arbitration clause in the Contracts. But if he wanted a reliable *promise* he should have secured a written commitment before adopting this course.

60. The Claimant nevertheless insisted until the end of these proceedings that the Contractor’s consent was vitiated by the influence of Mr Angjeli. He had been Minister of Finance for eight years. He created legitimate expectations (so it is alleged) that the Claimant could achieve satisfaction by going to the Albanian courts. Yet when asked by Albania’s counsel whether he had expected Mr Angjeli “to instruct the judiciary to give your claim”

Mr Sarantopoulos answered: “Definitely not.” (T:Day 1:128:3.) The Claimant cannot have it both ways. There was no promise. It was for the Claimant to decide whether it wished to forego arbitration under the Contracts and instead opt for the Albanian courts. Indeed the very proposition that this was a *choice* proves the overlapping nature of the two actions; pursuit of the alleged settlement agreement would perforce lead to lower recovery but would be inconsistent with a (higher) contractual claim. I was struck by a rather disabused reflection by Mr Sarantopoulos as he testified. He said he understood that the Contracts called for disputes to be resolved by arbitration and not in the Albanian courts. Yet the Claimant opted for the courts. “It seemed that it was the wrong decision – after ten years.” (T:Day 1:124:21-22.)

61. This is a matter of capital importance. It is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the *Woodruff* case (1903): whether or not “the fundamental basis of a claim” sought to be brought before the international forum is autonomous of claims to be heard elsewhere. This test was revitalised by the ICSID *Vivendi* annulment decision in 2002. It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora. The Claimant refers to many precedents but has not distilled significant principles from them. It is reduced to the mere assertion that claims based on Treaty provisions are inherently different from those it pursued as a contractor. This is argument by labelling – not by analysis. Albania on the other hand has sought to synthesise the precedents to the effect that claims have the same “essential basis” if they have the same factual predicates and request the same relief; it is not permissible merely to reformulate local contractual claims.

62. I am not persuaded that such generalities are helpful in deciding individual cases. The same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action. What I believe to be necessary is to determine whether claimed entitlements have the same normative source. But even this abstract statement may hardly be said to trace a bright line that would permit rapid decision. The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment. My analysis of the present circumstances is as follows.

63. The Claimant’s Albanian court action clearly had a contractual foundation. The alleged settlement arose on the footing that the Contracts allocated responsibility for loss from incidents such as the events of March

1997 to the “Employer” – e.g. Albania.³ The Court of Appeal of Tirana rejected the claim on the grounds that this contractual provision was a nullity.

64. This arbitration cannot proceed on a contractual basis for the simple reason that ICSID jurisdiction must be founded on the Treaty. There is no so-called umbrella clause in the Treaty which might leverage the contractual claim. The Claimant understands this very well and therefore insists that it is here invoking the protection of the Treaty and not that of the Contracts. The Claimant observes that it has limited the quantum of recovery it seeks to the amount accepted by the Special Commission only to avoid controversy; the true loss was greater but if pressed would entail a costly debate. Yet there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract. Otherwise the Claimant must live with the consequences of having elected to take its grievance to the national courts.

65. The conduct of the Minister of Finance gives pause. He had no contractual role. His intervention to reject the amount of contractual compensation accepted by the Special Commission (see Paragraph 19 above) might be challenged as an arbitrary act by a senior official which falls to be examined for compliance with the substantive standards of the Treaty.

66. This matter is easier to analyse if one considers the nature of the Claimant’s case before and after the Minister’s veto. At the level of the Special Commission the claim was obviously contractual. At the level of the courts it remained contractual because that is how it was treated. The courts did not deny the claim on the grounds that the Minister’s posture was legally justified. They rejected it because (so they said) the contractual undertaking to assume the risk of loss was unenforceable. The Ministerial veto was apparently not an impediment to recovery in the courts.

67. Ms Ingrid Shuli was the Minister of Public Works at the time and appeared to be examined by counsel for the Claimant. She was asked a number of questions about the authority of her Ministry to bind the Government by a promise to pay a contractor. The Claimant naturally sought to establish that such a promise emerged from the deliberations of the Special Commission. Albania takes the position that the Commission

³ Under Clause 11.1 (“Employer’s Risks”) the General Roads Directorate accepted responsibility for “risks of war, hostilities, invasion, acts of foreign enemies, rebellion, revolution, insurrection or military or usurped power, civil war, riot, commotion or disorder.”

did no more than to make a recommendation. The Minister of Finance's stance was that he could make no payment unless he had specific budgetary approval. The lawfulness of this stance was debated with Dr Eralda Cani whom Albania produced as an expert. Albania's position in this respect may have been wrong; the refusal to pay may have been unlawful. But that was precisely what Mr Sarantopoulos understood was being tested in the Albanian courts (T:Day 1:148:19-22). Mr Sarantopoulos was not mistaken. His company's pleadings before the Albanian courts were exactly in line with his affirmation. Its final submission (in the since abandoned petition to the Supreme Court) was that it was entitled to payment of US\$1,821,796 "because the Defendant had recognised and admitted that this amount is due". The logic is inescapable. To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same "fundamental basis". The Claimant's grievance thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.

68. This conclusion (commanded by both Article 26 of the ICSID Convention and Article 10(2) of the Treaty) does not exclude a claim for mistreatment at the hands of the Albanian courts: denial of justice. Such a claim is indeed being presented here. That is a matter of merits.

SUBSTANTIVE CLAIMS

69. There is no dispute with respect to the law applicable to the merits of the Claimant's claims. As succinctly stated in the Memorial: "the Tribunal must resolve this dispute in accordance with the BIT and the generally acknowledged rules and principles of international law".

70. I turn now to the claims that may be said to have an independent basis under the Treaty. They were not necessarily involved in the Albanian court action and therefore may be considered here on the merits.

(i) Full protection and security

71. The Claimant alleges that Albania failed to provide full protection and security of its investment in the Republic of Albania in breach of Article 4(1) of the Treaty which provides:

“Investments by investors of either Contracting Party shall enjoy full protection and security in the other Contracting Party.”

72. The claim for failure to ensure full protection and security is distinct from the contractual claim. The former posits that Albania had a duty to ensure that the harm caused in March 1997 would not occur. The latter concerns the assumption of the risk of such events. These are distinct bases of alleged liability. A failure of one claim would not automatically entail the failure of the other. (That full recovery under one thesis might make it pointless to pursue the other is a different and irrelevant matter.) A Treaty claim is therefore open to the Claimant.

73. The Claimant considers that Article 4(1) of the Treaty embodies an international standard of treatment imposing an obligation on Albania to exercise “due diligence” in the protection of its investment against both private and public action. It alleges that the March 1997 riots caused damage to its investment and that Albania was under an obligation not only actively to protect the Claimant’s investment from the looting but also to take precautionary measures to prevent it from occurring.

74. Albania relies defensively on the following comment by McNair in relation to state responsibility for the consequences of insurrection:

“a state can usually defeat a claim in respect of loss or damage sustained by resident foreigners by showing that they have received the same treatment in the matter of protection or compensation of any as its own nationals.”

75. Albania asserts that the Claimant has been accorded treatment equivalent to that of all other victims of the events of March 1997. Albania also says that the Claimant has failed to demonstrate that the Republic of Albania acted negligently in relation to the riots.

76. This issue recalls a similar problem that arises with respect to claims of denial of justice. Should a state’s international responsibility bear some proportion to its resources? Should a poor country be held accountable to a minimum standard which it could attain only at great sacrifice while a rich country would have little difficulty in doing so? No such proportionality factor has been generally accepted with respect to denial of justice. Two reasons appear salient. The first is that international responsibility does not relate to physical infrastructure; states are not liable for denial of justice because they cannot afford to put at the public’s disposal spacious buildings or computerised information banks. What matters is rather the human factor

of obedience to the rule of law. Foreigners who enter a poor country are not entitled to assume that they will be given things like verbatim transcripts of all judicial proceedings – but they are entitled to decision-making which is neither xenophobic nor arbitrary. The second is that a relativistic standard would be none at all. International courts or tribunals would have to make ad hoc assessments based on their evaluation of the capacity of each state at a given moment of its development. International law would thus provide no incentive for a state to improve. It would in fact operate to the opposite effect: a state which devoted more resources to its judiciary would run the risk of graduating into a more exacting category.

77. To apply the same reasoning with respect to the duty of protection and security would be parlous. There is an important distinction between the two in terms of the *consciousness* of state behaviour in each case. A legal system and the dispositions it generates are the products of deliberate choices and conduct developed or neglected over long periods. The minimum requirement is not high in light of the great value placed on the rule of law. There is warrant for its consistent application. A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.

78. The case of the *Cutler* claim in 1927 is instructive. It arose after the attack by a mob on a building in Florence. An American citizen sought to bring a claim for destroyed property. The Italian Government answered that while it accepted the obligation of “ordinary vigilance” it did not accept a duty “to prevent certain occurrences from taking place”. The US government essentially agreed when it instructed its embassy that “a claim could only be made if the authorities had knowledge, or should have had knowledge, of the impending attack, and failed to take precautions to thwart it”.⁴

79. O’Connell observed that a sensible distinction might be made between the “general rule” that a state is obliged to maintain adequate governmental functions “under normal conditions” but that the obligation would exceptionally dissolve “when the breakdown is temporary and due to

⁴ D. P. O’Connell, *International Law*, Vol. II, p. 968 (1970). Huber wrote that a state is “obligated to exercise only that degree of vigilance which corresponds to the means at its disposal” (1925) UNRIIA 639 at 644.

exceptional causes and circumstances.” This was the distinction proposed in the Harvard Research Draft on State Responsibility in 1929. Yet it fails to resolve the issue of differential capability. As O’Connell put it:

“Is the State required to conform to an international standard, and responsible for its incapacity to attain it? Or is it obliged only to do what can reasonably be expected of it? Judge Huber in *Certain British Claims in the Spanish Zone of Morocco* adhered to the latter as the only realistic position. On the other hand, in taking into account the capacity of the State we cannot depart altogether from the notion of an „international standard“.” *Op. cit.* at p. 967.

80. O’Connell continued as follows:

“... it cannot be said with absolute confidence that the State is responsible merely because the event could have been averted if sufficient police had been present. It must be established that the situation called for more police which could have been provided in time and were not. Obviously there will be disagreement about the judgment that was made, and that might have been made, and the most that can be said is that a prima facie case exists when it is established that the facts were known to the authorities and that the action which they took, if any, proved inadequate.”

81. My review of the cases and literature leads me to follow this reasoning and to adopt the more recent conclusion of Newcombe and Paradell:

“Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state’s level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same

expectation of physical security as one investing in London, New York or Tokyo.”⁵

82. Ms Dourou’s testimony was very clear. As Project Manager she was the Claimant’s eyes and ears on the ground. She depicted in striking terms an environment of desolation and lawlessness which she and her team encountered upon arrival in 1994. The Claimant cannot say today that it felt entitled to rely on a high standard of police protection. (Indeed an absence of such expectations may well explain the logic and value to the contractor of Clause 11 of the Contracts by which the Employer accepted the risk of loss caused by civil disturbance.) My view may have been different if police were present and turned their back. Ms Dourou’s evidence was to the contrary. She testified that the police said they were *unable* to intervene. That is crucially different from a *refusal* to intervene given the scale of the looting. I conclude that the Albanian authorities were powerless in the face of social unrest of this magnitude.

83. The Claimant pushes its argument to say that Albania should be liable because powerful public officials were complicit in the pyramid schemes that had so enraged the populace. The premise of this contention is problematic in principle. May an alleged chain of causation have so many links? This question need not be answered because the claim is simply unsubstantiated. The Claimant has seized on a general perception that Albania’s struggling public institutions were disserved by influential and unscrupulous officeholders. But a claim before an international tribunal simply cannot be made good by casual references to general perception. Specific conduct must be alleged and proved. So must its purported effect. It is difficult to resist the impression that this contention was raised more to enlist intuitive sympathy than with a serious belief that it could prevail in this forum.

84. The Claimant also curiously seeks to establish a violation of the duty to provide full protection and security by reason of Albania’s failure to give compensation for the events of March 1997. This argument is put in a number of ways. They all founder for the same simple reason: they confuse breach and the failure to provide remedy. The latter is not a breach in the absence of predicate acts or omissions. If those predicates are extant the breach is consummated without any need to refer to a failure of compensation. The Claimant has not shown that Albania failed to comply with its duty to extend full protection and security in the circumstances that gave rise to this case.

⁵ *Law and Practice of Investment Treaties* 310 (2009).

(ii) *Fair and equitable treatment*

85. The Treaty does not explicitly promise investors fair and equitable treatment. The Claimant nonetheless asserts an entitlement to such treatment on two alternative basis. The first is that the Treaty as an instrument of international law perforce encompasses such a standard. The second is that Article 3 of the Treaty promises Most Favoured Nation treatment; the Claimant may thus rely on the explicit texts of a number of other treaties.

86. Albania avoided debate by conceding that a violation of the fair and equitable standard would be sanctionable under the Treaty irrespective of the presence or absence of an MFN clause (T:Day 2:59:17).

87. It is true that arbitrary decisions may constitute unfair and inequitable treatment and that an ICSID tribunal in a general sense has jurisdiction to deal with the merits of such claims. Yet this proposition is immediately defeated if the particular claim of arbitrariness has been voluntarily submitted to another jurisdiction. It transpires on examination that the alleged arbitrariness is said to arise by reason of Albania's refusal to compensate. That is precisely the issue which the Claimant (to its current regret) took to the Albanian courts. I could not rule on it without violating my own jurisdictional constraints.

88. In a last-gasp refinement the Claimant suggests that the Treaty creates "a measure of protection which only this Tribunal is competent to apply" and that the fact that *lex specialis* duties are thus owed to foreigners "functions as an aggravating factor". This explanation sounds good in the abstract but I do not know what to do with it. The Claimant took a grievance to the Albanian courts and therefore presumptively accepted the standards that apply there. It is true that the Treaty adds another layer of protection: the international rule against denial of justice. But that has nothing to do with the grievance of non-payment and its referral to the Albanian courts. It is a complaint against the Albanian courts and falls to be separately examined as such (see subsection (iv) below).

89. The Claimant initially invoked Article 5(1) of the Treaty. It provides:

"Investors ... whose investments ... suffer losses owing to ... insurrection or riot ... shall be accorded ... treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the [host State]

accords to its own investors or to investors of any third State.”

By the end of the hearing the Claimant conceded that it could not prove that other victims of the civil disturbances had been favoured by the Government (T:Day 2:25:5).

(iii) *Pacta sunt servanda*

90. The Claimant argues that the absence of a so-called umbrella clause in the Treaty does not affect its claim because the settlement agreement constituted a commitment by Albania to pay compensation for its international delict of failing to secure full protection and security to the Claimant. Albania’s refusal to honour the alleged settlement agreement is thus a violation of the general principle of *pacta sunt servanda*.

91. Albania counters that the Claimant cannot avail itself of the principle of *pacta sunt servanda* because there is no umbrella clause to elevate any of the contractual obligations between Albania and the Claimant to the level of Treaty obligations. In any event the Claimant has not established that a valid and binding settlement agreement was concluded.

92. The Claimant’s argument is not easy to follow. Its counsel are of unquestionable ability and the problem is hardly one of their expository skills. The difficulty rather seems to lie in the line of reasoning. For where is the *pactum* that was dishonoured and is now sought to be vindicated through Treaty arbitration? It cannot be the Contracts; they stipulated a different arbitral forum. It cannot be the alleged settlement agreement; the Claimant’s very purpose in going to court in Albania was to enforce the Special Commission’s conclusion (see Paragraph 67 above.) It cannot be the alleged dialogue between Messrs Angjeli and Sarantopoulos; I have already concluded that the Minister cannot be found to have made a promise. Of course the Treaty itself is a *pactum*. But it adds nothing to say that a breach of the Treaty violates the principle of *pacta sunt servanda*. That conclusion is a given. What matters is the premise (the breach). And that remains to be determined by reference to specific causes of action defined by the Treaty.

(iv) *Denial of justice*

93. The fact that a claim is inadmissible due to an election to take the matter to national courts does not preclude an international claim alleging that a denial of justice occurred in the pursuit of local remedies. (Albania’s concession with respect to “fair and equitable treatment” perforce subsumes

this claim; see Paragraph 86 above.) The Claimant asserts that the Albanian courts have thus far “denied in a most unlawful and absurd manner to look into the Contractor’s case in an independent, objective and legally sound way.”

94. The general rule is that “mere error in the interpretation of the national law does not *per se* involve responsibility.”⁶ Wrongful application of the law may nonetheless provide “elements of proof of a denial of justice.”⁷ But that requires an extreme test: the error must be of a kind which no “competent judge could reasonably have made.”⁸ Such a finding would mean that the state had not provided even a minimally adequate justice system.

95. It may well be that the Albanian courts in this case have fallen short of even this standard. It is more than difficult to understand how Clause 11(1) of the Contracts could violate Albanian public policy. It is a standard clause which appears in myriad international construction contracts. Counsel for Albania conceded that the Contracts were based on the well known FIDIC Conditions of Contract. At the time of the Contracts it is likely the drafters were following the Fourth Edition (amended in 1992) of the FIDIC Conditions for Works of Civil Engineering Construction. Article 20.4 thereof (“Employer’s Risks”) seems a rather precise model for Clause 11.1. But the precursor could have been any of a great number of similar models. That such a clause should be illegal because it creates liability without fault is truly difficult to accept. The allocation of risk is a traditional and legitimate contractual objective. If it is a nullity one would apparently have to jettison the entire insurance industry.

96. Yet this *prima facie* suggestion of an extreme misapplication of law need not be examined further for a simple reason. Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole. This does not mean that remedies must be pursued beyond a point of reasonableness. It may not be necessary to initiate actions which exist on the books but are never in fact used. Oblique or indirect applications to parallel jurisdictions (e.g. an administrative appeal to remove a foot-dragging judge) may similarly be held unnecessary. Such determinations must perforce be made on a case-by-case basis.

⁶ Gerald Fitzmaurice, “The Meaning of the Term ‘Denial of Justice,’” 1932 *BYIL* 93 at 111, note 1.

⁷ Charles de Vischer, “Le déni de justice en droit international”, (1935) 34 *Recueil des cours* 370 at 376.

⁸ Fitzmaurice, *op. cit.* at 114.

97. The Claimant's problem here does not involve such complications. This is a matter of a simple hierarchical organisation of civil-law jurisdictions: first instance/appeal/cassation. One cannot fault Albania before having taken the matter to the top.

98. The Claimant's Albanian lawyer (Ms Evelina Qirjako) produced an affidavit describing her experience in prosecuting the Claimant's case before the local courts. She wrote:

“My law firm and myself have handled many cases where the opposing Party represented the State interests, but never have we encountered such a slow and frustrating progress of the hearing of a case. It is therefore my opinion that the merits of the case before the Albanian Courts do not justify the extreme delays in the progress of the hearings, and I feel even more strongly about the various judgments, so laboriously reached, whose legal reasoning is strikingly untenable and unfair.”

Ms Qirjako did not testify in the ICSID hearings because she has recently been appointed to serve as a judge of the Albanian Supreme Court. This noteworthy development cuts two ways. It gives credence to what she says with respect to the frustrations of the Claimant's case. But it also suggests that the Supreme Court recruits judges who are prepared to take a very critical view of the performance of lower courts. This observation naturally adds weight to Albania's argument that the Claimant should not be allowed to speak of denial of justice without having taken the matter to the highest court.

99. The Claimant insists it went to the Albanian courts to enforce what it considered to be a binding agreement reached on the basis of the determination of the Special Commission. It did not seek relief for breach of the Contracts. (This explains why in the interest of a speedy resolution the Claimant did not seek the larger amount to which it believed the Contracts entitled it.) It complains vehemently that the Albanian courts took it upon themselves to declare the invalidity of a contractual provision which had never been invoked before them.

100. I am troubled by the clear violation of fair procedure if it is true (as appears to be the case) that the Court of Appeal rejected the claim on a ground which the Claimant had not invoked and thus had no occasion to address. This is a serious matter. Yet it too fell within the scope of the Albanian legal system's power to correct.

101. The Claimant finally asks to be believed when it says that further action was hopeless. It argues that “enough was enough” as it found its simple claim frustrated by a “legal marathon” which revealed that the Albanian courts were determined to frustrate the claim.

102. I am unpersuaded. The procedures before the Albanian courts were to a significant degree prolonged by requests for postponements by counsel; on cross-examination Mr Sarantopoulos could not deny several of these were made by the Claimant’s own counsel. Nor can I accept that continuation of the process was bound to be an exercise in futility because the Supreme Court (acting as a Court of Cassation rather than appeal) could do no more than to send the case back to the appellate level with the inevitable result of another bad decision. I am unprepared to make such assumptions. I have not been shown any text establishing that the Albanian Supreme Court invariably sends censured cases back to the appellate level. Albania denies it and insists that Article 485 of the Albanian Civil Code is to contrary effect; the Supreme Court has the option of rendering a final judgment. Indeed the practice of *renvoi* does not appear to be an inevitable feature of cassation systems. Nor can I assume that the courts of appeal would always be unable or unwilling to conduct themselves in accordance with the minimum international standard. I am not sure that I truly understand why the Claimant did not stay the course before the Albanian courts. But it is inevitable that its failure to take the final step in the straight line to the Supreme Court is fatal to its claim of denial of justice.

COSTS

103. This case shows that competent lawyers on both sides of an investor-state dispute are able to represent their clients ably and efficiently without incurring vast expense. The Claimant seeks reimbursement of EUR 154,523; Albania’s corresponding claim is EUR 269,657. These amounts are but fractions of cost claims submitted in other ICSID cases. Yet the written and oral presentations were highly competent. Counsel are to be commended for setting such an example.

104. Albania prevails in this case. That does not necessarily mean that its claim for costs should be upheld. This case shows neither the executive nor judicial branches of Albania in a good light. The Claimant suffered losses which it appeared contractually entitled to recover. The Government negotiated a reduced amount. It then refused to pay on grounds that are difficult to understand. Subsequently Albanian courts denied the very validity of the underlying contract on equally obscure grounds. The claim does not fail for a lack of inherent validity. It rather falters because the Treaty is unavailable to the Claimant in the circumstances. I see no reason

to exercise my discretion in Albania's favour and therefore make no award of costs.

DECISION

105. I hereby decide that:

- (A) Albania's jurisdictional objection on the grounds of absence of a qualifying investment is rejected;
- (B) the claim of failure to ensure full protection and security is rejected on its merits;
- (C) the claim of denial of justice is rejected on its merits;
- (D) all other claims are either dismissed as inadmissible (to the extent they are subsumed by the Claimant's election to seise the Albanian courts) or rejected on the merits;
- (E) each party shall bear its costs in full without recourse to the other;
- (F) each party shall bear fifty per cent of the Tribunal's fees and expenses (including ICSID's charges) as separately notified by ICSID.

[*signed*]

Jan Paulsson

28 July 2009