IN THE MATTER OF AN INTERNATIONAL ARBITRATION
PURSUANT TO THE ICC RULES OF ARBITRATION (AS OF 1 MARCH 2017)

ICC ARBITRATION 23998/MHM/HBH (C-24011/MHM/HBH)

BETWEEN

1. THE JOINT VENTURE "JV COPRI CONSTRUCTION ENTERPRISES W.L.L. & AKTOR TECHNICAL SOCIETE ANONYME"
(ALBANIA)

2. COPRI CONSTRUCTION ENTERPRISES W.L.L.
(KUWAIT)

3. AKTOR S.A.
(GREECE)

CLAIMANTS

AND

ALBANIAN ROAD AUTHORITY
UNDER THE AUTHORITY OF THE
MINISTRY OF PUBLIC WORKS AND TRANSPORT
(ALBANIA)

RESPONDENT

FINAL AWARD

ARBITRAL TRIBUNAL

EDUARDO SILVA ROMERO, CO-ARBITRATOR
PETER REES QC, CO-ARBITRATOR
WILLEM VAN BAREN, PRESIDENT

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LIST OF ABBREVIATIONS AND TERMINOLOGY

AAPC	Albanian Administrative Procedures Code
ACC	Albanian Civil Code
(A)DRB-Agreements	The ADRB-Agreement and the DRB-Agreement
(A)DRB Decisions	The Segment 1 Decision and the Segment 3 Decision
ADRB-Agreement	Amicable Dispute Resolution Board Agreement of 24 July 2017
Agency Agreement	Istisna'a Agency Agreement dated 7 April between the Council of Ministers of the Republic Albania and the Islamic Development Bank
Aktor	Aktor S.A.
ARA	Albanian Road Authority under the authority of the Ministry of Public Works and Transport
Arbitration Proceedings	ICC Case No. 23988/MHM/HBH (c-24011/MHM/HBH)
Claimants	First Claimant, Copri and Aktor
Contract Amendments	Contract Amendment No. 7 and Contract Amendment No. 12
Contract Amendment No. 7	Contract Amendment No. 7 to the Segment 3 Contract dated 4 July 2017
Contract Amendment No. 12	Contract Amendment No. 12 to the Segment 1 Contract dated 24 July 2017
Contracts	The Segment 1 Contract and the Segment 3 Contract
Contractor	The Joint Venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme"
Copri	Copri Construction Enterprises W.L.L.
Court	International Court of Arbitration of the International Chamber of Commerce
DB	Dispute Board
DRB-Agreement	Dispute Review Board Agreement of 7 August 2017.
Employer	Albanian Road Authority under the authority of the Ministry of Public Works and Transport

Engineer	Spectrum Engineering Consultants S.A.R.L. as Engineer under the Segment 1 Contract and under the Segment 3 Contract
Exhibit C-[●]	Claimants' exhibit
Exhibit R-[●]	Respondent's exhibit
Financing Agreement	The Agency Agreement and the Istisna'a Agreement
First Claimant	The Joint Venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme"
GP	FIDIC Golden Principles (1st Ed., 2019)
IBA Rules on Evidence	IBA Rules on the Taking of Evidence in International Arbitration as adopted on 29 May 2010
IDB	Islamic Development Bank
Istisna'a Agreement	Istisna'a Agreement between the Council of Ministers of the Republic Albania and the Islamic Development Bank
Lazimi Report	Expert Report by Mr Fatos Lazimi dated 31 January 2020 (Exhibit C-75)
Party	Each of Claimants or Respondent
Parties	Claimants and Respondent
PHB Claimants	Claimants' Post-Hearing Brief dated 4 March 2020
PHB Respondent	Respondent's Post-Hearing Brief dated 4 March 2020
PMU Director	The director of the PMU of ARA
Procedural Timetable	Procedural Timetable of the Arbitration Proceedings dated 29 March 2019, as amended from time to time.
PMU	Project Management Unit
Projects	The projects: (i) "Construction of Tirana-Elbasan Road Segment No. 1, Km 0 (2+850) till Tunnel Entrance Km 13 (15+160) Road Project", and (ii) "Construction of Tirana-Elbasan Road Segment No. 3, Tunnel Exit km 15.2 (18+163) till Elbasan City Km 27 (29+275) Contract 666/1"
Queleshi Report	Expert Report by Mrs Joana Queleshi dated 20 January 2020 (Exhibit R-29)
Rejoinder	Respondent's Rejoinder dated 20 January 2020

Respondent	Albanian Road Authority under the authority of the Ministry of Public Works and Transport
Reply	Claimants' Reply dated 8 November 2019
Rules	Rules of Arbitration of the International Chamber of Commerce in force as of 1 January 2017
Secretariat	Secretariat of the ICC International Court of Arbitration
Segment 1 Contract	Contract for the "Construction of Tirana-Elbasan Road Segment No. 1, Km 0 (2+850) till Tunnel Entrance Km 13 (15+160) Road Project" between First Claimant and Respondent, signed on 10 February 2012, as amended
Segment 1 Decision	"Amicable Dispute Resolution Board ("ADRB") Decision" of 9 October 2017
Segment 3 Contract	Contract for the "Construction of Tirana-Elbasan Road Segment No. 3,Tunnel Exit km 15.2 (18+163) till Elbasan City Km 27 (29+275) Contract 666/1" between the First Claimant and the Respondent, signed on 13 February 2012, as amended
Segment 3 Decision	"Amicable Dispute Resolution Board ("ADRB") Decision" of 7 September 2017
SoC	Claimants' Statement of Claim dated 26 June 2019
SoD	Respondent's Statement of Defence dated 13 September 2019
ToR	Terms of Reference dated 5 April 2019.

I. THE PARTIES, THEIR REPRESENTATIVES AND THE ARBITRAL TRIBUNAL

A. The Parties and their Representatives

1. The claimants ("Claimants") in ICC Case No. 23988/MHM/HBH (c-24011/MHM/HBH) (the "Arbitration Proceedings") are:

(1) The Joint Venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme", a joint venture established according to the provisions of the laws of Albania, having its registered offices at Bulevardi Deshmoret e Kombit, Twin Towers 2, Kati 13, P. 1, Tirana, Albania (the "First Claimant");

(2) Copri Construction Enterprises W.L.L., is a limited liability company, incorporated according to the provisions of the laws of the State of Kuwait, having its seat at Ardiya Industrial Area Block, Street (1), Plot. No. (90), Ardiya, Kuwait ("Copri"); and

(3) Aktor S.A., a Société Anonyme, incorporated according to the laws of the Hellenic Republic, having its seat at 25 Ermou Str., 14564 Kifisia – Athens, Greece ("Aktor").

All Claimants' contact details in the State of Albania are Bulevardi Deshmoret e Kombit, Twin Towers 2, Kati 13, P. 1, Tirana, Albania.

2. Claimants are represented by their in-house counsel:

Dr Panagiotis Skouris
64, Leoforos Alexandras
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Greece
E pskouris@aktor.qa

and by their external counsel:

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Tirana
Albania
E denita.katragjini@lfc-albania.al

3. Respondent is the Albanian Road Authority under the authority of the Ministry of Public Works and Transport, having its registered offices at Sami Frasheri Nr1019, Tirana, Albania ("Respondent" or "ARA" or "Employer").

4. Respondent is represented by:

Ms Julinda Mansaku
Ms Boriana Nikolla
Ms Enkelejda Muçaj
State Advocate's Office
Rr. "Abdi Toptani", Nd. 5, Kati 4,
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Albania
E julinda.mansaku@avokaturashtetit.gov.al
boriana.nikolla@avokaturashtetit.gov.al
enkelejda.mucaj @avokaturashtetit.gov.al

B. The Tribunal

5. The arbitrators (the "Tribunal") are:

Willem van Baren (President)
Dijsselhofplantsoen 12
1077 BL Amsterdam
The Netherlands
E willem.vanbaren@arbitration.nl

Dr Eduardo Silva Romero (Co-arbitrator)
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32 rue de Monceau
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Peter Rees QC (Co-arbitrator)
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United Kingdom
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6. Pursuant to Article 13(1) of the Rules of Arbitration of the International Chamber of Commerce in force as from 1 March 2017 (the "Rules"), the International Court of Arbitration of the International Chamber of Commerce (the "Court") on 17 January 2019 confirmed Dr Eduardo Silva Romero as co-arbitrator upon Claimants' joint nomination and Mr Peter Rees QC as co-arbitrator upon Respondent's nomination

7. Pursuant to Article 13(4)(a) of the Rules, the Court directly appointed on 1 March 2019 Mr Willem van Baren as president of the Tribunal.

8. By execution of the Terms of Reference on 5 April 2019, the members of the Tribunal confirmed their acceptance of their mandate in the Arbitration Proceedings and the Parties confirmed that they agreed that the Tribunal has been properly constituted.[1]

II. BRIEF SUMMARY OF THE DISPUTE

9. Claimants made claims under:

   (a) the contract for the "Construction of Tirana-Elbasan Road Segment No. 1, Km 0 (2+850) till Tunnel Entrance Km 13 (15+160) Road Project" between First Claimant and Respondent, signed on 10 February 2012, as amended (the "Segment 1 Contract");[2] and

   (b) the contract for the "Construction of Tirana-Elbasan Road Segment No. 3, Tunnel Exit km 15.2 (18+163) till Elbasan City Km 27 (29+275) Contract 666/1" between First Claimant and Respondent, signed on 13 February 2012, as amended (the "Segment 3 Contract").[3]

10. The scope of the Segment 1 Contract is the construction of a dual carriageway 2x2 lane motorway with a total length of 12.80 km with commencement at Km 0+00 at the Sauk roundabout and ending at Km 2+850 at the Farka roundabout (distance from the capital Tirana). The works also include the construction of two junctions. The Segment 1 Contract is an integral part of a construction program, which included two other segments: Segment 2 (Tunnel, Ivan) and Segment 3 between Tirana and Elbasan from the tunnel exit. The scope of the Segment 3 Contract is the construction of a dual carriageway 2x2 lane motorway with a total length of just over 11km between Tirana and Elbasan from the tunnel exit at Km 15,2 (18+163) to Elbasan City at Km 27 (29+275). The works also included the construction of two junctions. Both contracts comprise the FIDIC Conditions of Contract for Construction – Multilateral Development Bank Harmonised Edition (2005).[4]

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1 Terms of Reference dated 5 April 2019, ¶¶ 11-12. The Terms of Reference are incorrectly dated 5 March 2019, but were executed on 5 April 2019.
2 Exhibits C-08 and R-03.
3 Exhibit C-15.
4 Terms of Reference dated 5 April 2019, ¶¶ 62-64.

11. In an "Amicable Dispute Resolution Board ("ADRB") Decision" of 7 September 2017, the ADRB found that in respect of the Segment 3 Contract the First Claimant is entitled to the sum of USD 11,665,552.31 for extension of time (the "Segment 3 Decision").[5]

12. In an "Amicable Dispute Resolution Board ("ADRB") Decision" of 9 October 2017, the ADRB found that in respect of the Segment 1 Contract the First Claimant is entitled to the sum of USD 25,220,016.37 for extension of time (the "Segment 1 Decision").[6]

13. Claimants submit that the Segment 1 Decision and the Segment 3 Decision (jointly: the "(A)DRB Decisions") have become final and binding for the Parties and Respondent is bound to pay the awarded amounts, increased with VAT, to Claimant. Respondent denies that these are final and binding Dispute Board decisions as provided for and regulated by the FIDIC Contracts and submits that Claimants should present their claims for extension of time to the Tribunal under Sub-Clauses 20.8 (Expiry of Dispute Board's Appointment) of the Segment 1 Contract and the Segment 3 Contract (jointly: the "Contracts").

III. PROCEDURAL HISTORY

A. The Initial Phase

14. On 16 October 2018, the Secretariat of the ICC International Court of Arbitration (the "Secretariat") received a first Request for Arbitration dated 15 October 2018 filed by Claimants in relation to the Segment 1 Contract, listing as respondent the Republic of Albania, Ministry of Public Works and Transport, Albanian Road Authority. In their Request, Claimants proposed that the arbitration be submitted to a three-member tribunal.

15. On 22 October 2018, the Secretariat received a second Request for Arbitration dated 22 October 2018 filed by Claimants in relation to the Segment 3 Contract, listing as respondent the Republic of Albania, Ministry of Public Works and Transport, Albanian Road Authority. In their Request, Claimants proposed that the arbitration be submitted to a three-member tribunal.

16. On 30 October 2018, the Secretariat notified the first Request for Arbitration, dated 15 October 2018, to Respondent under case reference ICC 23998/MHM. On the same date, the Secretariat requested Claimants, without prejudice to any agreement the Parties may reach as to the number of arbitrators, to nominate co-arbitrator by 9 November 2018.

17. On 31 October 2018, the Secretariat notified the second Request for Arbitration, dated 22 October 2018, to Respondent under case reference ICC 24011/MHM. On the same date, the Secretariat requested Claimants, without prejudice to any agreement the Parties may reach as to the number of arbitrators, to nominate co-arbitrator by 14 November 2018.

18. On 5 November 2018, Claimants nominated Dr Eduardo Silva Romero as co-arbitrator in both the cases 23998/MHM and 24011/MHM and proposed that Paris, France be the place of arbitration.

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5 Exhibits C-33.and R-20.
6 Exhibit C-26.

19. On 19 November 2018, Respondent applied to the Court for consolidation under Article 10 of the Rules of cases 23998/MHM and 24011/MHM into a single arbitration.

20. On 23 November 2018, Respondent agreed for both arbitrations to be submitted to a three-member tribunal.

21. On 27 November 2018, Claimants indicated that they did not agree to consolidate the two cases as per Respondent's request.

22. On 5 December 2018, the Secretariat invited Respondent to nominate its co-arbitrator in both cases by 14 December 2018.

23. On 14 December 2018, Respondent nominated Mr Peter Rees QC as co-arbitrator in both the cases 23998/MHM and 24011/MHM.

24. On 2 January 2019, following an extension of time granted by the Secretariat, the Secretariat received an Answer to the Request for Arbitration filed by Respondent in the cases 23998/MHM and 24011/MHM. In the Answers, Respondent agreed with Claimants' proposal that Paris, France be the place of arbitration in both cases.

25. In the Answers, Respondent raised pleas pursuant to Article 6(3) of the Rules. On 4 January 2019, the Secretariat informed the Parties that such pleas will be decided directly by the Tribunal, after providing the parties with an opportunity to comment. The Secretariat also informed the Parties that it would soon be in a position to invite the Court to decide on Respondent's request to consolidate the two cases.

26. Further to correspondence of the Parties, the Secretariat indicated on 11 January 2019 that, if any of the parties wished to provide additional comments regarding the consolidation issue, such comments may be filed by 15 January 2019.

27. On 15 January 2019, Claimants and Respondent submitted further comments on the consolidation issue.

28. On 17 January 2019, the Court: (i) decided to consolidate under Article 10 of the Rules the arbitrations 24011/MHM and 23998/MHM into arbitration 23998/MHM (c-24011/MHM); (ii) confirmed pursuant to Article 13(1) of the Rules Dr Eduardo Silva Romero as co-arbitrator upon Claimants' joint nomination and confirmed Mr Peter Rees QC as co-arbitrator upon Respondent's nomination; and (iii) fixed the advance on costs at US$ 605,000 subject to later readjustments pursuant to Article 37(2) of the Rules.

29. On 1 March 2019, Mr Willem van Baren was appointed directly by the Court as president of the Tribunal, pursuant to Article 13(4)(a) of the Rules.

30. Pursuant to Article 16 of the Rules, the file was transmitted to the Tribunal on 4 March 2019.

31. At its session of 7 March 2019, the Court extended the time limit for establishing the Terms of Reference until 3 May 2019 pursuant to Article 23(2) of the Rules.

32. On 17 March 2019, the Tribunal sent drafts of the terms of reference, a first procedural order, and procedural timetable to the Parties for their comments. The draft documents referred to the Republic of Albania, Ministry of Public Works and Transport, Albanian Road Authority as respondent.

33. On 21 March 2019, both Parties provided comments on the drafts. Respondent noted in its comments that the Republic of Albania is not the proper respondent, but rather the Albanian Road Authority under the authority of the Ministry of Public Works and Transport.

34. As required by Article 24 of the Rules, the Tribunal convened a case management conference which took place via telephone conference on 26 March 2019 to discuss the drafts and consult the Parties on procedural measures that may be adopted pursuant to Article 22(2) of the Rules and Appendix IV to the Rules. On 26 March 2019, prior to the case management conference, the Tribunal sent revised drafts of the terms of reference and the procedural timetable to the Parties, which were subsequently discussed in the case management conference. During the case management conference Claimants agreed that the Albanian Road Authority under the authority of the Ministry of Public Works and Transport would be the appropriate respondent in this arbitration.

35. On 27 March 2019, Respondent submitted the reasons on its inability to comply with the draft procedural timetable as distributed by the Tribunal on 26 March 2019, to which Claimants responded that same day.

36. On 29 March 2019, the Tribunal sent to the Parties and the ICC the Procedural Order No. 1 issued on that date, the procedural timetable as established by the Tribunal pursuant to Article 24(2) of the Rules on that date (as amended from time to time: the "Procedural Timetable"), in which Respondent's concerns were addressed by extending the time periods for submission of Respondent's Statement of Defence from 8 to 12 weeks and for submission of the Statement of Rejoinder from 5 to 6 weeks, and the final version of the Terms of Reference for the Parties' signature.

37. On 7 April 2019, the Tribunal sent to the Parties and the ICC a copy of the signed Terms of Reference, dated 5 April 2019 (the "ToR").

38. On 11 April 2019, the Secretariat informed the Parties and the Tribunal that the ToR had been transmitted to the Court at its session of 11 April 2019.

39. On 16 April 2019, Respondent filed an application with 4 exhibits for interim measures pursuant to Article 28(1) of the Rules in which it requested the Tribunal, in relation to a new claim by Claimants under the Segment 1 Contract in which Claimants sought to initiate a new DRB process, to issue an order: (i) directing Claimants to maintain the *status quo ante*; and (ii) to refrain from any action capable of altering the *status quo ante* or of aggravating the present dispute, pending resolution of this arbitration for the first phase.

40. On 19 April 2019, Claimants submitted a reply to Respondent's request for interim measures with 6 exhibits.

41. On 26 April 2019, the Tribunal issued Procedural Order No. 2, in which the Tribunal found it has *prima facie* jurisdiction over the dispute, but held that Respondent failed to demonstrate how its legal rights in this arbitration would be prejudiced or impaired or the integrity of these pending proceedings would be compromised if Respondent would participate in a DRB process in relation to a new claim under the Segment 1 Contract under express reservation of rights. The Tribunal therefore dismissed Respondent's application for interim measures and ruled that a decision on costs would be deferred until the final award.

42. At its session of 2 May 2019, the Court fixed pursuant to Article 31(1) of the Rules the time limit for the final award at 30 April 2020.

B. The Written Phase

43. On 26 June 2019, Claimants submitted their Statement of Claim ("SoC") with 70 exhibits, including a witness statement of Mr Panteleimon Delapoglou, Area Manager of Aktor in Albania.

44. On 12 July 2020, the Tribunal issued, after consultation of the Parties, a revised Procedural Timetable.

45. On 14 September 2019 (at 00:28 hrs CET), Respondent submitted its Statement of Defence dated 13 September 2019 ("SoD") with 26 exhibits.

46. On 17 September 2019, Claimants requested the Tribunal to reject and disregard the Respondent's SoD, because according to Claimants Respondent: (i) failed to comply with the obligation to strictly keep the time-limit set by the Tribunal, without establishing that this failure was due to circumstances beyond Respondent's control and responsibility or requesting for an extension or agreeing thereto with Claimants; and (ii) breached the obligation to make the electronic filing simultaneously to the Tribunal and Claimants, and has so breached the Procedural Timetable.

47. On 19 September 2019, Respondent provided its comments to Claimants' request of 17 September 2019.

48. On 22 September 2019, after deliberations, the Tribunal decided to dismiss Claimants' request of 17 September 2019. Exercising its discretion under paragraph 12 of Procedural Order No. 1, the Tribunal held that the filing delay of 28 minutes and a subsequent delay in sending a copy to the Claimants of five more minutes had not been demonstrated to prejudice in any manner the Claimants' procedural rights and therefore a rejection of the Statement of Defence would in the given circumstances be disproportionate.

49. On 8 November 2019, Claimants submitted their Reply ("Reply") with Exhibits C-71 through C-74.

50. On 16 December 2019, Respondent requested an extension of time of 30 days for filing its Rejoinder (due by 20 December 2019) in view of the earthquake of 26 November 2019 in Albania, to which request Claimants consented on 17 December 2019.

51. On 19 December 2019, the Tribunal extended the filing date for Respondent's Rejoinder to 20 January 2020 and amended the Procedural Timetable accordingly. The Tribunal informed the Parties that the Pre-hearing Telephone Conference could be held on Tuesday 28 or Wednesday 29 January 2020, provided the Parties agree to conduct the telephone conference with the President on his own.

52. On 23 December 2019, the Parties confirmed their availability for the Pre-hearing Telephone Conference with the President on his own at the suggested dates.

53. On 10 January 2020, Respondent informed the Tribunal and Claimants of its intention to submit two expert reports with the Respondent's Rejoinder. On the same date, Claimants stated their intention to examine an expert during the hearing and requested from the Tribunal to set a date for the submission of the expert report from the expert to be presented by Claimants.

54. On 14 January 2020, the Tribunal granted leave to Claimants to submit an expert report in response to expert reports to be submitted with Respondent's Rejoinder not later than Friday 31 January 2020, provided Claimants shall advise the Tribunal and Respondent of the identity of Claimants' expert by Monday 27 January 2020.

55. On 16 January 2020, Respondent requested to be granted the same time for submission of its experts' names and their reports as has been granted to Claimants on 14 January 2020.

56. On 17 January 2020, Claimants provided their comments to Respondent's request of 16 January 2020.

57. Also on 17 January, the Tribunal dismissed Respondent's request of 16 January 2020. The Tribunal reasoned that due process required that, in line with the arrangements in Procedural Order No. 1, the Claimants would be granted the opportunity to submit an expert report in response to the two expert reports to be submitted with Respondent's Rejoinder.

58. On 21 January 2020, Respondent submitted its Rejoinder dated 20 January 2020 (the "Rejoinder") with Exhibits R-27 through R-29, including an expert report by Mrs Joana Queleshi dated 20 January 2020 (the "Queleshi Report").[7]

59. On 24 January 2020, Claimants informed the Tribunal and Respondent that Mr Fatos Lazimi had been engaged to prepare an expert report to be submitted by Claimants on 31 January 2020.

60. On 28 January 2020, the Pre-hearing Telephone Conference took place and was attended by the President of the Tribunal, Mr Skouris for Claimants, and Ms Mansaku and Ms Nikolla for Respondent, during which the attendance at the hearing and hearing logistics were confirmed,

[7] Exhibit R-29.

it was agreed for counsel to Claimants to prepare a hearing bundle and distribute an index thereof, and the Parties made submissions regarding the hearing schedule.

61. On 29 January 2020, the Tribunal confirmed to the Parties the outcome of the Pre-hearing Telephone Conference and provided the Parties with the hearing schedule as determined by the Tribunal.

62. On 31 January 2020, Claimants submitted an expert report by Mr Fatos Lazimi dated 31 January 2020 (the "Lazimi Report") with 4 additional documents.

C. The Oral Phase

63. The hearing was held on 3 and 4 February 2020 at the ICC Hearing Centre in Paris, France. The hearing was attended for Claimants by their legal counsel Dr Panagiotis Skouris, Prof. Dr Charalambos P. Pamboukis, Mr Leondias G. Maravelis, and Ms Denita Katragjini. For Respondent, the hearing was attended by its legal counsel Ms Julinda Mansaku, Ms Boriana Nikolla, and Mr Aldion Baze. The hearing was transcribed by Ibis Transcription Limited.

64. After opening statements, Mr Panteleimon Delapoglou was heard as a fact witness. On the second day of the hearing, Ms Joana Queleshi was heard as Respondent's expert witness, followed by Mr Fatos Lazimi as Claimants' expert witness.

65. During the hearing, Respondent submitted that the Lazimi Report extended beyond the rebuttal of the Queleshi Report as instructed by the Tribunal and, moreover, did not meet the requirements of Section 5.2 of the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules on Evidence") and therefore it would not put forward any questions on issues extending beyond the rebuttal and, more in general, requested the Tribunal not to consider the Lazimi Report.[8] After deliberation, the Tribunal decided that it would hear the examination of Mr Lazimi, it is for Respondent to decide whether it wishes to question Mr Lazimi on issues that are in its opinion outside the scope of the permitted expert report, and submissions whether or not his testimony should be allowed can be made in the Parties' post-hearing briefs to be decided upon later.[9] When questioned by the Tribunal, Mr Lazimi confirmed that he had no relationship with the Parties and considers himself an independent expert.[10]

66. At the end of the hearing, dates were agreed for Parties to simultaneously submit post-hearing briefs, costs submissions, and comments to the other side's costs submissions. When asked by the Tribunal, the Parties confirmed that they had been provided sufficient opportunity to present their case to the Tribunal.[11]

67. On 5 April 2020, the Tribunal confirmed arrangements agreed during the hearing and ordered Claimants to provide a Word-version of the Lazimi Report and Respondent to produce certain documents referred to by the Parties in their submissions but not yet added to the record.

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8 Transcript Hearing Day 2, 110:21–112:3, 112:21–113:22, and 114:15-22.
9 Transcript Hearing Day 2, 115:16-24.
10 Transcript Hearing Day 2, 115:25-116:6.
11 Transcript Hearing Day 2, 173:9-14.

D. The Post-Hearing Phase

68. On 12 February 2020, Claimants submitted a Word-version of the Lazimi Report and Respondent submitted additional Exhibits R-30 (a complete version of the Financing Agreement), R-31 (Law no. 10 049 dated 26 May 2011), R-32 (Order no. 57 dated 8 May 2011), R-33 (IDB Guidelines), R-34 (Bid submitted and signed by Claimant - Segment No.1), and R-35 (Bid submitted and signed by Claimant - Segment No.3).

69. On 4 March 2020, Claimants filed their Post-Hearing Brief ("PHB Claimants").

70. On 5 March 2020 (at 01:16 hrs CET), Respondent filed its Post-Hearing Brief dated 4 March 2020 ("PHB Respondent").

71. Also on 5 March 2020, Claimants noted that Respondent, by submitting the PHB Respondent more than an hour beyond the time limit set by the Tribunal, acted contrary to the order of the Tribunal for simultaneous submission of the briefs and requested the Tribunal to take this into account.

72. On 10 March 2020, the Tribunal reminded the Parties that Procedural Order No. 1 contains a procedure for simultaneous filing of submissions, which would, if complied with, have prevented the situation commented on by Claimants and requested clarification from the Parties regarding the hearing transcript.

73. On 11 March 2020, both Parties made costs submissions.

74. On 11 and 13 March 2020, the Parties confirmed that the Tribunal must consider the transcripts as provided by Ibis Transcription Limited to the Tribunal on 3 and 4 February 2020 (as attached to the Tribunal's e-mail to the Parties of 10 March 2020) as the final transcript.

75. On 19 March 2020, the Parties provided comments on the other side's costs submission.

76. On 23 March 2020, the Tribunal declared the proceedings closed under Article 27 of the Rules and informed the Secretariat and the Parties that it expects to submit its draft award to the Court for approval pursuant to Article 34 of the Rules as soon as it is able to and will endeavour to do so before 8 May 2020.

77. On 30 April 2020, the Court extended the time limit for rendering the final award until 30 June 2020.

78. On 23 June 2020, the Tribunal submitted the draft award to the Court for scrutiny. On 30 July 2020, the Court approved the draft award (Article 34 of the Rules).

79. On 25 June 2020, the Court extended the time limit for rendering the final award until 31 August 2020. On 27 August 2020, the Court extended the time limit for rendering the final award until 30 September 2020. This award is rendered on the date hereof within the time limit for rendering the final award.

IV. FACTUAL BACKGOUND

80. This section seeks to present a brief background to the Parties' dispute by providing a general overview of the facts, in so far as they are essential for the Tribunal's determination of the issues decided in this award. Without aspiring to be exhaustive, this factual summary is based on the documentary evidence and on the written and oral evidence in the record.

A. The Contracts

81. The First Claimant is a simple partnership, which on 26 March 2012 has been established according to Albanian law by the second Claimant Copri and the third Claimant Aktor for the construction of the projects: (i) "Construction of Tirana-Elbasan Road Segment No. 1, Km 0 (2+850) till Tunnel Entrance Km 13 (15+160) Road Project", and (ii) "Construction of Tirana-Elbasan Road Segment No. 3, Tunnel Exit km 15.2 (18+163) till Elbasan City Km 27 (29+275) Contract 666/1" (jointly with Segment No. 2 (the tunnel between Segment No. 1 and Segment No. 3): the "Project").[12]

82. Respondent is the Albanian Road Authority under the authority of the Ministry of Public Works and Transport.[13]

83. Financial assistance for the Project in the amount of USD 222,700,000 was provided to the Government of Albania by the Islamic Development Bank ("IDB") by way of an Istisna'a Agency Agreement dated 7 April 2011 and an undated Istisna'a Agreement between the Council of Ministers of the Republic Albania and the IDB (each the "Agency Agreement" and the "Istisna'a Agreement"; jointly: the "Financing Agreement").[14] By Law No. 10 419, dated 26 May 2011, the Parliament of the Republic of Albania ratified the Financing Agreement.[15]

84. The Agency Agreement provides that the Agent (defined as the Council of Ministers of the Republic of Albania), through the Albanian Road Authority in consultation with the IDB and in accordance with Albanian public procurement law provided that it is consistent with the Procurement Procedures of the IDB and subject to its approval, shall award all contracts financed thereunder.[16] Section 4 (Alterations and Amendments of the Contract) of the Agency Agreement provides:[17]

> *The Agent shall not, without the prior written consent of the IDB, make any amendments, alterations or modifications of the Contract which may (a) result in an increase in the Contract Price or (b) result in an extension of the completion date or (c) result in a change of the specification, or (d) not be in accordance with usual good practice.*

85. Annexes II (Description of the Project) of the Agency Agreement and of the Istisna'a Agreement each provide that the project comprises of the components civil works, consultancy services,

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12 SoC, ¶ 26; SoD, ¶ 8, Exhibit C-3.
13 Since 2017 merged into the Ministry of Infrastructure and Energy.
14 SoD, ¶ 11; Exhibits R-01 and R-30.
15 SoD, ¶ 11; Exhibit R-31.
16 Agency Agreement (Exhibit R-30), Section 3.1.
17 Exhibit R-30.

project management unit, and audit and stipulates with respect to the Project Management Unit ("PMU"):[18]

> *A new Project Management Unit shall be set up to follow-up the implementation of the Project. The PMU will comprise of: a director, procurement specialist, three site engineers, financial/economist, secretary/translator, two drivers, office equipment & furniture, and two 4x4 vehicles. The PMU will be in charge of: (i) preparation of all procurement process for the selection of consultants and contractors according to the IDB guidelines and procedures; (ii) project finance and administration aspects including contracts management and disbursements; (iii) evaluation, monitoring, and reporting on overall project implementation.*

86. By Order No. 57 of the Minister of Public Works and Transport of 8 May 2011, the PMU was established:[19]

> *... with subject-matter implementing the specified obligations:*
>
> *i. The management of the signed contract for the construction of the Krraba Tunnel in the Tirana-Elbasan road segment named Lot 1 under the Financing Agreement;*
>
> *ii. Preparation of the entire procurement process for the selection of consultants and contractors in accordance with IDB guidelines and procedures;*
>
> *iii. Financing and management of the entire project of Tirana-Elbasan Road, including also the tunnel in this road segment and administration aspects including contract management and disbursements;*
>
> *iv. Evaluation, monitoring and reporting on overall project implementation;*
>
> *v. Any other task specified as such under the Financing Agreement.*

87. On the basis of the Bidding Documents issued in September 2011 by Respondent as employer,[20] the First Claimant submitted on 25 November 2011 bids for Segment No. 1 and Segment No. 3.[21] On 13 January 2012, the First Claimant was informed that its bids for Segment No. 1 and for Segment No. 3 were accepted.[22]

88. On 10 February 2012, Respondent and the First Claimant entered into the Segment 1 Contract. The contract price was USD 83,953,041.94 excluding VAT.[23] On 13 February 2012, Respondent and the First Claimant entered into the Segment 3 Contract. The contract price was USD 85,318,842.20 excluding VAT.[24]

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18 Exhibit R-30.

19 Exhibit R-32 ("Order No. 57 dated 08.05.2011 on the Establishment of the PMU in Pursuance of the Commitment of the Council of Ministers Decision N0. 288, dated 15.04.2011, on the Proposal of the "Draft Law" on the Ratification of the Istisna Agreement and the Agreement of the Istisna Agency, between the Council of Ministers of the Republic of Albania and the Islamic Development Bank (IDB), on the financing of the Tirana Elbasan Road Project").

20 Exhibit R-02.

21 Exhibits R-34 and R-35.

22 Exhibits C-08, C-15 and R-03.

23 Exhibits C-08 and R-03.

24 Exhibit C-15.

89. Both the Segment 1 Contract and the Segment 3 Contract provide in Article 2 of the Contract Agreement:[25]

> *The following documents shall be deemed to form and be read and construed as part of this Agreement. This Agreement shall prevail over all other Contract documents.*
>
> *(i) the Letter of Acceptance (Volume 2)*
> *(ii) the Letter of Bid (Volume1)*
> *(iii) the addenda Nos _____(if any) (Volume 1)*
> *(iv) the Particular Conditions (Volume 2)*
> *(v) the General Conditions (Volume 2)*
> *(vi) the Specification (Volume 3)*
> *(vii) the Drawings; and B.O.Q (Volume 4)*
> *(viii) the completed Schedules (Volume 1)*

90. Sub-Clauses 20.2 through 20.8 of the General Conditions of the Segment 1 Contract and of the General Conditions of the Segment 3 Contract provide in identical terms:[26]

> *20.2 Appointment of the Dispute Board*
>
> *Disputes shall be referred to a DB for decision in accordance with Sub-Clause 20.4 [Obtaining Dispute Board's Decision]. The Parties shall appoint a DB by the date stated in the Contract Data.*
>
> *The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons ("the members"), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents. If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons, one of whom shall serve as chairman.*
>
> *lf the Parties have not jointly appointed the DB 21 days before the date stated in the Contract Data and the DB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The first two members shall recommend and the Parties shall agree upon the third member, who shall act as chairman.*
>
> *The agreement between the Parties and either the sole member or each of the three members shall incorporate by reference the General Conditions of Dispute Board Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.*
>
> *The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment of the member or*

[25] Exhibits C-08, C-15 and R-03.
[26] Exhibits C-08, C-15 and R-03.

such expert (as the case may be). Each Party shall be responsible for paying one-half of this remuneration.

If a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [Discharge] shall have become effective.

20.3 Failure to Agree on the Composition of the Dispute Board

If any of the following conditions apply, namely:

(a) the Parties fail to agree upon the appointment of the sole member of the DB by the date stated in the first paragraph of Sub-Clause 20.2, [Appointment of the Dispute Board],

(b) either Party fails to nominate a member (for approval by the other Party) or fails to approve a member nominated by the other Party, of a DB of three persons by such date,

(c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DB by such date, or

(d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4 Obtaining Dispute Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DB of three persons, the DB shall be deemed to have received such reference on the date when it is received by the chairman of the DB.

Both Parties shall promptly make available to the DB all such additional information, further access to the Site, and appropriate facilities, as the DB may require for the

purposes of making a decision on such dispute. The DB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. lf the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction and intention to commence arbitration.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) For contracts with foreign contractors:

(i) international arbitration with proceedings administered by the international arbitration institution appointed in the PC, in accordance with the rules of arbitration of the appointed institution;

(ii) the place of the arbitration shall be the city, where the headquarters of the appointed arbitration institution is located or such other place selected in accordance with the applicable arbitration rules; and

(iii) the arbitration shall be conducted in the language for communications defined in Sub-Clause 5.3; and

(b) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the DRB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DRB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DRB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior or after completion of the Works. The obligations of the Parties, the Engineer and the DRB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.7 Failure to Comply with Dispute Board's Decision

In the event that a Party fails to comply with a DB decision which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 (Arbitration). Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

20.8 Expiry of Dispute Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of the Contract or the execution of the Works and there is no DB in place, whether by reason of the expiry of the DB's appointment or otherwise:

(a) Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and

(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

91. The Particular Conditions of the Segment 1 Contract and of the Segment 3 Contract provide in identical terms, *inter alia*:[27]

Conditions	*Sub-Clause*	*Data*
Date by which the DB shall be appointed	*20.2*	*28 days after the Commencement Date*
The DB shall be comprised of	*20.2*	*Three Members*
List of potential DB sole members	*20.2*	*["none"]*
Appointment (if not agreed) to be made by	*20.3*	*International Chamber of Commerce*
Rules of Arbitration	*20.6(a)*	*Rules of the International Chamber of Commerce*

B. The Contractor's Claims and the Amendment of the Contracts

92. On 12 May 2015, the First Claimant submitted to Spectrum Engineering Consultants S.A.R.L. (the "Engineer")[28] a claim for extension of time and additional costs under the Segment 3 Contract in the amount of USD 14,029,177.34.[29] The claim was submitted to the Engineer in a final manner with supporting documents and particulars on 31 March 2017.[30]

93. On 11 December 2015, the First Claimant submitted to the Engineer two claims for extension of time and additional costs under the Segment 1 Contract in the total amount of USD 31,299,889.20.[31] The claims were submitted to the Engineer in a final manner with supporting documents and particulars on 30 June 2017.[32]

94. On 19 April 2017, Mr Albens Alite, the director of the PMU of ARA (the "PMU Director"), expressed the dissatisfaction of the Employer with the Contractor's claim for Segment No. 3 to the First Claimant and the Engineer, noted that no dispute board ("DB") had been appointed in time, for which reason it is impossible to obtain a Dispute Board's Decision under Sub-Clause 20.4, and continued:[33]

> *As Employer we are going to undertake the following steps to deal with this Claim presented under Sub-Clause 20.1 (Contractor's Claims):*
>
> *First, the Engineer should assess the Claim in full details and provide to the Employer an "Evaluation Report for the Claim" reasonably substantiated (according Sub-Clause*

27 Exhibits C-08, C-15 and R-03.
28 Spectrum Engineering Consultants S.A.R.L. was appointed as Engineer under both the Segment 3 Contract and the Segment 1 Contract.
29 Exhibit C-16.
30 Exhibit C-17.
31 Exhibits C-9 and C-10.
32 Exhibits C-11 and R-15.
33 Exhibit R-05.

20.1 within 42 days the Engineer shall respond with approval or disapproval and detailed comments).

The Employer will hire a second "Independent Consultant" for a second professional opinion. Negotiation process will be conducted on high management levels of both parties trying to reach an acceptable solution to this dispute on this first stage. The Employer will try to reach an "Amicable Settlement" (under Sub-Clause 20.5 of the Contract) in impossible situation to obtain a Dispute Board's Decision (under Sub-Clause 20.4). Both parties shall attempt to settle the dispute amicably before commencement of arbitration. (Negotiation process can last as much as agreed by the parties, example 60 days).

Second, if the tentative for an "Amicable Settlement" as described in the first step will fail then the parties will give a "Notice of Dissatisfaction and intention to commence arbitration" to each other after undertaking the "Negotiation Process". According to the CoC, Sub-Clause 20.5 (unless both parties agree otherwise, arbitration may be commenced on or after 56th day after the day on which notice of dissatisfaction and intention to commence arbitration was given). The arbitration shall proceed in accordance with Sub-Clause 20.6 (Arbitration).

95. On 17 May 2017, the Engineer determined that the First Claimant was entitled to receive a compensation of USD 12,475,892.16 for its claim under the Segment 3 Contract.[34]

96. On 22 May 2017, the PMU Director wrote to the First Claimant and the Engineer:[35]

The Employer received the assessment of the Claim for Segment No. 3 by the Engineer (Evaluation Report for Claim for Segment No. 3).
Attached there is the: "Evaluation Report related to Contractor Claims- Segment No.3". As Employer we are not satisfied with the assessment of the Consultant.
As Employer we intend to go to dispute if no Amicable Settlement will not be reached. We give to the Contractor this "Official Invitation to attempt Amicable Settlement before Dispute, according Sub-Clause 20.5".

Provisions of the Contract:

Referring to the Contract, Sub-Clause 20.2 (Appointment of the Dispute Board, DB), the parties should appoint a DB by the date stated in the Contract Data, and
Referring to Section VIII, Particular Conditions, Contract Data Sub-Clause 20.2, pg. 138, should assigned a DB of "Three Members", 28 days after the Commencement date;
As Employer we observe that the deadline to meet this contract requirement and appoint a DB as foreseen by the contract is not met by the parties. In this situation, obtaining a Dispute Board's Decision (under Sub-Clause 20.4) is impossible.

Anyway, if the Contractor will agree we can attempt to amend the Contract by deleting the current provisions referred above for DB and first go to the DB to refer the Claims

34 Exhibit C-18.
35 Exhibits C-19 and R-06. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

for Segment No. 3 and have a DB Decision under Sub-Clause 20.4. Please clarify your position (to the Contractor) in this regard.

Otherwise, you are invited to participate a process of negotiations among the Parties and attempt to find an administrative solution (Amicable Settlement) to Claims for Segment No. 3 before dispute.

If the process of negotiations will fail and the Amicable Solution will not be reached by the Parties than the Employer will give "Notice of Dissatisfaction according Sub-Clause 20.4" and proceed for dispute to Arbitration in 56 days after this notice will be issued.

97. In a letter of 30 May 2017, the First Claimant expressed to Respondent and the Engineer its dissatisfaction with the determination of its Segment No. 3 claim and wrote further:[36]

Regarding, the Employer's proposal for Amicable Settlement, we must say that we welcome this initiative which is at any time preferable to any dispute resolution procedure, given that time and money unnecessary expenditures can be avoided.

For clarity reasons however we must emphasize that the settlement discussions which are indeed always possible and always very useful cannot be confused with the very specific type of amicable settlement provided for under Sub-Clause 20.5.

Sub-Clause 20.5 provides specifically for the parties' obligation to allow a period of 56 days for amicable settlement, regardless of whether either of the parties initiates any settlement discussions at all. Sub-Clause 20.5 also provides that this period commences upon the service of a Notice of Dissatisfaction in relation to a DAB Decision.

In this case however, there is no DAB in place, no DAB Decision and no notice of Dissatisfaction in the sense provided for under Sub-Clause 20.4 of the Contract.

This amicable settlement is a conventional discussion, in accordance with an informal agreement of the Parties which is nevertheless equally valid and can materialize, if agreement is reached in an Addendum to the Contract which is stronger than any DAB Decision.

In addition to that and always in relation to your proposal for Amicable Settlement, firstly we would like to clarify that according to the Contract and more specifically Sub-Clause 20.5, the amicable Settlement is a procedure that has to follow the DB Decision. Due to the fact that DB has not been appointed by now in compliance with the Particular Conditions of the Contract and more specifically within the time limit foreseen in the Contract, which is 28 days following Commencement Date (see Sub-Clause 20.2 as modified by the Particular Conditions of the Contract). According to Sub-Clause 20.3 of the Contract, a possibility of appointing the DB remains open. This probably also the reason, why you are proposing the amendment of the Contract in relation to this matter. It is clear, that if we decide to proceed in this way we will have to do so according to the provisions of the Contract regarding amendments and to notify this possibility to

[36] Exhibits C-20 and R-08. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

whomever we are obliged to. In view of this issue and in order to avoid additional cost for both sides, in principle the Contractor does not reject the possibility to participate to the negotiations for "Amicable Settlement" under the condition that bath parties will proceed to the issuing of a Contract Amendment, in which the negotiating procedure will be determined in details concerning the parties, the time schedule of the negotiation as well as the next steps, in case that after the closure of such discussions the Settlement will be failed. In addition, and according to Contractor's point of this procedure is the timely effective than the appointment of the DB at this phase of the project. It is clear that further to amending the contractual provisions regarding the DB, we will also have to amend Sub-Clause 20.5 (Amicable Settlement) exactly because of the fact that the Amicable Settlement procedure follows any kind of disagreement with the DB decision. Given that this will be necessary, there is a possibility to foresee a procedure dealing with the abovementioned issues in relation to the Amicable Settlement. Especially the time frame to reach a settlement has to be clear. In addition to that we would propose, that if the time limit set out by the Parties elapses without reaching an agreement, every interested Party will be allowed to proceed to dispute resolution immediately after such elapse.

On contrary, if both Parties will not agree to the procedure for the Amicable Settlement, then we as the Contractor will request from the appointment entity ICC to maintain DB for dispute under the provisions of Sub-clause 20.2 and 20.4.

98. In a letter of 7 June 2017, the PMU Director responded to the First Claimant and the Engineer:[37]

With our letter of May 22, 2017 (Nr. Prot. 185) we clearly stated that we intend to dispute the "Evaluation Report related to Contractor Claims-Segment No. 3", which has been circulated to the Parties according to the provisions of the Contact. Furthermore, we invited you to try and reach an amicable settlement with reference to the relevant Sub-Clause 20.5 of the Contract. Given the fact that we have not kept the time limit for the appointment of DAB, we further invited you to agree to an addendum of the Contract in relation to Sub-Clauses 20.2 to 20.4, which concern the DAB.

In your reply to our letter above of May 30, 2017 (No. Prot. OD01408.3/0UT/528) you stated that you are willing to dispute against the above evaluation of the Engineer as well. You also correctly pointed out that in addition to the necessary addendum of the above Sub-Clauses of the Contract, also amendment of Sub-Clause 20.5 for the amicable settlement is necessary.

From the above it becomes clear that:

i) We are clearly dealing with a dispute according to the provisions of the Contract, given that both Parties are dissatisfied with the Engineer's evaluation and have clearly stated that they are willing to challenge it; and

ii) Both Parties have failed to appoint the DAB according to the contractual provisions; and

[37] Exhibit R-09. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

iii) According to the above correspondence there is a possibility that the Parties agree to a modification of the Contract in relation to Sub-Clauses, which relate to the DAB and the amicable settlement.

In view of the above we would propose that the said amendment should proceed and that the Parties agree upon an amicable settlement procedure. This procedure can provide for a substitution of the DAB, through an amicable settlement board. Similar provisions in relation to its appointment and the decision-making process shall be included in the said addendum. In relation to the time-limit for a decision, we could also adopt the same as for the DAB. Finally, and if either Party is dissatisfied with the findings of the amicable settlement board, or if it becomes absolutely clear that there is no way to settle the dispute, then the Parties will have the right to refer the matter to arbitration according to Sub-Clause 20.6 of the Contract.

In view of the above and having stated our views in relation to the proposed addendum of the Contract, we invite you, provided of course that you agree with the proposed basic principles for the amicable settlement above, to exchange of proposals in relation to the procedure of the amicable settlement we are to agree upon.

99. By letter of 17 June 2017, the First Claimant sent to Respondent and the Engineer a draft contract amendment No. 7.[38]

100. On 20 June 2017, the PMU Director wrote to the IDB, with copy to, *inter alia*, the Albanian Minister of Transport and Infrastructure, the General Director of ARA, and the First Claimant in relation to an amendment of the dispute resolution procedure of the Segment 3 Contract as follows:[39]

(...)

As you are probably aware of, in Articles 20.2 to 20.4 the Contract foresees the appointment of a Dispute Board (DAB), which has the competence to decide upon every dispute that arises between the Parties. This board is dealing with the disputes, before they are referred to arbitration.

More specifically, the DAB procedure is absolutely necessary according to those provision and arbitration cannot begin, if the DAB has not decided upon a dispute. Furthermore, according to the Contract, the Parties had a time limit to appoint the DAB as per relevant provisions. This time limit was 28 days after Commencement Date. If for any reasons the Parties would fail to appoint the DAB within this time limit, then the dispute would be referred directly to arbitration (see Article 20.8). This means that, if the Parties fail to appoint the DAB within the said time limit, there is no procedure for resolving a dispute, before the arbitration.

For reasons that we are not capable to explain at present time, the Parties have not managed to appoint the DAB according to the provisions of the Contract. This means

38 Exhibit R-10. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

39 Exhibit C-71.

that the DAB-procedure cannot be followed in relation to any kind of dispute and we (the Parties) have to refer directly to the arbitration. Kindly we note that, given the fact that for the specific project our Contractor is a JV of international companies, we are dealing with an arbitration according to the ICC Rules, which will take place in the seat of the ICC. This means that the said arbitration will be rather costly.

In view of the above, the Parties have started considering the amendment of the Contract (see the attached draft), in order to practically add a procedure similar to the DAB procedure, before the matter is referred to the arbitration. We are considering to establish a panel, which will be called the Amicable Dispute Resolution Board (ADRB).

This panel will be appointed for each dispute and by taking into account the context it might have from time to time. The appointment procedure is similar to the one provided for in relation to the DAB in the existing contract provisions. In setting out this procedure we have tried to give to the panel enough time for its decision and we have also taken into account that it is for the benefit of all involved Parties, if it does not take very long. The decision of the ADRB will be binding for the Parties and if they disagree with it, they have the possibility to refer to the said disagreement to the arbitration.

It becomes clear that with the proposed amendment the Parties are trying to introduce a procedure to the Contract, which is similar to the DAB procedure. We remind you at this point that, because of the non-timely appointment of the DAB, all disputes have to be referred directly to arbitration. However, there is no doubt that it is better to have a procedure (similar to DAB) before the arbitration. This was also the original provision of the Contract.

Such a procedure might offer a determination upon a dispute, which will be issued rather fast and will not be as expensive as the arbitration. Furthermore, and provided that the ADRB issues a decision, which is reasoned properly, it will probably convince the Parties in relation to its correctness and lead them to avoid triggering the arbitration procedures.

To sum up the above, we believe that the proposed amendment is in total agreement with the original will of the Parties to have a panel of experts to decide upon a dispute, before referring the matter to arbitration. In addition to that, it gives the parties the opportunity to resolve their disputes in a less time consuming procedure and to thus avoid judicial procedures, which apart from everything else are rather costly. It is obvious that the possibility to refer to arbitration after the issuance of the decision of the ADRB cannot be excluded, however, if the said decision is based on a strong argumentation there is a possibility that the Parties will not seek further actions. In any case, it is in the interest of all involved parties to have such an option, which cannot be the case at present, given that the DAB has not been appointed according to the contractual provisions as analyzed above.

Having stated the above we wish to inform you in relation to the changes in the Contract, that we have described above and kindly ask you to verify that you are in agreement with our proposals.

(...)

101. On 21 June 2017, the PMU Director wrote to the First Claimant and the Engineer:[40]

> *Following receipt of Contractor's letter Prot. No. 529, dated June 17, 2017, we (the Employer) would like to state with the present that we agree to the proposed amendment of the Contract as far as dispute resolution is concerned and especially the substitution of DAB through the so called ADRB. It is clear that the proposed amendment follows our proposal for settlement of the dispute, which has arisen between us.*
>
> *In view of the above we are also attaching a few comments and modifications to the proposed amendment as highlighted and attached to this letter.*
>
> *The comments:*
>
> *1- We propose to add the phrase at Sub-Clause 20.2. "The appointment of the ADRB shall be terminated after the delivering of its decision upon the specific dispute it has been appointed for"; and*
>
> *2- We propose to replace the phrase at Sub-Clause 20.3. "ICC International Centre of Expertise" with "The President of FIDIC".*
>
> *(...)*

102. On 30 June 2017, the claims under the Segment 1 Contract were submitted by the First Claimant to the Engineer in a final manner with supporting documents and particulars.[41]

103. Contract Amendment No. 7 to the Segment 3 Contract ("Contract Amendment No. 7") was signed on 4 July 2017 by the First Claimant and on behalf of Respondent by ARA's General Director Mr Dashamir Xhika and the PMU Director. The recitals thereof provide:[42]

> *On 07th of June 2017, both parties agreed, that clearly dealing with a dispute according to the provisions of the Contract and intent to settle this dispute under an amicable settlement procedure by amended the current Contract.*

Contract Amendment No 7 further provides:[43]

> *ARTICLE 1*
> *PURPOSE OF CURRENT AMENDMENT*
>
> *The purpose for this contract amendment is to determine the amicable settlement procedure for the dispute, given that both Parties are dissatisfied with the Engineer's evaluation of Contractor's Claim for Segment III and both agreed to the resolution of the above dispute through an amicable settlement board, hereafter referred as ADRB.*
>
> *ARTICLE 2*
> *REASONS FOR AMICABLE SETTLEMENT*
>
> *From the above referred events it becomes clear that:*

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40 Exhibit R-11. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

41 Exhibits C-11 and R-15.

42 Exhibits C-22 and R-12.

43 Exhibits C-22 and R-12.

i) both parties clearly dealing with a dispute according to the provisions of the Contract, given that are dissatisfied with the Engineer's evaluation and have clearly stated that the they are willing to challenge it;
ii) both Parties have failed to appoint the DAB according to the contractual provisions; and
iii) according to the correspondence exchanged according to the above there is a possibility that the Parties agree to a modification of the Contract in relation to the Sub-Clauses, which relate to the DAB and the amicable settlement.

With the current addendum it is amended the sub clause 20.2 to 20.8 of the Contract Agreement Prot. No. 666/1 as below.

ARTICLE 3
AMENDED SUB-CLAUSES OF THE CONTRACT

The Sub-Clauses 20.2 to 20.8 are deleted and substitute with the following:

20.2 Amicable Dispute Resolution Board	*In case any kind of dispute arises between the Parties according to the above Sub-Clause, the Parties will try to resolve it by appointing a board for the amicable settlement of the said dispute (Amicable Dispute Resolution Board). The ADRB will be appointed each time there is a dispute according to the above Sub-Clause. The appointment of the ADRB shall be terminated after the delivering of its decision upon the specific dispute it has been appointed for* *The Amicable Dispute Resolution Board (ADRB) shall comprise of three members ("the members"), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents. One of the members shall serve as Chairman.* *Each Party shall nominate one member of the ADRB. The said nomination shall be made formally and in writing according to the provisions of the Contract following the notification that it disagrees with the Engineer's evaluation. The appointment of the first two members by each Party will have to be finalised within forty-two (42) days, after the notification that there is a dispute according to the above Sub-Clause. The first two members shall agree upon the third member, who will act as Chairman of the ARB. The Chairman shall be appointed by the first two members within fifteen (15) days following the appointment of the second member of the ADRB.* *The terms of the remuneration of the members of the ADRB as well as the remuneration of any expert the ADRB might have to consult, will be mutually agreed upon by the Parties, when agreeing upon the appointment of the ADRB and in view of the specific dispute.*

	Each Party shall be responsible for paying one half of this remuneration. *lf a member declines to act, or is unable to act as a result of death, disability, resignation or termination of appointment, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.*
20.3 Failure to agree on the composition of the ADRB	*lf any of the following conditions apply, namely:* *(a) either Party fails to nominate a member within 42 days from the notification of the dispute* *(b) the first two members fail to agree upon the appointment of the third member (to act as the Chairman of the ADRB within a time limit of fifteen (15) days after the appointment of the second member.* *(c) if either Party fails to appoint a replacement person within twenty (20) days after the date on which the member it had originally appointed declines or is unable to act as a result of death, disability, resignation or termination of appointment* *(d) the first two members fail to agree upon a replacement person to act as the Chairman of the ADRB within twenty (20) days after the date on which the member originally appointed declines or is unable to act as a result of death, disability, resignation or termination of appointment* *then the President of FIDIC in its capacity as an appointing authority, shall, upon the Request of either or both of the Parties, appoint this member of the ADRB. This appointment will be final and conclusive. Each Party shall be responsible for paying one half of the remuneration of the above appointing authority.*
20.4 The decision of the ADRB	*If a dispute of any kind arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party will give written notice to other Party according to the provisions of the Contract of such dispute.* *Following the notification of the dispute, the Parties shall proceed to the appointment of one member tor the ADRB within forty-two (42) days from the notification.* *Fifteen days after appointment of the second member of the ADRB the first two members will appoint the third member, who will also act as Chairman of the ADRB.*

	After the finalisation of the appointment of the ADRB the Parties will be called upon to refer their dispute in writing within a time limit of seven (7) days before the members of the ADRB tor its decision with copies to the other Party and the Engineer. Such reference shall state that it is given under the specific Sub-Clause. *Both Parties shall promptly make available to the ADRB all such additional information, further access to the Site and appropriate facilities, as the ADRB may require for the purposes of making a decision on such dispute. The ADRB shall not be deemed to be acting as arbitrators.* *Within fifty-six (56) days after receiving such reference, or within such other period as may be proposed by the ADRB and approved by both Parties, the ADRB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it, unless it shall be revised in an arbitral award as described below. Unless the Contract has either been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance to the Contract.* *If either Party is dissatisfied with the decision of the ADRB, then either Party may within twenty-eight (28) days after receiving the said decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. lf the ADRB fails to give its decision within the period of fifty-six (56) days (or otherwise approved) after receiving such reference, then either Party may, within twenty-eight (28) days after this period has expired, give notice to other Party of its dissatisfaction and intention to commence arbitration.* *In either event, this notice of shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.6 [Failure to comply with the decision of the ADRB] neither Party shall be entitled to commence arbitration of a dispute, unless a notice of dissatisfaction has been given according to this Sub-Clause.* *lf the ADRB has given its decision as to a matter of dispute to both Parties, and no notice of dissatisfaction has been given by either Party within twenty-eight (28) days after it received the decision of the ADRB, then the decision shall become final and binding upon the Parties.*

20.5 Arbitration	*Unless indicated otherwise in the Particular Conditions, any dispute, in respect of which the decision of the ADRB (if any) has not become final and binding, shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:* *(a) For contracts with foreign contractors:* *(i) international arbitration with proceedings administered by the international arbitration institution appointed in the PC, in accordance with the rules of arbitration of the appointed institution;* *(ii) the place of the arbitration shall be the city, where the headquarters of the appointed arbitration institution is located or such other place selected in accordance with the applicable arbitration rules; and* *(iii) the arbitration shall be conducted in the language for communications defined in Sub-Clause 5.3; and* *(b) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.* *The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the ADRB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.* *Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the ADRB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the ADRB shall be admissible in evidence in the arbitration.* *Arbitration may be commenced prior or after completion of the Works. The obligations of the Parties, the Engineer and the ADRB shall not be altered by reason of any arbitration being concluded during the process of the Works.*
20.6 Failure to comply with a decision of the ADRB	*In the event that a Party fails to comply with a decision of the ADRB, which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.5 [Arbitration]. Sub-Clause 20.4 [The decision of the ADRB] shall not apply to this reference.*

20.7 Taxes	*All duties, taxes, and other levies payable by the Contractor under the Contract, or for any other cause, as of the date twenty-eight (28) days prior to the deadline for submission of bids, shall be included in the rates and prices total Bid Price submitted by the Bidder.*

104. Also on 4 July 2017, the Director-General of ARA wrote to the IDB:[44]

> *Following the tight time limits agreed between parties and after difficult negotiation process, we are submitting for your record and information the Amendment No. 7 for Segment No. 3, despite the fact that up to this moment we have not received the No-Objection or any comments related to it.*
>
> *This Amendment No. 7 will enable the functioning of ADRB under same attributions as the DAB, but setting the respective deadlines.*
>
> *As previously communicated with IDB via email, we are following your suggestion regarding the setting up of the ADRB, which holds the same attributions as the DAB, and will take into review the disagreement at this level.*

105. On 12 July 2017, the Engineer determined that the First Claimant was entitled to receive a compensation of USD 25,889,644.92 for its claim under the Segment 1 Contract.[45]

106. By letter of 17 July 2017, the PMU Director expressed to the First Claimant the Employer's dissatisfaction with the determination of the Engineer and wrote:[46]

> *As Employer (and on IDB advice), we are asking to the Contractor to accept for Claims of Segment 1 the same procedure (settle a dispute board for this case) as it is now in place for Claims for Segment 3. This way, the Employer will be able have a "second independent and professional determination" before being able to make a final decision in this regard.*
>
> *We observe the following contractual situation (Wo[r]ks Contract, Segment No. 1):*
>
> *Provisions of the Contract:*
>
> *Referring to the Contract, Sub-Clause 20.2 (Appointment of the Dispute Board, DB), the parties should appoint a DB by the date stated in the Contract Data; and referring to Section VIII, Particular Conditions, Contract Data Sub-Clause 20.2, pg. 138, should assigned a DB of "Three Members", 28 days after the Commencement date;*
>
> *We observe that the deadline to meet this contract requirement and appoint a DB as foreseen by the contract is not met by the parties. In this situation, obtaining a Dispute Board's Decision (under Sub-Clause 20.4) is impossible because it is impossible to formally ask to have a DB itself.*

44 Exhibit C-72.
45 Exhibit C-12.
46 Exhibits C-13 and R-16. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

Anyway if the Contractor will agree we can attempt to amend the Contract by deleting the current provisions referred above for DB and first to go to a new dispute board to refer the Claims for Segment o. 1 and have a dispute board decision under Sub-Clause 20.4.

Please clarify your position in this regard.

107. By letter of 17 July 2017, also the First Claimant expressed its dissatisfaction with the determination of the Engineer for its claim under the Segment 1 Contract. As to the Employer's proposal, the First Claimant wrote:[47]

Regarding, the Employer's proposal for Dispute Board, we must say that we welcome this initiative, which is necessary in order not to lose a dispute resolution procedure (meaning the procedure before the dispute board), given that time and money unnecessary expenditures can be avoided. Employer's reference to the failure to appoint the dispute board within the time-limit provided for in the Contract is correct and this is the reason an amendment of the relevant provisions is necessary.

The resolution through a Dispute Board is a conventional discussion, in accordance with an informal agreement of the Parties, which is nevertheless equally valid and can materialize, if agreement is reached in an Addendum to the Contract, which is stronger than any DAB Decision.

In view of this issue and in order to avoid additional cost for both sides, in principle the

Contractor agrees to participate to the negotiations for amending the provisions concerning the appointment of the Dispute Board, based on the already settled procedure for SEG-III Claims. Precondition to this alternative, is that both parties will proceed to the executing of a Contract Amendment, in which the negotiating procedure will be determined in detail concerning the parties and the time schedule of the negotiation.

In addition, and according to Contractor's point of this procedure, the procedure adopted for the claims for Segment III and especially the time limits agreed upon, provide us with a result, which is timely far more effective than the appointment of the DB at this phase of the project by following the existing provisions. It is clear that further to amending the contractual provisions regarding the DB, we will also have to amend Clause 20 and probably its relative Appendix (General Conditions of DAB) exactly because of the fact that this procedure of Dispute Board will have to substitute any kind of disagreement resolution procedure according to the Contract Provisions.

In addition to that we would propose, that if the time limit set out by the Parties elapses without reaching an agreement, every interested Party will be allowed to proceed to arbitration immediately after such elapse.

108. On 21 July 2017, the PMU Director wrote to the IDB, with copy to, *inter alia*, the Albanian Minister of Transport and Infrastructure, the General Director of ARA, and the First Claimant

47 Exhibit C-14. The letter was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.

in relation to an amendment of the dispute resolution procedure of the Segment 1 Contract in terms comparable to his letter of 20 June 2017 regarding the amendment of the dispute resolution procedure of the Segment 3 Contract.[48]

109. Contract Amendment No. 12 to the Segment 1 Contract ("Contract Amendment No. 12"; Contract Amendment No. 7 and Contract Amendment No. 12 jointly: the "Contract Amendments") was signed on 24 July 2017 by the First Claimant and on behalf of Respondent by ARA's General Director Mr Dashamir Xhika and the PMU Director. The recitals thereof provide, *inter alia*:[49]

> *On 17-07-2017 both parties expressed their dissatisfaction to the Engineer's Determination through letters 0001408.1/0UT/1368 and 271 relatively. In this interchanging correspondence it becomes clear that both parties dealing with a dispute according to the provisions of the Contract and intent to settle these dispute of both Claims under a Dispute Board.*
>
> *On 18-07-2017, the Employer (ref.no:273) invited the Contractor to participate to a Contract Amendment, in which the negotiating procedure will be determined in details concerning the parties and the time schedule of the negotiation.*

Contract Amendment No 12 further provides:[50]

> *ARTICLE 1*
> *PURPOSE OF CURRENT AMENDMENT*
>
> *The purpose tor this contract amendment is to determine the procedure tor the Dispute Board, given that both Parties are dissatisfied with the Engineer's evaluation of Contractor's Claims (1st and 2nd Period) for Segment I and both agreed to the resolution of the above disputes through a Dispute Resolution Board, hereafter referred as DRB.*
>
> *ARTICLE 2*
> *REASONS FOR AMICABLE SETTLEMENT*
>
> *From the above referred events it becomes clear that:*
> *i) both parties clearly dealing with a dispute according to the provisions of the Contract, given that are dissatisfied with the Engineer's evaluation and have clearly stated that the they are willing to challenge it;*
> *ii) both Parties have failed to appoint the DAB according to the contractual provisions; and*

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48 Exhibit C-73, see also above, ¶ 100.

49 Exhibits C-22 and R-17. Contract Amendment 12 provides that it was signed on 20 July 2017, but refers on the front page in handwriting to a date of 24 July 2017. Absent specific submissions of the Parties on the issue, the Tribunal concludes from the letter of 21 July 2017 of the PMU Director to the IDB (Exhibit C-73), copied to, *inter alia*, the First Claimant, referring to a "proposed amendment" and attaching an unsigned draft of the Contract Amendment already referring to being signed on 20 July 2017 that Contract Amendment 12 must have been signed on 24 July 2017.

50 Exhibits C-22 and R-17.

iii) according to the correspondence exchanged according to the above issue, both Parties agree to proceed to a modification of the Contract's Sub-Clauses which are related to the DAB.

With the current addendum it is amended the sub clause 20.2 to 20.8 of the Contract Agreement Prot. No. 666/1 as below.

ARTICLE 3
AMENDED SUB-CLAUSES OF THE CONTRACT

The Sub-Clauses 20.2 to 20.8 are deleted and substitute with the following:

20.2 Dispute Resolution Board (DRB)	*In case any kind of dispute arises between the Parties according to the above Sub-Clause, the Parties will try to resolve it by appointing a board for the settlement of the said dispute (Dispute Resolution Board). The DRB will be appointed each time there is a dispute according to the above Sub-Clause. The appointment of the DRB shall be terminated after the delivering of its decision upon the specific dispute it has been appointed for* *The Dispute Resolution Board (DRB) shall comprise of three members ("the members"), each of whom shall be fluent in the language for communication defined in the Contract and shall be a profession experience in the type of construction involved in the Works and with the interpretation of contractual documents. One of the members shall serve as Chairman.* *Each Party shall nominate one member of the DRB. The said nomination shall be made formally and in writing according to the provisions of the Contract following the notification that it disagrees with the Engineer's evaluation. The appointment of the first two members by each Party will have to be finalised within twenty-one (21) days, after the notification that there is a dispute according to the above Sub-Clause. The first two members shall agree upon the third member, who will act as Chairman of the ARB. The Chairman shall be appointed by the first two members within seven (7) days following the appointment of the second member of the DRB.* *The terms of the remuneration of the members of the DRB as well as the remuneration of any expert the DRB might have to consult, will be mutually agreed upon by the Parties, when agreeing upon the appointment of the DRB and in view of the specific dispute. The payment of the DRB members will follow in principle the provisions for the DAB as included in the General Conditions of the Contract before the present amendment. Each Party shall be responsible for paying on half of this remuneration.*

	If a member declines to act, or is unable to act as a result of death, disability, resignation or termination of appointment, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.
20.3 Failure to agree on the composition of the DRB	*lf any of the following conditions apply, namely:* *(a) either Party fails to nominate a member within 21 days from the notification of the dispute* *(b) the first two members fail to agree upon the appointment of the third member (to act as the Chairman of the DRB within a time limit of seven (7) days after the appointment of the second member.* *(c) if either Party fails to appoint a replacement person within twenty (20) days after the date on which the member it had originally appointed declines or is unable to act as a result of death, disability, resignation or termination of appointment* *(d) the first two members fail to agree upon a replacement person to act as the Chairman of the DRB within twenty (20) days after the date on which the member originally appointed declines or is unable to act as a result of death, disability, resignation or termination of appointment* *then the President of FIDIC in its capacity as an appointing authority, shall, upon the Request of either or both of the Parties, appoint this member of the DRB. This appointment will be final and conclusive. Each Party shall be responsible for paying one half of the remuneration of the above appointing authority.*
20.4 The decision of the ADRB	*If a dispute of any kind arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party will give written notice to other Party according to the provisions of the Contract of such dispute.* *Following the notification of the dispute, the Parties shall proceed to the appointment of one member tor the DRB within twenty-one (21) days from the notification.* *Seven (7) days after appointment of the second member of the DRB the first two members will appoint the third member, who will also act as Chairman of the ADRB.*

	After the finalisation of the appointment of the DRB the Parties will be called upon to refer their dispute in writing within a time limit of seven (7) days before the members of the DRB tor its decision with copies to the other Party and the Engineer. Such reference shall state that it is given under the specific Sub-Clause. *Both Parties shall promptly make available to the DRB all such additional information, further access to the Site and appropriate facilities, as the DRB may require for the purposes of making a decision on such dispute. The DRB shall not be deemed to be acting as arbitrators.* *Within seventy (70) days after receiving such reference, or within such other period as may be proposed by the DRB and approved by both Parties, the DRB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it, unless it shall be revised in an arbitral award as described below. Unless the Contract has either been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance to the Contract.* *If either Party is dissatisfied with the decision of the ADRB, then either Party may within twenty-eight (28) days after receiving the said decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. lf the ADRB fails to give its decision within the period of seventy (70) days (or otherwise approved) after receiving such reference, then either Party may, within twenty-eight (28) days after this period has expired, give notice to other Party of its dissatisfaction and intention to commence arbitration.* *In either event, this notice of shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.6 [Failure to comply with the decision of the DRB] neither Party shall be entitled to commence arbitration of a dispute, unless a notice of dissatisfaction has been given according to this Sub-Clause.*
20.5 Amicable Settlement	*Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day, on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt of amicable settlement has been made.*

20.6 Arbitration	*lf the DRB has given its decision as to a matter of dispute to both Parties, and no notice of dissatisfaction has been given by either Party within twenty-eight (28) days after it received the decision of the ADRB, then the decision shall become final and binding upon the Parties.* *Unless indicated otherwise in the Particular Conditions, any dispute, in respect of which the decision of the ADRB (if any) has not become final and binding, shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:* *(a) For contracts with foreign contractors:* *(i) international arbitration with proceedings administered by the international arbitration institution appointed in the PC, in accordance with the rules of arbitration of the appointed institution;* *(ii) the place of the arbitration shall be the city, where the headquarters of the appointed arbitration institution is located or such other place selected in accordance with the applicable arbitration rules; and* *(iii) the arbitration shall be conducted in the language for communications defined in Sub-Clause 5.3; and* *(b) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.* *The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the ADRB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.* *Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the ADRB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the ADRB shall be admissible in evidence in the arbitration.* *Arbitration may be commenced prior or after completion of the Works. The obligations of the Parties, the Engineer and the ADRB shall not be altered by reason of any arbitration being concluded during the process of the Works.*

20.6 Failure to comply with a decision of the DRB	*In the event that a Party fails to comply with a decision of the DRB, which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.5 [Arbitration]. Sub-Clause 20.4 [The decision of the DRB] shall not apply to this reference.*
20.7 Taxes	*All duties, taxes, and other levies payable by the Contractor under the Contract, or for any other cause, as of the date twenty-eight (28) days prior to the deadline for submission of bids, shall be included in the rates and prices total Bid Price submitted by the Bidder.* *IDB financing does not cover any the payment of taxes, duties, levies and any other imposition of this nature.*

110. On 25 July 2017, the IDB wrote to ARA:[51]

> *Please refer to the Director PMU letter No. 278 Port dated 21 July 2017 submitting clarification on the proposed Dispute Resolution Procedure and other communication related to subject matter.*
>
> *The IDB in principle has no objection to your proposed dispute settlement mechanism per se. However, we would like to advise you to ensure that any accepted dispute mechanism shall be valid for all sections of the project. Also, the dispute resolution and/or amicable settlement process shall be sought for all pending items at a time and should not be processed one by one since approach will help in avoiding any potential processing delays and/or other unforeseen future issues.*
>
> *Please ensure the compliance of above during the process and send the executed agreements for reference before implementing.*

C. Assessment of the Contractor's Claims

111. In July 2017, Mr Angelo Perrone and Mr Werner Michallek were appointed as ADRB-members for the claims under the Segment 3 Contract and as DRB-members for the claims under the Segment 1 Contract. Mr. David Simper was appointed as President of the ADRB and of the DRB.[52]

112. On 24 July 2017, the ADRB-members, ARA and the First Claimant entered into an Amicable Dispute Resolution Board Agreement (the "ADRB-Agreement"). The ADRB-Agreement provides, *inter alia*:[53]

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51 Exhibit C-74.
52 Exhibits C-33 and R-20, ¶¶ 10-12; Exhibits C-26 and R-23, ¶¶ 16-18;
53 Exhibit C-30.

(...)

Whereas the Employer and the Contractor have entered into the Contract and desire jointly to appoint the Members to act as adjudicators who are also called to "ADRB".

The Employer, Contractor and Members jointly agree as follows:

1. *The conditions of this Amicable Dispute Review Board Agreement comprise the "General Conditions of Dispute Adjudication Agreement", which is appended to the General Conditions of the "Conditions of Contract for Constructions" First Edition 1999 published by the Féderation Internationale des Ingénieurs-Conseils (FIDIC), and the following provisions. (...)*

113. On 7 August 2017, the DRB-members, ARA and the First Claimant entered into a Dispute Resolution Board Agreement (the "DRB-Agreement", jointly with the ADRB-Agreement the "(A)DRB-Agreements").[54] The DRB-Agreement contains, except for references to a "DRB" and a "Dispute Review Board Agreement" wording identical to the wording of the ADRB-Agreement cited in the previous paragraph.

114. In the Segment 3 Decision of 7 September 2017, the ADRB found that the First Claimant is entitled to the sum of USD 11,665,552.31 in respect of the Segment 3 Contract.[55] On 8 September 2017, the PMU Director confirmed receipt of the Segment 3 Decision.[56]

115. On 29 September 2017, the PMU Director wrote to the Minister of Infrastructure and Energy and to the Minister of Finance (with a copy to the General Director of ARA and the First Claimant):[57]

> *Regarding to the ADRB Decision of "Claims for Segment 3" and analyzing professionally all the details of the overall respective situation, the actual NPMU's final opinion is to close the dispute with the Contractor at current stage by accepting and not challenging the decision of the ADRB. Every other attempt to solve this dispute in a higher level of adjudication (referring the dispute to an International Arbitration Court- as described in the ADRB Agreement) in NPMU's opinion will be more expensive for the Government of Albania. We must also take into account that until now both competent authorities to decide upon Contractor's specific claim have recognized that in principle the latter is right in seeking compensation. This is something that we have to come up against in the arbitration procedure. In addition to that, we have to remind you that Contractor's claim bas not been accepted in full and that ADRB has narrowed it down. If we challenge the decision of the ADRB, there is a possibility that Contractor proceeds to claiming the full amount.*

54 Exhibit C-23.
55 Exhibits C-33.and R-20.
56 Exhibit C-35.
57 Exhibit C-41.

116. In the Segment 1 Decision of 9 October 2017, the DRB (referring to itself as ADRB in the decision) found that the First Claimant is entitled to the sum of USD 25,220,016.37 in respect of the Segment 1 Contract.[58] It was received by Respondent on the same date.[59]

117. On 18 October 2017, the First Claimant sent a Final Statement with respect to the Contractor's claims under the Segment 3 Contract pursuant to Sub-Clause 14.11 thereof to Respondent, which was approved by the Engineer on 9 November 2017.[60]

118. On 31 October 2017, the PMU Director wrote to the Minister of Infrastructure and Energy and to the Minister of Finance (with a copy to the General Director of ARA and the First Claimant) in relation to the Segment 1 Decision in identical words (though changing "ADRB" to "DRB") as in his letter of 29 September 2017 in relation to the Segment 3 Decision.[61]

119. On 17 November 2017, the First Claimant submitted an Interim Payment Certificate with respect to the Contractor's claims under the Segment 1 Contract to the Engineer, which was approved by the Engineer on 20 November 2017.[62]

120. On 20 November 2017, the PMU Director wrote to the Minister of Infrastructure and Energy and to the Minister of Finance (with a copy to the First Claimant) in respect of the First Claimant's claim under the Segment 3 Contract:[63]

> *Following all the previous procedure and relative correspondence regarding the Dispute settlement for the Contractor's Claims, the Contractor has issued the Final Payment Certificate including the Claim amount according his Contractual rights under sub-clause 14.13 and has been approved by the Engineer.*
> *The NPMU has already expressed its opinion to the matter and we consider that since the final settlement of this dispute is of high importance, the prompt actions and the decision making of all the involved parties are necessary in order to avoid additional costs and expenses for the Albanian State.*

121. On 21 November 2017, the PMU Director wrote to the Minister of Infrastructure and Energy and to the Minister of Finance (with a copy to the First Claimant) in similar terms in respect of the First Claimant's claim under the Segment 1 Contract.[64]

122. The amounts of USD 11,665,552.31 in respect of the Segment 3 Contract and of USD 25,220,016.37 in respect of the Segment 1 Contract have remained unpaid until this date.

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58 Exhibit C-33.
59 Exhibit C-28.
60 Exhibits C42 and C-43.
61 Exhibit C-37.
62 Exhibits C-38 and C-39.
63 Exhibit C-44.
64 Exhibit C-40.

V. THE PARTIES' POSITIONS AND REQUESTS FOR RELIEF

123. This section of the award provides a brief summary of the Parties' main contentions. In the analysis sections of the award, the Tribunal will also refer to other arguments by the Parties, to the extent the Tribunal considers them relevant.

A. Summary of Claimants' Position

124. Claimants submit that the Parties agreed in the Contract Amendments to re-instate the dispute resolution procedure, as proposed by Respondent and agreed to by Claimants in good faith and as it was initially provided for the contracts, with the only exception that the ADRB and the DRB is not a permanent board but now appointed in relation to every specific dispute (as an *ad-hoc* dispute board).[65] This is moreover confirmed by the fact that in both cases contracts were signed between the Parties and the respective dispute boards, as is provided for in the FIDIC-model. Following these amendments of the contracts, both Parties participated in the appointment of the relevant dispute boards (DRB in the Segment 1 Contract and ADRB for the Segment 3 Contract).

125. As the Segment 1 Decision of 9 October 2017, in which the DRB found that that Claimants were entitled to receiving a compensation of USD 25,220,016.37, and the Segment 3 Decision of 7 September 2017, in which the ADRB that Claimants were entitled to receiving a compensation of USD 11,665,552.31, were not challenged by Respondent within 28 days by giving a notice of dissatisfaction to Claimants, these decisions have according to Claimants become final and binding upon the Parties pursuant to Sub-Clauses 20.4 of the Segment 1 Contract and of the Segment 3 Contract. Claimants moreover submit that Respondent accepted both decisions in subsequent correspondence.[66]

126. Claimants submit that pursuant to Sub-Clauses 20.6 of both the Contracts, which provide that in the event that a Party fails to comply with a decision of the (A)DRB, which has become final and binding, then the other Party may refer the failure itself to arbitration under Sub-Clause 20.5, and accordingly Claimants are entitled to seek enforcement of the final and binding Segment 1 Decision and the final and binding Segment 3 Decision in these Arbitration Proceedings.

127. It is Claimants' case that: (i) the DRB (Segment 1 Contract) and the ADRB (Segment 2 Contract) are dispute boards as described in Sub-Clauses 20.2-20.4 of the FIDIC Red Book and both contracts; (ii) the ad-hoc Segment 1 and Segment 3 Decisions can no longer be questioned or challenged, due to the fact that they have become final and binding according to Sub-Clause 20.4; (iii) Respondent is bound to comply with these decisions and pay the awarded amounts to Claimants; and (iv) the present case is a case of failure to comply with a final and binding dispute board decision (Segment 1 Decision and Segment 3 Decision) and this is also the only content of the specific dispute according to Sub-Clause 20.6.[67]

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65 PHB Claimants, ¶¶ 26 and 32-34.
66 PHB Claimants, ¶¶ 27-29.
67 ToR, ¶ 78.

128. Claimants submit that a Final Statement with respect to the amount determined in the Segment 3 Decision was issued to the Employer on 17 November 2017 and subsequently approved by the Engineer in accordance with the provisions of the Segment 3 Contract, and as a result the amount of USD 11,665,552.31 became due and payable to the First Claimant on 3 January 2018 pursuant to Sub-Clause 14.7(c) of the Segment 3 Contract.[68] Claimants further submit that Interim Payment Certificate 36 with respect to the amount determined in the Segment 1 Decision was issued to the Engineer on 17 November 2017 and subsequently approved by the Engineer in accordance with the provisions of the Segment 1 Contract, and as a result the amount of USD 25,220,016.37 became due and payable to the First Claimant on 12 January 2018 pursuant to Sub-Clause 14.7(b) of the Segment 1 Contract.[69]

129. Claimants submit that the amounts claimed in these Arbitration Proceedings from the Respondent in relation to the (A)DRB Decisions are as part of the supply value subject to Albanian VAT at a rate of 20% and such VAT must be added to its claims.[70]

130. Claimants deny that FIDIC contracts like the Contracts can be properly qualified as administrative contracts under Albanian law.[71] Claimants submit that Contract Amendments neither run counter to an Albanian provision of law which is of a mandatory character, nor resulted in a breach that cannot not be rectified.[72] As to the no-objection from the IDB, Claimants submit that it was, although not required, in fact obtained, it is not a legal imperative clause binding upon legal and/or private persons in general, and upon the First Claimant in particular.[73] According to Claimants, the PMU is an integral part of Respondent, the Employer, and its actions are attributable to Respondent and therefore the procedures before the (A)DRB are valid.[74]

131. Finally, Claimants argue that Respondent's arguments are made in "a manifest bad faith in violation of the fundamental general principle that parties should act in good faith", a well-established principle in international arbitration, and should for that reason being estopped.[75]

B. Relief Sought by Claimants

132. In the Terms of Reference Claimants seek the following relief, which remained unamended throughout the arbitration proceedings:[76]

(1) a declaratory final award which affirms the binding character and finality of the Segment 1 Decision and the Segment 3 Decision;

(2) an award requiring Respondent to make immediate payment to Claimants of the amount of (a) USD 25,220,016.37 (plus USD 5,044,003.27 for VAT as described

68 SoC, ¶¶ 225-235; PHB Claimants, ¶ 31.
69 SoC, ¶¶ 202-214; PHB Claimants, ¶ 31.
70 SoC, ¶¶ 215-220 and 236-241; Transcript Hearing Day 1, 100:4-101:6.
71 PHB Claimants, ¶¶ 36-49.
72 PHB Claimants, ¶¶ 50-62.
73 PHB Claimants, ¶¶ 111-125.
74 PHB Claimants, ¶¶ 63-98.
75 PHB Claimants. ¶¶ 126-141.
76 ToR, ¶ 79, repeated in SoC, ¶ 317; Reply, ¶ 157; and PHB Claimants, Section 9.

in detail in the relevant Request for Arbitration) as this has been determined by the DRB in its decision of 9 October 2017 with the Segment 1 Decision in a no longer disputable manner or that Respondent makes such payment within a time period to be determined by the Tribunal; and (b) USD 11,665,552.31 (plus USD 2,333,110.46 for VAT as described in detail in the relevant Request for Arbitration) as this has been determined by the ADRB in its decision of 7 September 2017 with the Segment 3 Decision in a no longer disputable manner or that Respondent makes such payment within a time period to be determined by the Tribunal;

(3) payment of Claimants' costs of and incidental of these arbitration proceedings (including but not limited to, lawyers' and experts' fees); and

(4) such other relief as the Tribunal may deem appropriate.

C. Summary of Respondent's Position

133. Respondent's position is that the Tribunal lacks jurisdiction, Claimants' claims are inadmissible, alternatively should be dismissed or declared groundless. Its defences against Claimants' claims can be summarised and categorised at follows.

Jurisdiction

134. As a preliminary defence, Respondent submits that the Tribunal lacks jurisdiction over Copri and Aktor. The projects were awarded to the Joint Venture Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme and the Segment 1 Contract and the Segment 3 Contract were signed by Copri and Aktor as representatives of the Contractor, the Joint Venture Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme. According to Respondent, at the time of signing the contracts, the Contractor was an unincorporated contractual joint venture, but as of 26 March 2012 it became an incorporated joint venture in the form of a simple partnership, the First Claimant, since its object of activity was the implementation of the projects. A tax identification number was assigned to the First Claimant and from the time of registration, the First Claimant is able to exercise rights and assume obligations as an Albanian legal entity, established and organized in accordance with Albanian laws (in other words, it has legal personality).[77]

135. Respondent's position is that the consent to arbitrate in this case derives from arbitration agreements between the Albanian Road Authority (at the time the General Road Directorate under the Ministry of Public Works and Telecommunications) as the Employer and First Claimant as the Contractor. Respondent submits that Copri and Aktor are not parties to these arbitration agreements, they have not participated in the dispute settlement process before the DRB and the ADRB, and none of the decisions of which enforcement is sought in these Arbitration Proceedings are addressed to them.[78]

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77 SoC, ¶¶ 56-64; Transcript Hearing Day 1, 35:11-38:9.
78 SoC, ¶ 65; Transcript Hearing Day 1, 2-9.

136. Moreover, in its Rejoinder Respondent argues that the Tribunal lacks jurisdiction to hear Claimants' claims because the Contract Amendments do not establish a Dispute Board (or a Dispute Adjudication Board) as required by the FIDIC contracts.[79]

Contract Amendments not in accordance with FIDIC contract mechanisms

137. Respondent refers to the standard multi-tier dispute resolution mechanism in FIDIC contracts, consisting of: (i) determination of a claim by the Engineer; (ii) referral of the dispute to a Dispute Adjudication Board (or, in MDB contracts like the Contracts), a Dispute Board);[80] (iii) an attempt to reach an amicable settlement; and (iv) a referral to arbitration. The DB can be either a standing DB or an *ad hoc* DB. Adoption of a standing DB in Books with an *ad hoc* DB (and *vice versa*) can be achieved through including wording to such effect in the Particular Conditions. Provisions regarding the DB can be found in: (i) Sub-Clause 20; (ii) Appendix to Tender, Contract Data, and Particular Conditions; (iii) the Dispute Adjudication or Dispute Board Agreement; (iv) the General Conditions of Dispute Adjudication or Dispute Board Agreement; and (v) the Procedural Rules. To ensure that the Parties can avail themselves of arbitration, Sub-Clause 20.8 provides jurisdiction to an arbitral tribunal when a dispute arises and there is no DB in place.[81]

138. Respondent submits that the (A)DRB Decisions are not DB decisions as envisaged in the FIDIC contracts. According to Respondent, the parties by their own free will have departed from the FIDIC contract requirements and established new procedures to attempt to have the disputes settled through a second professional opinion, by preserving in any case the possibility to have the disputes, reviewed, scrutinized and determined to the fullest extent possible by an arbitral tribunal. Rather than submitting the disputes directly to arbitration, the Parties were exploring alternative methods, such as "amicable settlement" or "substitution of the DB procedure", to settle their disputes. Respondent submits that the Parties, by their own will, have deviated from the routine contractual mechanisms contained in the FIDIC Contracts for disputes settlement and employed new procedures to have the disputes settled, but that the Parties were sufficiently cautious to have either the amicable settlement procedure or the substitution of the DB Resolution Procedure, as a first dispute settlement forum followed by an additional dispute settlement forum in case they might be unsatisfied with the outcome of the new procedures.[82]

139. Respondent argues that for these reasons, and following the FIDIC Contracts Guide, the Contract Amendments were not duly made.[83] The ADRB and the DRB established by the amendments do not have the characteristics of standing and *ad hoc* DB's. Further the amendments did not cover all the documents, integral parts of the contract, containing the relevant provisions regulating the Dispute Boards. Deleting only a part of the General Conditions of Dispute Board Agreement, a part of the Procedural Rules and a part of the Dispute Board Agreement do not constitute a due replacement of the standing DB with an *ad hoc* DB, as it establishes a complete deviation from the FIDIC contract mechanism by borrowing and

79 Rejoinder, ¶¶ 52-69.
80 Hereafter, the Dispute Adjudication Board and or the Dispute Board will be referred to as "DB".
81 SoD, ¶¶ 67-95.
82 SoD, ¶¶ 96-101.
83 SoD, ¶ 102.

mixing the FIDIC Contracts provisions in relation to dispute resolution procedure, resulting in a negotiating process to attempt an amicable resolution of the claims before arbitration.[84] In particular, Respondent submits that in the Contact Amendments, contrary to good practice and the FIDIC Guide rules, the chairman of the (A)DRB is appointed by the other two members and not by the Parties upon recommendation of the other members, the time for the (A)DRB to issue its decision is reduced from 84 days to 56 and 70 days respectively, and, in the case of the Contract Amendment No.7, the amicable settlement clause is deleted.[85]

140. The absence of an amicable settlement procedure in Contract Amendment No. 7 even entails, according to Respondent, that absent a specific clause stipulating referral to arbitration, the Tribunal has no discretion to rule on any dispute arising out of or with the Segment 3 Decision.[86]

141. Respondent submits that the FIDIC contracts envisage a standing full-term DB, appointed 28 days after the Commencement Date. The *ad hoc* DB established by the Contract Amendments in response to the failure to timely appoint such standing DB is not suitable and does not serve the nature of construction contracts. Failure to set up a standing DB in real time has created the risk of inaction and documentation in real-time of the claims and their evaluation. The (A)DRB was less effective as it had to evaluate the disputes based on documents only and within a shortened time period.[87] Moreover, at the point in time the disputes arose there was no point in referring the disputes to an *ad hoc* DB, as the Parties had the possibility under Sub-Clause 20.8 to refer the disputes directly to arbitration as a "more guaranteed dispute settlement process".[88]

142. According to Respondent, the Dispute Adjudication Agreements entered into by the Parties and the (A)DRB members are not, as required by Sub-Clause 20.2, fifth paragraph, and the FDIC Contract Guide, between the Employer, the Contractor and each of the (A)DRB members individually but constitute an agreement between five parties.[89]

143. On a separate note, Respondent argues that the Contract Amendments are not effective, because they have not modified the Particular Conditions with respect to the DB (the constitution within 28 days from the Commencement Date), which accordingly remain in force and prevail over the Contract Amendments.[90]

144. Respondent also submits that ARA used the IDB Standard Bidding Documents for Procurement of Works and its User's Guide comprising the FIDIC contract model. Pursuant to these Standard Bidding Documents, which bidders have accepted and signed, the text of the General Conditions may not be modified other than through Particular Conditions. The Contract Amendments, which deleted and substituted Sub-Clauses 20.1 through 20.8 of the General Conditions, were made against the provisions of the IDB Standard Bidding Documents, its User's Guide and FIDIC Guide Rules, as they "*were not duly amended as provided by the FIDIC Guide and the*

84 SoD, ¶ 113; Rejoinder, ¶¶ 52-59 and 70-74; PHB Respondent, ¶¶ 15-20.
85 Rejoinder, ¶¶ 60-62; PHB Respondent, ¶¶ 21-26.
86 Rejoinder, ¶¶ 75-76; PHB Respondent, ¶ 27.
87 Rejoinder, ¶¶ 66-69.
88 Rejoinder, ¶¶ 77-82.
89 Rejoinder, ¶ 64.
90 Rejoinder, ¶ 63.

good practice in common, by the Particular Conditions during the negotiation process before signing of the Contracts."[91]

145. The Contract Amendments lack, according to Respondent, also legal and contractual grounds. Other than Sub-Clause 13 relating to Variation Orders, the Contracts do not contain any Sub-Clause providing the Parties the right to amend the General Conditions, particularly the dispute resolution procedure therein. Absent a specific contractual stipulation to such effect, the freedom of the Parties to amend the Contracts must find support, as a legal basis, first and foremost in the contract itself and is moreover limited by the good practice in the field of civil engineering and prevention of confusion in the correct application of contract clauses. A regularly stipulated contract has force of law between the parties (Article 690 of the Albanian Civil Code ("ACC")). Respondent claims that failure to timely institute a DB in the form required by the Contracts, has resulted in the creation of a hybrid DB form, unknown by the FIDIC contracts and by dispute adjudication practice in general and therefore the decisions of the (A)DRB Decisions are unenforceable.[92] Absent a specific provision under the Contracts regulating the referral to arbitration of the (A)DRB Decisions, the Tribunal lacks discretion to settle the recognition and enforcement of the (A)DRB Decisions.[93]

Contract Amendments invalid as they are invalid amendments of Administrative Contracts

146. Respondent submits that the Contracts, including the Contract Amendments, should be qualified as administrative contracts as defined in Article 3(4) of the Albanian Administrative Procedures Code ("AAPC").[94] Article 124 AAPC stipulates that it is only for matters on the administrative contract which are not explicitly regulated by the AAPC, that the corresponding provisions of the Albanian Civil Code or special legal provisions shall apply. Accordingly, the provisions of the AAPC supersede the provisions of the ACC.[95]

147. Opposed to contracts governed by the ACC, the nature of administrative contracts is according to Respondent defined by, *inter alia*: (i) the juridical inequality of the parties, determined by the need to protect the general interest manifested by the public authority; (ii) the public authority acting as one of the contract parties; and (iii) limitation of the freedom of contract for the public authority by legal provisions.[96] The limitation of freedom of contract for public authorities comprises three aspects, as the freedoms for signing the contract, to choose the contractor and to define the contract terms are limited. Respondent argues that such limitation specifically arises from Section 3.1 sub (f) of the Law No. 10 419, dated 26 May 2011, ratifying the Agency Agreement, and Section 3.1 of the Agency Agreement.

148. Respondent argues that any contract modification outside Article 123 AAPC, which allows amendment or dissolution of an administrative contract due to unforeseen circumstances which make the continuation of the performance of the obligations under the contract extremely

91 Rejoinder, ¶¶ 13-16.
92 Rejoinder, ¶¶ 22-26 and 83-85; PHB Respondent, ¶¶ 6-10.
93 PHB Respondent, ¶ 29.
94 Law no. 44/2015 dated 30 April 2015.
95 Rejoinder, ¶¶ 92-97.
96 Rejoinder, ¶ 103.

difficult for one of the parties, is illegal and does not oblige the public contracting authority to apply the modification of contract terms despite the fact that it has agreed to do so by signing the contract amendment. The non-compliance with the timely institution of the DB within 28 days from the Commencement Date does according to Respondent not amount to such unforeseen circumstance. Moreover, the Contract Amendments were the result of absolutely legal void actions by the PMU during the process of negotiating these amendments, because of non-compliance with the provisions of the Agency Agreement and the Order no.57 dated 8 May 2011 of the Minister of Public Works and Transport on the establishment of the PMU. [97]

Contract Amendments invalid due to lack of prior consent of the IDB

149. Respondent argues that in the absence of prior consent of the IDB the Contract Amendments were entered into in breach of Section 4 (Alterations and Amendments of the Contracts) of the Agency Agreement, which provides that without the prior consent of the IDB no amendments, no alterations or modifications of the Contract which may not be in accordance with usual good practice may be made by Respondent.[98]

150. The (A)DRB Decisions themselves and the decision-making have financial implications. This means that the Contract Amendments indirectly establish a mechanism that will judge the decision of the engineer on financial costs and reach a decision with financial obligations and as such will lead to a modification of the contract price, a situation in which it is expressly stipulated that the parties are obliged to comply with an agreement for no objection.[99]

151. As the Financing Agreement was ratified by Law No. 10 419, dated 26 May 2011, Section 4 of the Agency Agreement became a mandatory provision of Albanian law. According to Article 92 ACC, the Contract Amendments are therefore null and void.[100]

Respondent is not bound by the (A)DRB Decisions as it did not participate in the process

152. Respondent submits as a further defence that is not bound by the (A)DRB Decisions, because: (i) the ADRB and the DRB were not created in accordance with the contractual stipulations as – without authorisation to such effect – the PMU, and not Respondent, selected the Employer's representative; (ii) Respondent did not participate in the process as – without authorisation to such effect – the PMU, and not Respondent, made submissions to the ADRB and to the DRB; and (iii) Respondent never accepted the (A)DRB Decisions, as the correspondence referred to by Claimants originated from the PMU and does not constitute a statement by Respondent.[101]

VAT

153. During the hearing, Respondent explained that Claimants' prayer for relief as outlined in the Terms of Reference in essence only requests the Tribunal to determine the binding character

97 Rejoinder, ¶¶ 110-120; PHB Respondent, ¶¶ 46-54.
98 SoD, ¶ 103; Rejoinder, Section V.
99 PHB Respondent, ¶ 14.
100 SoD, ¶¶ 104-105; Rejoinder, ¶¶ 17-21 and 86-88; PHB Respondent, ¶¶ 34-45.
101 Rejoinder, ¶¶ 27-51.

and finality of the (A)DRB Decisions. For this reason no VAT should be applicable upon the (A)DRB Decisions.[102]

D. Relief Sought by Respondent

154. In the Terms of Reference, Respondent requested the Tribunal:[103]

(a) To declare that:

1. The Tribunal does not have jurisdiction to hear the claims;
2. Alternatively the claims are inadmissible;

(b) Further or alternatively, the Tribunal is asked to:

1. dismiss the claims;
2. declare that the claims are groundless;

(c) Further or alternatively, order that the Respondent is entitled to reimbursement of all the costs associated with these arbitrations proceedings, including its arbitration costs, such as legal fees and disbursements and those of any experts and/or witnesses.

155. In its Statement of Defence, Respondent requested the Tribunal to:[104]

(a) DISMISS Claimants' claims in their entirety for lack of jurisdiction;

(b) Further or alternatively DISMISS the Claimant's claims in their entirety for inadmissibility;

(c) ORDER the Claimant to pay the Respondent's costs of the arbitration in full, including but not limited to the fees and expenses of the Tribunal and the Respondent's costs of legal representation and assistance, and all other fees and expenses incurred in participating in the arbitration, with interest until the date of payment; and

(d) ORDER such other relief in favour of the Respondent as the Tribunal may deem appropriate.

VI. ARBITRATION AGREEMENTS AND APPLICABLE LAW

A. Arbitration Agreements

156. Claimants made claims under arbitration agreements contained in: (i) the two Sub-Clauses 20.6 of the Segment 1 Contract as amended by Contract Amendment No. 12; and (ii) the Sub-Clauses 20.5 and 20.6 of the Segment 3 Contract as amended by Contract Amendment No. 7.

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102 Transcript Hearing Day 1, 106:4-13.
103 ToR, ¶ 89.
104 SoD, ¶ 115, repeated in Rejoinder, ¶ 115, and PHB Respondent, ¶ 70.

157. Respondent disputes that the Contract Amendments have validly amended the arbitration agreement as agreed by the Parties in the General Conditions of the Segment 1 Contract and the Segment 3 Contract respectively.

158. Both the Segment 1 Contract and the Segment 3 Contract provide in Article 2 of the Contract Agreement:[105]

> *The following documents shall be deemed to form and be read and construed as part of this Agreement. This Agreement shall prevail over all other Contract documents.*
>
> *(i) the Letter of Acceptance (Volume 2)*
> *(ii) the Letter of Bid (Volume1)*
> *(iii) the addenda Nos _____(if any) (Volume 1)*
> *(iv) the Particular Conditions (Volume 2)*
> *(v) the General Conditions (Volume 2)*
> *(vi) the Specification (Volume 3)*
> *(vii) the Drawings; and B.O.Q (Volume 4)*
> *(viii) the completed Schedules (Volume 1)*

159. According to Claimants, Sub-Clause 20.6 of the Segment 1 Contract as amended by Contract Amendment No. 12 provides:[106]

> *20.6 Arbitration*
>
> *If the DRB has given its decision as to a matter of dispute to both Parties, and no notice of dissatisfaction has been given by either Party within twenty-eight (28) days after it received the decision of the DRB, then the decision shall become final and binding upon the Parties.*
>
> *Unless indicated otherwise in the Particular Conditions, any dispute, in respect of which the decision of the DRB (if any) has not become final and binding, shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*
>
> *(a) For contracts with foreign contractors:*
>
> *(i) international arbitration with proceedings administered by the international arbitration institution appointed in the PC, in accordance with the rules of arbitration of the appointed institution;*
>
> *(ii) the place of the arbitration shall be the city, where the headquarters of the appointed arbitration institution is located or such other place selected in accordance with the applicable arbitration rules; and*
>
> *(iii) the arbitration shall be conducted in the language for communications defined in Sub-Clause 5.3; and*

105 Exhibits C-08, C-15 and R-03.
106 SoC, ¶ 126.

(b) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the DRB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DRB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DRB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior or after completion of the Works. The obligations of the Parties, the Engineer and the DRB shall not be altered by reason of any arbitration being concluded during the process of the Works.

20.6 Failure to comply with the Dispute Board's Decision

In the event that a Party fails to comply with a decision of the DRB, which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.5 [Arbitration]. Sub-Clause 20.4 [The decision of the DRB] shall not apply to this reference.

160. According to Claimants, Sub-Clauses 20.5 and 20.6 of the Segment 3 Contract as amended by Contract Amendment No. 7 provide:[107]

20.5 Arbitration

If the ADRB has given its decision as to a matter of dispute to both Parties, and no notice of dissatisfaction has been given by either Party within twenty-eight (28) days after it received the decision of the DRB, then the decision shall become final and binding upon the Parties.

Unless indicated otherwise in the Particular Conditions, any dispute, in respect of which the decision of the DRB (if any) has not become final and binding, shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) For contracts with foreign contractors:

(i) international arbitration with proceedings administered by the international arbitration institution appointed in the PC, in accordance with the rules of arbitration of the appointed institution;

(ii) the place of the arbitration shall be the city, where the headquarters of the appointed arbitration institution is located or such other place selected in accordance with the applicable arbitration rules; and

(iii) the arbitration shall be conducted in the language for communications defined in Sub-Clause 5.3; and

107 SoC, ¶ 138.

(b) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the ADRB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the ADRB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the ADRB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior or after completion of the Works. The obligations of the Parties, the Engineer and the ADRB shall not be altered by reason of any arbitration being concluded during the process of the Works.

20.6 Failure to comply with the Dispute Board's Decision

In the event that a Party fails to comply with a decision of the ADRB, which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.5 [Arbitration]. Sub-Clause 20.4 [The decision of the ADRB] shall not apply to this reference.

161. According to Respondent, the applicable arbitration agreement is contained in Sub-Clauses 20.6 and 20.8 of the original Segment 1 Contract and in Sub-Clauses 20.6 and 20.8 of the original Segment 3 Contract, which each provide in identical terms:

20.6 Arbitration

Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) For contracts with foreign contractors:

(i) international arbitration with proceedings administered by the international arbitration institution appointed in the PC, in accordance with the rules of arbitration of the appointed institution;

(ii) the place of the arbitration shall be the city, where the headquarters of the appointed arbitration institution is located or such other place selected in accordance with the applicable arbitration rules; and

(iii) the arbitration shall be conducted in the language for communications defined in Sub-Clause 5.3; and

(b) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of the Engineer, and any decision of the DRB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer from being called as witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DRB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DRB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior or after completion of the Works. The obligations of the Parties, the Engineer and the DRB shall not be altered by reason of any arbitration being concluded conducted during the process progress of the Works.

(...)

20.8 Expiry of Dispute Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of the Contract or the execution of the Works and there is no DB in place, whether by reason of the expiry of the DB's appointment or otherwise:

(a) Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and

(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

162. It is undisputed between the Parties that the Particular Conditions of the Contracts provide, *inter alia*:

Conditions	*Sub-Clause*	*Data*
Governing Law	*1.4*	*Albanian Law*
Ruling Language	*1.4*	*English*
Language for communications	*1.4*	*English*
Rules of arbitration	*20.6(a)*	*Rules of the International Chamber of Commerce*

163. Respondent's assertion that the Tribunal lacks jurisdiction to decide on Claimants' claims as the Contract Amendments have not validly amended the arbitration agreement as agreed by the Parties in the General Conditions of the Contracts, will be further analysed in Sub-Section VII.C below.

164. In both Claimants' and Respondent's position, the Parties agreed to arbitration under the Rules of the ICC with Paris, France, the city where the headquarters of the appointed arbitration institution is located, as seat of the arbitration.[108]

165. The Parties moreover agreed that, subject to any mandatory rules of French law, the proceedings shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the Tribunal may settle on and that in regard to matters concerning the gathering or taking of evidence, the Tribunal may refer to the IBA Rules on Evidence for guidance as to practices commonly accepted in international arbitration, but shall not be bound to apply them.[109]

166. Sub-Clause 1.4 of both the Segment 1 Contract and the Segment 3 Contract provides that the ruling language of the Contract and the language for communication shall be that stated in the Contract Data. The Contract Data (Particular Conditions A) state that the ruling language and the language for communications as meant in Sub-Clause 1.4 is English. Accordingly, the language of the arbitration is English.[110]

B. Applicable Substantive Law

167. Sub-Clause 1.4 of the Contracts provides that the contracts shall be governed by the law of the country or other jurisdiction stated in the Contract Data. The Contract Data (Particular Conditions A) state that the governing law as meant in Sub-Clause 1.4 is Albanian law.

168. Accordingly, the Tribunal shall decide in accordance with the rules of Albanian law as the law governing the merits of the Parties' dispute.[111]

VII. ANALYSIS AND REASONS FOR THE AWARD

169. In the course of its deliberations, the Tribunal has considered the positions of the Parties as summarized in the preceding Section V and as detailed in their written submissions and oral arguments. The Tribunal has particularly noted the clarifications and specifications made by the Parties during the hearing. That said, in the analysis that follows, the Tribunal has not considered it necessary to address expressly each and every one of these submissions and arguments for the purpose of this final award. Therefore, to the extent that any of the Parties' submissions or arguments, relevant for the Tribunal's findings, are not referred to expressly below, it should not be assumed that these have not been considered by the Tribunal but must be treated as being subsumed into its analysis.

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108 ToR, ¶¶ 52-56.
109 ToR, ¶¶ 48-49
110 ToR, ¶¶ 50-51.
111 Article 1511 French Code of Civil Procedure. See also, ToR, ¶ 47.

A. Introduction

170. At the start of its analysis, the Tribunal makes the preliminary observation that the factual basis for Claimants' claims is not in dispute between the Parties, but rather the legal qualification and consequences of those facts.

171. As to Claimants' claim relating to the Segment 1 Contract, the Tribunal notes that it is not in dispute between the Parties that: (i) the Parties entered into the Segment 1 Contract;[112] (ii) the First Claimant submitted a claim for extension of time and additional costs to the Engineer;[113] (iii) the Engineer determined that the First Claimant was entitled to receive a compensation of USD 25,889,644,92 for its claim;[114] (iv) both the First Claimant and Respondent expressed dissatisfaction with the Engineer's determination;[115] (v) Contract Amendment No. 12 was signed on 24 July 2017 by the First Claimant and Respondent;[116] (vi) in the Segment 1 Decision of 9 October 2017, the DRB found that the First Claimant is entitled to the sum of USD 25,220,016.37;[117] (vii) Respondent gave no notice of dissatisfaction within 28 days after it received the Segment 1 Decision;[118] (viii) the First Claimant submitted an Interim Payment Certificate for this amount, which was approved by the Engineer;[119] and (ix) the amount of USD 25,220,016.37 has not been paid by Respondent.[120]

172. As to Claimants' claim relating to the Segment 3 Contract, the Tribunal notes that it is not in dispute between the Parties that: (i) the Parties entered into the Segment 3 Contract;[121] (ii) the First Claimant submitted a claim for extension of time and additional costs to the Engineer;[122] (iii) the Engineer determined that the First Claimant was entitled to receive a compensation of USD 12,475,892.16 for its claim;[123] (iv) both the First Claimant and Respondent expressed dissatisfaction with the Engineer's determination;[124] (v) Contract Amendment No. 7 was signed on 4 July 2017 by the First Claimant and Respondent;[125] (vi) in the Segment 3 Decision of 7 September 2017, the ADRB found that the First Claimant is entitled to the sum of USD 11,665,552.31;[126] (vii) Respondent gave no notice of dissatisfaction within 28 days after it received the Segment 3 Decision;[127] (viii) the First Claimant submitted an Final Statement for this amount, which was approved by the Engineer;[128] and (ix) the amount of USD 11,665,552.31 has not been paid by Respondent.[129]

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112 See above, ¶ 88.
113 See above, ¶ 93.
114 See above, ¶ 105.
115 See above, ¶¶ 106-107.
116 See above, ¶ 109.
117 See above, ¶ 116.
118 See above, ¶¶ 112, 114.
119 See above, ¶ 119.
120 See above, ¶ 122.
121 See above, ¶ 88.
122 See above, ¶ 92.
123 See above, ¶ 95.
124 See above, ¶¶ 96-97.
125 See above, ¶ 103.
126 See above, ¶ 114.
127 See above, ¶¶ 110-111.
128 See above, ¶ 117.
129 See above, ¶ 122.

173. Claimants submit that on the basis of these facts Respondent is pursuant to the terms of the Contracts, including Contract Amendments No. 7 and No. 12, obliged to pay USD 25,220,016.37 and USD 11,665,552.31, each amount to be increased with applicable VAT, to Claimants.

174. Respondent in essence disputes for various reasons: (i) the jurisdiction of the Tribunal; (ii) the scope and meaning of the arrangements in the Contract Amendments; (iii) the validity of the Contract Amendments; (iv) the validity of the (A)DRB Decisions; and (v) the increase of amounts payable by VAT.

175. The jurisdictional defences raised by Respondent with respect to the Tribunal's jurisdiction to rule on Claimants' claims and with respect to the Tribunal's jurisdiction over Copri and Aktor will be addressed in Sub-Section C below.

176. Thereafter, the Tribunal will analyse in Sub–Section D below the scope and meaning of the arrangements in the Contract Amendments, assuming that the Contract Amendments were validly agreed, as the arguments raised by Respondent against the validity of these amendments are based on certain assumptions regarding the agreed scope and meaning.

177. In Sub-Section E below, the Tribunal will discuss the contractual impediments against the validity of the Contract Amendments as raised by Respondent, followed by an analysis of the impediments raised by Respondent resulting from ratification of the Agency Agreement (in Sub-Section F). In Sub-Section G, the Tribunal will consider Respondent's arguments regarding its alleged non-participation in the processes leading to the (A)DRB Decisions. Sub-Section H will address whether a qualification of the Contracts as administrative contracts under Albanian law has implications for the Tribunal's conclusions reached in Sub-Sections F and G. Finally, in Sub-Section I below, the Tribunal will address the VAT issues, followed by a conclusion in Sub-Section J.

178. In its analysis of the various impediments against the validity of the Contract Amendments, the Tribunal has been assisted by the explanations provided at the hearing by Claimants' expert Mr Fatos Lazimi and Respondent's expert Ms Joana Qeleshi. Both experts submitted reports, the Queleshi Report of 20 January 2020 and the Lazimi Report of 31 January 2020. In the following Sub-Section B, the Tribunal will first address Respondent's objections against the admission of the Lazimi Report.

B. Admission of the Lazimi Report

179. On the second day of the hearing Respondent requested the Tribunal to disregard all parts of the Lazimi Report that are not responsive to the Queleshi Report and objected to the absence in the Lazimi Report of statements regarding relationship and independence as required by Article 5.2 of the IBA Rules on Evidence.[130]

[130] Transcript Hearing Day 2, 110:21-114:22. See also above, ¶ 65.

180. The Tribunal decided that the cross-examination of Mr Lazimi would continue, that the Parties could make further submissions regarding the admission of his evidence in their post-hearing briefs, and that the Tribunal would decide on the Respondent's objections later.[131]

Respondent's position

181. Respondent's primary position is that the Lazimi Report should be disregarded by the Tribunal because it does not comply with the requirements set forth in Article 5.2 of the IBA Rules on Evidence, which are applicable pursuant to para. 37 of Procedural Order No. 1, in that it does not contain the full name and address of the expert, it lacks a statement regarding the expert's past relationship with any of the parties, their legal advisors and the arbitral tribunal, and it lacks a statement of the expert's independence from the parties, their legal advisors and the arbitral tribunal.[132]

182. According to Respondent, this constitutes a grave procedural infringement from Claimants as it puts into question the very principles of due process.[133] Respondent refers in this respect to a decision of the German Federal Supreme Court in which it rules that if an expert fails to disclose circumstances that give rise to justifiable doubts about his impartiality and independence, then the arbitral proceedings are not conducted in accordance with the German *lex arbitri*, and any award based on that expert's opinion, can be subjected to challenge. [134]

183. In the alternative, Respondent argues that the Tribunal's instructions were to provide a rebuttal to the Queleshi Report, not a rebuttal of the Respondent's Rejoinder and unfairly provide another round of submissions on Claimants' behalf. Therefore the Tribunal should disregard all parts of the Lazimi Report that are not responsive to the Queleshi Report.[135]

Claimants' Position

184. Claimants submit that Respondent itself repeatedly failed to respect time limits set by the Tribunal without further consequences and therefore it is inappropriate for Respondent to raise this objection.[136]

185. Moreover, para. 39 of Procedural Order No. 1 expressly allows experts to raise new facts and arguments that are material and relevant to the other Party's prior submissions and main arguments and/or defences, or the other Party's prior evidence or relate to new facts and documents that could not have been dealt with previously and further support the Party's case. According to Claimants, the Lazimi Report appropriately responds to Respondent's Exhibits R-27 and R-28 and the characterisation of FIDIC contracts in the Queleshi Report.[137]

131 Transcript Hearing Day 2, 115:21-24.
132 Transcript Hearing Day 2, 112:23-113:9; PHB Respondent, ¶¶ 59-61.
133 PHB Respondent, ¶ 62.
134 PHB Respondent, ¶¶ 64-66.
135 Transcript Hearing Day 2, 110:21-112:2: PHB Respondent, ¶¶ 67-69.
136 PHB Claimants, ¶ 9.
137 PHB Claimants, ¶¶ 10-18.

186. As to Mr Lazimi's independence, Claimants submit that, when being asked by the Tribunal during the hearing, Mr Lazimi confirmed his independence.[138]

The Tribunal's Analysis and Discussion

187. Para. 37 of Procedural Order No. 1 provides:

> *Each Party may retain and submit the evidence of one or more experts to the Tribunal. Each expert report produced by the Parties shall contain the information stated in Article 5.2 of the IBA Rules, as well as a picture of the expert on the first page and citations to all documents and witness statements relied upon in the applicable format referred to in paras. 27 and 30 above and 38 below.*

Para. 39 of Procedural Order No. 1 provides:

> *Consistent with para. 21 above,*[139] *witness statements and expert reports shall be submitted with the first exchange of submissions. Witness statements and expert reports filed together with the Parties' replies and rejoinders are prepared to rebut statements made in the first submissions and shall not raise new facts or arguments, unless such arguments are material and relevant to the other Party's prior submissions and main arguments and/or defences, or the other Party's prior evidence or relate to new facts and documents that could not have been dealt with previously and further support the Party's case.*

Article 5.2 of the IBA Rules on Evidence provides:

> *The Expert Report shall contain:*
>
> *(a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;*
>
> *(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;*
>
> *(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;*
>
> *(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;*
>
> *(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions.*

138 PHB Claimants, ¶ 20.

139 Para. 21 of Procedural Order No. 1 provides: "*In the interest of procedural efficiency, in the first exchange of submissions the Parties shall set forth all the facts and legal arguments, and submit all evidence on which they intend to rely. The Parties' replies and rejoinders shall not raise new facts or arguments, unless such arguments or facts are material and relevant to the other Party's prior submissions and the main arguments and/or defences, or to the other Party's prior evidence or consist of new facts and documents that could not have been dealt with previously and further support the Party's case.*"

Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

188. As a preliminary observation, the Tribunal notes that absent agreement otherwise by the Parties or specific arrangements to such effect, it is up to the Tribunal to determine the consequences of a Party's failure to wholly or partially satisfy any order, decision or measure of the Tribunal. In general, the Tribunal may draw any conclusions from such failure that it considers appropriate.

189. In the Tribunal's view, Mr Lazimi's omission to include his full name and address, a statement regarding his present and past relationship (if any) with any of the Parties, their legal advisors and the Tribunal, and a statement regarding his independence cannot be considered "a grave procedural infringement", but rather an administrative oversight. Mr Lazimi's full name is in the report and his address can be found in the appendices submitted with the report. The absence of a statement regarding past relationships and a statement of independence is cured by Mr Lazimi's express confirmation during the hearing that no such relationships exist and that he considers himself independent. Respondent has not raised any issue regarding Mr Lazimi's past relationship with any of the Parties, their legal advisors and the Tribunal and/or his independence that would cause the Tribunal to doubt Mr Lazimi's confirmations. Finally, the German case referred to by Respondent concerns a failure to disclose circumstances that give rise to justifiable doubts about his impartiality and independence. As Respondent has not stated nor specified which disclosures, if any, Mr Lazimi should have made, it has not demonstrated that any failure to disclose occurred.

190. Accordingly, the Tribunal finds in the non-compliance with the requirements of Article 5.2 of the IBA Rules on Evidence as claimed by Respondent no reason to exclude the Lazimi Report from the record.

191. As to Respondent's alternative request to disregard the parts of the Lazimi Report that are not responsive to the Queleshi Report, the Tribunal notes that only on 10 January 2020, Respondent indicated its intention to submit two expert reports with its Rejoinder due on 20 January 2020. In response, Claimants on 10 January 2020 expressed their intention to examine an expert at the hearing and requested leave to submit an expert report. On 14 January 2020, the Tribunal granted leave for Claimants to submit an expert report by 31 January 2020.

192. By e-mail of 16 January 2020, Respondent requested the Tribunal to be granted the same time period as Claimants for submission of its expert reports, while specifically noting that it "*does in no way contest Claimants' right to bring up every line of argument it deems necessary and appropriate for its Expert Report in due time*". Upon receipt of Claimants' comments, the Tribunal rejected Respondent's request, noting that now that Respondent had announced that two expert reports would be submitted with its Rejoinder, due process required that, in line with the arrangements in Procedural Order No. 1, Claimants would be granted the opportunity to submit an expert report in response.

193. Contrary to what is argued by Respondent, the Tribunal has not directed Claimants to limit their expert's report to a response to the issues raised in the – at the time yet unknown – expert reports to be submitted by Respondent, but rather granted leave to bring an expert to the hearing and have the expert submit the required expert report. As correctly noted by Claimants, para. 39 of Procedural Order No. 1 allows Mr Lazimi to address Respondent's Exhibits R-27 and R-28 and the characterisation of FIDIC contracts in the Queleshi Report, because such arguments are material and relevant to Respondent's prior submissions and prior evidence and support Claimants' case. Respondent has failed to identify any further issues in the Lazimi Report that do not comply with para. 39 of Procedural Order No. 1.

194. For these reasons, the Tribunal finds no ground to disregard any parts of the Lazimi Report that are not responsive to the Queleshi Report.

195. On a separate note and in any event, the Tribunal holds that Respondent by having expressly acknowledged on 16 January 2020 Claimants' right to bring up every line of argument it deems necessary and appropriate for its Expert Report, by having received the Lazimi Report on 31 January 2020, by having raised no procedural objections to admission of the report at the start of the hearing or in its opening statement on 3 February 2020, and by only belatedly raising its procedural complaints against admission of the Lazimi Report at the start of his cross examination on 4 February 2020, must be deemed to have waived its right to avail itself of the alleged procedural irregularities regarding the Lazimi Report.[140]

Conclusion

196. For these reasons, the Tribunal admits the Lazimi Report and the statements made by Mr Lazimi at the hearing to the record of these Arbitration Proceedings.

C. The Tribunal's Jurisdiction

197. The jurisdictional defences raised by Respondent address: (i) the Tribunal's jurisdiction to rule on Claimants' claims, particularly whether, as argued by Claimants, their claims should be awarded under Sub-Clauses 20.6 of the Contract Amendments because no timely notice of dissatisfaction has been given by Respondent to the (A)DRB Decisions; and (ii) the Tribunal's jurisdiction over Copri and Aktor.

[140] Article 1466 French Code of Civil Procedure.

198. The Tribunal finds that the issue raised by Respondent regarding jurisdiction over Claimants' claims in essence addresses the consequence of the Respondent's failure to comply with the (A)DRB Decisions. Should the Tribunal find the Contract Amendments to be valid and binding, the Tribunal will have jurisdiction for the claimed declaratory relief that the (A)DRB Decisions are final and binding and (on the basis of Sub-Clauses 20.6 of the Contract Amendments) for the claimed monetary relief. Should the Tribunal find the Contract Amendments to be invalid and there to be no DB in place, it might not have the power to grant the claimed declaratory relief that the (A)DRB Decisions are final and binding, but it may still have jurisdiction under Sub-Clauses 20.8 and 20.6 of the original Contracts (without the Contract Amendments) to determine the merits of Claimants' monetary claims (*i.e.*, not because of Respondent's failure to comply with the (A)DRB Decisions, but because of the dispute having arisen without DB in place).[141]

Respondent's Position

199. Respondent submits that for various reasons the Contract Amendments, including the arbitration agreements therein, are invalid and accordingly the Tribunal has no jurisdiction to rule on the failure to comply with a final and binding decision of the DRB (for the Segment 1 Contract) or of the ADRB (for the Segment 3 Contract).[142]

200. According to Respondent, the Tribunal does have jurisdiction under Sub-Clauses 20.8 and 20.6 of the Contracts (without the Contract Amendments) to rule on disputes between the Parties because there was no DB in place.[143]

201. Moreover, Respondent argues that the Tribunal lacks jurisdiction to hear Claimants' claims because the Contract Amendments do not establish a Dispute Board (or a Dispute Adjudication Board) as required by the FIDIC contracts.[144]

202. As to the Tribunal's jurisdiction over Copri and Aktor, Respondent submits that the joint venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme" was turned into a simple partnership by its members, representing an incorporated joint venture special purpose company. Respondent asserts that as from the moment of registration as required by law, the "Joint Venture Copri Aktor (Simple Partnership)" is able to exercise rights and assume obligations as any Albanian legal entity, established and organized in accordance with Albanian laws; in other words: it does have legal personality.[145]

203. Respondent submits that the scope of consent contained in the applicable arbitration clause does not extend to permitting claims to be brought by Copri and Aktor, as the parties to the Contracts are Respondent and the First Claimant. Moreover, Copri and Aktor have not participated in the process leading to the (A)DRB Decisions[146]

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141 See also above, ¶ 161.
142 ToR, ¶ 41; Rejoinder, ¶¶ 52-68.
143 ToR, ¶ 45.
144 Rejoinder, ¶¶ 52-69.
145 SoD, ¶ 63; Transcript Hearing Day 1, 35:11-38:9 and 104:14-106:13.
146 SoD, ¶ 65; Transcript Hearing Day 1, 105:15-20.

Claimants' Position

204. Claimants submit that pursuant to the respective Sub-Clauses 20.6 of the Contract Amendments as agreed between the Parties, they are entitled to refer the failure to comply with a final and binding decision of the DRB (for the Segment 1 Contract) or of the ADRB (for the Segment 3 Contract) directly to arbitration under the respective Sub-Clause 20.6 of Contract Amendment No. 12 and Sub-Clause 20.5 of Contract Amendment No. 7.

205. Claimants accept that if the Tribunal will determine that the arbitration agreements between the Parties do not allow for Respondent's failure to comply with the (A)DRB Decisions itself to be referred to arbitration, Claimants may present their claims under Sub-Clause 20.8 (Expiry of the Dispute Board's Appointment) as referred to in para. 161 above.[147]

206. As to the Tribunal's jurisdiction over Copri and Aktor, Claimants submit that in the tender procedure the contracts were awarded to the joint venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme". Subsequently Copri and Aktor as members of this joint venture formed a simple partnership pursuant to Article 1074 ACC for performance of the works, which was done for fiscal purposes, using the provisions of the tax legislations which imposed an obligation on simple partnerships to be incorporated and have a VAT number to be used for issuing and receiving invoices during the performance of works.[148]

207. Registration with the tax authorities does, however, according to Claimants not denote attribution of legal personality. A simple partnership does not embody the distinct characteristics of a commercial company as regulated by the Albanian Civil Code (Article 1075(2) ACC). In relation to third parties, the simple partnership acquires rights and assumes obligations through its members, which are entitled to represent it (Article 1088 ACC). Claimants submit that Copri and Aktor are both entitled to represent separately and bring legal actions on behalf of the simple partnership. Moreover, both members' representatives have signed the main contract on their own, affirming that both have entered into the arbitration clause and can both stand as claimants.[149]

The Tribunal's Analysis and Discussion of Its Jurisdiction to Rule on Claimants' Claims

208. The starting point of the Tribunal's analysis is that arbitrators may rule on their own jurisdiction (*competence-competence*). They decide on the extent or existence of their jurisdiction if it is challenged.[150]

209. The Parties agree that if the Tribunal will determine that the arbitration agreements between the Parties do not allow for Respondent's failure to comply with the (A)DRB Decisions itself to be

147 ToR, ¶ 92.
148 Reply, ¶¶ 61-64.
149 Reply, ¶¶ 65-67. In Reply, ¶ 65, Claimants refer to "a commercial company as regulated by the Commercial Code", but continue to refer to relevant articles of the Albanian Civil Code.
150 Article 1465 French Code of Civil Procedure.

referred to arbitration, the Tribunal does have jurisdiction under Sub-Clauses 20.8 and 20.6 of the Contracts (without the Contract Amendments) to rule on the merits of Claimants' claims.[151]

210. Under the *competence-competence* principle, the Tribunal may rule on its own jurisdiction under to the arbitration agreements in the Contract Amendments. In case the Tribunal finds the Contract Amendments (and the arbitration agreements incorporated therein) to be valid and thus replacing Sub-Clauses 20.8 and 20.6 of the original Contracts, the Tribunal will have jurisdiction pursuant to these arbitration agreements in the Contract Amendments to decide whether Claimants' claims for declaratory and monetary relief can be awarded under Sub-Clauses 20.6 of the Contract Amendments. In case the Tribunal finds the Contract Amendments to be invalid, the Tribunal will not have the power to grant the claimed declaratory relief that the (A)DRB Decisions made pursuant to those Contract Amendments are final and binding. It will, however, then still have jurisdiction under Sub-Clauses 20.8 and 20.6 of the original Contracts (without the Contract Amendments) to determine the merits of Claimants' monetary claims in a second phase of these Arbitration Proceedings.

211. Moreover, in case the Tribunal finds the Contract Amendments (and the arbitration agreements incorporated therein) to be valid, Respondent's argument that the Tribunal lacks jurisdiction to hear Claimants' claims because the Contract Amendments do not establish a Dispute Board (or a Dispute Adjudication Board) as required by the FIDIC contracts fails as the Parties agreed for the (A)DRB established therein to replace the Dispute Board (or a Dispute Adjudication Board) as required by the FIDIC contracts.

212. The Tribunal concludes that it: (i) has jurisdiction to hear and determine Claimants' request for monetary relief, either under Sub-Clauses 20.6 and 20.5 of Contract Amendment No. 7 and Sub-Clause 20.6 of Contract Amendment No. 12, if those Contract Amendments are found to be valid, or under Sub-Clauses 20.8 and 20.6 of the original Contracts (without the Contract Amendments), if the Contract Amendments are found to be invalid; and (ii) only has jurisdiction to hear and determine Claimants' request for declaratory relief in case the Contract Amendments are found to be valid. In the following Sub-Sections D through H the Tribunal will address the validity of the Contract Amendments.

The Tribunal's Analysis and Discussion of Its Jurisdiction over Copri and Aktor

213. The Parties agree that prior to the formation of the simple partnership by Copri and Aktor the contractual joint venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme" lacked legal personality and could only act and be represented through its members Copri and Aktor.[152] The Contracts were accordingly signed by Copri and Aktor for the First Claimant on 10 and 13 February 2012.

214. Claimants' position is that the simple partnership subsequently established on 26 March 2012 between Copri and Aktor for performance of the obligations of the Contractor under the Contracts – thus transforming First Claimant from a contractual joint venture into a partnership

151 ToR, ¶ 92.
152 SoD, ¶¶ 59-61; Reply, ¶¶ 61-62.

joint venture – lacks legal personality and that the First Claimant continues to acquire rights and assume obligations (including rights and obligations under the arbitration agreements) through and continues to be represented by its members Copri and Aktor. The Tribunal understands Respondent's position to be that as a registered simple partnership the First Claimant has legal personality under the Albanian Civil Code and that therefore as of 26 March 2012 First Claimant does no longer act through its members Copri and Aktor, who are therefore no (longer a) party to the arbitration agreements in their (earlier) capacity of members of the unincorporated joint venture.

215. The Tribunal will analyse the issue under Albanian law as the law applicable to the Contracts as well as the simple partnership agreement addressing the capacity of its partners Copri and Aktor to be a party to the arbitration agreements.

216. Both Parties agree that Copri and Aktor in their capacity of members of the joint venture "JV Copri Construction Enterprises W.L.L. & Aktor Technical Societe Anonyme" were a party to and bound by the arbitration agreements in the Contracts.[153] The contractual joint venture has no legal personality under Albanian law; it cannot act in its own name as contracting party and/or as party in legal proceedings. All of the rights and obligations assumed by the contractual joint venture are therefore in fact rights and obligations of its members.[154]

217. On 26 March 2012, Copri and Aktor have brought these rights and obligations under the Contracts into the simple partnership established at that date. It is not in dispute between the Parties that the First Claimant is entitled to bring its claims in these Arbitration Proceedings. In Respondent's view this results from the First Claimant having attained legal personality. Claimant's position must result from the view that, although a simple partnership under Albanian law lacks legal personality, it has the capacity to act as a party in its own name in legal proceedings.

218. Articles 1074 through 1112 of the Albanian Civil Code contain provisions regarding simple partnerships. Claimants specifically referred in support of their position to Articles 1074 and 1088 ACC, which provide:[155]

> *Article 1074*
>
> *The company is a contract wherewith two or more persons agree to carry out an economic activity to the effect of sharing the profit emerging thereof.*
> *The person being a company member shall make available to this activity money, property items or services.*
>
> *(...)*
>
> *Article 1088*

153 SoD, ¶¶ 59-61; Reply, ¶¶ 61-62.
154 Reply, ¶¶ 62-63.
155 See https://euralius.eu/index.php/en/library/albanian-legislation/send/71-civil-code/231-civil-code-en (in this translation "company" must be read to refer to "partnership").

> *The company shall acquire rights and commit itself to obligations through the members having the right to represent it.*
> *In lieu of other provisions in the contract, the representation shall be incumbent on any administrator member and extend on all actions falling under the scope of the company.*
> *The changes and forfeiture of representation powers shall be regulated by the provisions on the representation.*

219. These provisions of the Albanian Civil Code applicable to simple partnerships show that the positions of Copri and Aktor as members of the corporate joint venture have not substantially changed as a result of the transformation of the contractual joint venture into a simple partnership under Albanian law irrespective of whether the legal partnership has in fact legal personality. The simple partnership acquires rights and takes over obligations through the members that have the right to represent it.[156] The members who acted in the name and on account of the partnership are also personally or jointly responsible for the partnership obligations.[157] In other words: the rights and obligations assumed by the simple partnership continue to be rights and obligations of its members. As a result Copri and Aktor, *in their capacity of members of the simple partnership*, therefore continue to be a party to the arbitration agreements entered into by the First Claimant.

220. The claims in these Arbitration Proceedings of the First Claimant as Contractor under the Contracts can therefore not only be pursued by the First Claimant itself, but also pursuant to Article 1088 ACC by Copri and Aktor in their capacity as members of the simple partnership representing the First Claimant. Article 1088 ACC also provides, however, that it is the simple partnership itself, and not its individual members, that acquires rights and commits itself. It follows that Copri and Aktor can therefore in their capacity as members of the simple partnership only pursue claims for the First Claimant and not for themselves. The Tribunal finds for this reason that it lacks the power to hear and determine the Claimants' requests for monetary relief to the extent that such relief requests the Tribunal to require Respondent to make payments to Copri and/or Aktor. Conversely, the Tribunal finds that it does have jurisdiction to hear and determine Claimants' request for monetary relief insofar as it requests the Tribunal to order Respondent to make payments to the First Claimant.[158]

221. Finally, this conclusion does not change by Respondent's assertion that Copri and Aktor have not participated in the process leading to the (A)DRB Decisions. Respondent fails to explain on which ground Copri and Aktor would be required to have participated in this process to pursue (in their capacity as members of the First Claimant) claims of the First Claimant who has itself duly participated in the process.

222. Accordingly, the Tribunal holds that Copri and Aktor in their capacity as members of the First Claimant as simple partnership are entitled to pursue the claims of the First Claimant in this arbitration.

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156 Article 1088 ACC.
157 Article 1089 ACC.
158 Claimants' request for relief (see above, ¶ 132 (2)) refers to "payment to Claimants" and thus encompasses payments to First Claimant only.

223. Having established jurisdiction, the Tribunal will now turn to the scope and meaning of the arrangements in the Contract Amendments.

D. The Scope and Meaning of the Contract Amendments

224. In order to properly assess in the subsequent Sub-Sections the various arguments raised by Respondent against the validity of the Contract Amendments, the Tribunal will first discuss the scope and meaning of the amendments, particularly whether the amendments mean that, as argued by Claimants, the failure of a Party to comply with a decision of the (A)DRB, which has become final and binding, itself may be directly referred to arbitration by the other Party.

Claimants' Position

225. Claimants submit that after expressing their dissatisfaction to the Engineer in relation to the Contractor's claims submitted under the Contracts, the Parties had as a result of their failure to timely appoint a dispute board the choice between either amending the Contracts and reinstating the dispute board to have it decide on both claims, or proceeding directly to arbitration under Sub-Clause 20.8 of the Contracts. It was Respondent, who in letters of 22 May 2017 and 17 July 2017, after expressing its dissatisfaction with the determinations of the Engineer, proposed to have the disputes resolved by a dispute board, which had to be reinstated through contract amendment. Claimants agreed to that suggestion.[159]

226. According to Claimants, also the wording of the Contract Amendments clearly shows that both Parties were willing to have their disputes settled under a reinstated dispute board and that Respondent invited the First Claimant to participate in the contract amendment. Each of the Contract Amendments specifically state that the Parties agreed to the resolution of the disputes through an amicable settlement board (ADRB, Contract Amendment No. 7) or a Dispute Resolution Board (Contract Amendment No. 12) and therefore agreed to proceed to a modification of the Sub-Clauses 20.2 to 20.8, which are related to the DAB. Sub-Clause 20.6 of the Segment 1 Contract as amended by Contract Amendment No. 12 and Sub-Clause 20.6 of the Segment 3 Contract as amended by Contract Amendment No. 7 clearly stipulate that in the event that a Party fails to comply with a decision of the (A)DRB, then the other Party may refer the failure itself to arbitration under the relevant Sub-Clauses.[160]

Respondent's Position

227. Respondent submits that upon receipt of the Contractor's claims under the Segment 3 Contract, in the absence of a DB in place as required under the Segment 3 Contract, Respondent proposed in the letter of the PMU Director of 19 April 2017[161] the following: (i) hiring a second independent consultant for a second professional opinion; (ii) conducting a negotiation process by high management levels of both parties trying to reach an acceptable solution to this dispute on this first stage, (iii) attempts by both Parties to settle the dispute amicably before commencement of arbitration; (iv) alternatively, if the settlement attempts fail, providing Notice

159 SoC, ¶¶ 112-117.
160 SoC, ¶¶ 118-139.
161 Exhibit R-05.

of Dissatisfaction to the other party with the intention to commence arbitration. Respondent asserts that the First Claimant did not respond to this letter.[162]

228. Respondent asserts that the subsequent letter of 22 May 2017[163] of the PMU Director provided the Contractor with an official invitation to attempt amicable settlement before the dispute in accordance with Sub-Clause 20.5. In the letter the PMU Director proposed to attempt to amend the Segment 3 Contract by deleting the provisions for a DB.[164] In its response of 30 May 2017,[165] the First Claimant according to Respondent: (i) acknowledges that the amicable settlement procedure stipulated in Sub-Clause 20.5 could not be followed by the parties because the procedure should follow a DB decision and no DB was in place, as provided for by Sub-Clause 20.2; (ii) failed to construe properly the provisions of Sub-Clause 20.3 [Failure to agree on the composition of the Dispute Board] when it states that in the given circumstances a possibility to appoint a DB under this Sub-Clause still existed; (iii) does not reject the possibility to participate in negotiations for "Amicable Settlement", provided, however, that both parties will issue a Contract Amendment according to the provisions of the Segment 3 Contract; (iv) states that the Contract Amendment to be issued must contain the negotiating procedure in detail, the time schedule of the negotiation as well as the next steps, in case that after the closure of such discussions no amicable settlement can be reached; and (v) concludes that in light of the new proposed Amicable Settlement procedure, Sub-Clause 20.5 [Amicable Settlement] should be amended, specified time frames to reach a result would have to be determined and in case of failure to reach a settlement any party would be allowed to proceed to dispute resolution immediately.[166]

229. Following a further exchange of correspondence on 7 June 2017, 17 June 2017 (in which First Claimant provided a draft contract amendment, and 21 June 2017 (in which the PMU Director commented on the draft), Contract Amendment No. 7 was signed on 4 July 2017.[167]

230. Respondent further submits that upon receipt of the Contractor's claims under the Segment 1 Contract and in the absence of a DB in place as required under the Segment 1 Contract, the PMU Director proposed on 17 July 2017 to the First Claimant to accept for claims of Segment 1 Contract, the same procedure as was in place for claims for Segment 3 Contract. After a further exchange of correspondence, Contract Amendment No. 12 to the Segment 1 Contract was signed on 24 July 2017.[168]

231. According to Respondent, thereby the Parties by their own free will have departed from the FIDIC contract requirements and established new procedures to attempt to have the disputes settled through a second professional opinion, by preserving in any case the possibility to have the disputes, reviewed, scrutinized and determined to the fullest extent possible by an arbitral tribunal. These alternative methods were to be used for settlement of the disputes, rather than

162 SoD, ¶¶ 25-26.
163 Exhibit R-06.
164 SoD, ¶¶ 27-30.
165 Exhibit R-08.
166 SoD, ¶¶ 31-34.
167 SoD, ¶¶ 35-38.
168 SoD, ¶¶ 41-51.

submitting the dispute directly to arbitration as provided for by Sub-Clause 20.8.[169] According to Respondent, the amendment of the dispute resolution clauses in the Contracts has created a hybrid board form, the (A)DRB, which is not known in FIDIC contracts or in dispute adjudication practice in general. Respondent submits that as a result, the (A)DRB Decisions are not enforceable.[170]

The Tribunal's Analysis and Discussion

232. It is not in dispute between the Parties that the Contract Amendments have in fact been agreed and signed by the Parties. The Parties are in dispute, however, about the scope and meaning of the Contract Amendments. In order to determine the scope and meaning of the substitution of the Sub-Clauses 20.2 to 20.8 of the original Contracts by the Sub-Clauses 20.2 to 20.7 of Contract Amendment No. 7 and Sub-Clauses 20.2 to 20.7 of Contract Amendment No. 12, the Tribunal will start with an analysis of the agreed amendments to the original dispute resolution arrangements.

233. It is common ground between the Parties that under Albanian contract interpretation rules, the wording of the contract is not *per* se decisive.[171] When interpreting a contract, the real and joint intention of the parties must be assessed, without limiting oneself to the literal meaning of the words, also in light of their conduct in general, prior to and following the conclusion of the contract.[172] The contract shall be interpreted in good faith by the parties and every clause of the contract is interpreted with reference to all the others, attributing to each the meaning resulting from the act as a whole.[173]

(a) Contract Amendment No. 7

234. Contract Amendment No. 7 was signed on 4 July 2017 for Respondent by its general director Mr Xhika and the PMU Director Mr Alite as representing ARA. In the recitals, express reference is made to the correspondence of the Parties of 22 May, 30 May and 7 June 2017. Article 1 specifies the purpose of the contract amendment as to determine the amicable settlement procedure for the dispute through the ADRB. To that effect the Parties wished according to Article 2 to modify the Segment 3 Contract in relation to the Sub-Clauses, which relate to the DAB and the amicable settlement and amended Sub-Clauses 20.2 to 20.8 of the Segment 3 Contract as follows:

(a) The standing DB to be appointed within 28 days of the Contract Date as provided for in Sub-Clause 20.2 is replaced by an *ad hoc* ADRB to be appointed each time there is a

169 SoD, ¶ 97-100; Rejoinder, ¶¶ 3 and 55-58.
170 Rejoinder, ¶¶ 26 and 70-74; PHB Respondent, ¶ 29.
171 SoC, ¶¶ 304-309; SoD, ¶ 109.
172 Reply, ¶ 115; SoD, ¶ 109; See Article 681 ACC, quoted in Reply, ¶ 115, as providing "*While interpreting a contract, there needs to be explained which the real and joint intention of the parties was, while not focusing on the literal meaning of the words, and assessing their conduct in general, prior to and following the conclusion of the contract.*"
173 Reply, ¶ 116; SoD, ¶ 112; See Article 682 ACC, quoted in Reply, ¶ 116, as providing "*The conditions of the contract shall be interpreted in their relationships, while assigning to each of them the meaning stemming from the entirety of the act. The contract shall be interpreted by the parties in good faith*."

dispute. The quality requirements for each of the three members of the ADRB remain unchanged. The original appointment method of the DB members (each Party to nominate one member for the approval of the other Party and the first two members to recommend and the Parties to agree upon the chairman) is replaced by a nomination by each Party of one member within 42 days after notification of a dispute according to Sub-Clause 20.1, who will then appoint the chairman within 15 days of appointment of the second member of the ADRB. The terms of remuneration and replacement of members have not changed. The paragraph on termination of the appointment of any member has been deleted in the amended Sub-Clause 20.2.

(b) Sub-Clause 20.3 [Failure to agree on the composition of the Dispute Board] is amended to reflect the amended appointment method of the ADRB members and introduces – at the request of the PMU Director[174] – the President of FIDIC instead of the ICC as appointing authority.

(c) Sub Clause 20.4 [Obtaining the Dispute Board's Decision] is amended to reflect that the *ad hoc* ADRB must first be appointed before a dispute can be referred to it. The ADRB is to give its decision within 56 days after receiving such reference, thus reducing the 84 days available to the original DB. The stipulation that the decision of the DB shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised by an arbitral award also is applicable to the ADRB decision. The final paragraph providing that if the DB had given its decision as to the matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon the Parties is repeated in Contract Amendment No. 7 for ADRB Decisions.

(d) Sub-Clause 20.5 [Amicable Settlement] is deleted.

(e) Some minor editorial changes are made to Sub-Clause 20.6 [Arbitration], which is renumbered to 20.5, without change to its scope and meaning.

(f) Sub-Clause 20.7 [Failure to comply with Dispute Board's Decision], renumbered to 20.6, is in essence repeated in Contract Amendment No. 7, in that the Parties again stipulated that in the event a Party fails to comply with a decision of the ADRB, which has become final an binding, then the other Party may refer the failure itself directly to arbitration under Sub-Clause 20.5.

(g) Sub-Clause 20.8 [Expiry of the Dispute Board's Appointment] is deleted.

235. The Tribunal finds the pre-contractual correspondence between the PMU Director and the First Claimant in line with the revised wording of Sub-Clauses 20.2 to 20.8 of the Segment 3 Contract. Upon receipt of the Engineer's position, both Parties were confronted with the situation that no DB had been timely appointed. On 22 May 2017, the PMU Director expressed to the Contractor the Employer's dissatisfaction with the decision of the Engineer, invited the

174 Exhibit R-11. See also above, ¶ 101.

Contractor to the amicable settlement process pursuant to Sub-Clause 20.5, and suggested to the Contractor that the Employer would be willing to amend the contract to "first go to the DB" and have a DB decision under Sub-Clause 20.4.[175] By letter of 30 May 2017, the Contractor noted that Sub-Clause 20.5 was inapplicable in the absence of a timely appointed DB, confirmed that it was willing to participate in negotiations for an amicable settlement, provided the process is formalised in a contract amendment, and suggested that if no agreement could be reached on the procedure for amicable settlement, the Contractor would request the appointing entity ICC to appoint a DB.[176] In the response of 7 June 2017, the PMU Director notes that the correspondence of 22 and 30 May 2017 shows that there is a possibility for the Parties to agree to a modification of the Contract in relation to Sub-Clauses, which relate to the DB and the amicable settlement, and therefore for the alternative option to "first go to the DB" to proceed:[177]

> *In view of the above we would propose that the said amendment should proceed and that the Parties agree upon an amicable settlement procedure. This procedure can provide for a substitution of the DAB, through an amicable settlement board. Similar provisions in relation to its appointment and the decision-making process shall be included in the said addendum. In relation to the time-limit for a decision, we could also adopt the same as for the DAB. Finally, and if either Party is dissatisfied with the findings of the amicable settlement board, or if it becomes absolutely clear that there is no way to settle the dispute, then the Parties will have the right to refer the matter to arbitration according to Sub-Clause 20.6 of the Contract.*

On 17 June 2017, the First Claimant provided a draft contract amendment, which was agreed to with minor comments and suggested modifications by the PMU Director on behalf of Respondent on 21 June 2017.[178] The comments were accepted and Contract Amendment No. 7 was signed by the Parties on 4 July 2017.

236. The Tribunal notes that all correspondence referred to in the previous paragraph was copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.[179] There is no indication or evidence in the record that any of these parties raised any objections to the contents of the correspondence. The Tribunal moreover notes that, in spite of Respondent's reservations on the authority of the PMU Director, Mr Alite, to bind ARA, it is not in dispute between the Parties that Contract Amendment No. 7 has been validly signed for ARA by its General Director. Respondent itself extensively quotes from the referred correspondence by the PMU Director in the period 22 May 2017 through 21 June 2017, which was copied the General Director of ARA, as evidence for its position regarding the real and joint intention of the Parties in agreeing to Contract Amendment No. 7. In the Tribunal's opinion, any reservations regarding the authority of the PMU Director to bind ARA do not preclude the use of correspondence by the PMU Director as evidence of the intent of the Parties when ARA agreed to be bound by Contract Amendment No. 7 by the signature of its General Director.

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175 Exhibits C-19 and R-06. See also above, ¶ 96.
176 Exhibit C-20 and R-08. See also above, ¶ 97.
177 Exhibit R-09 (Underlining by the Tribunal). See also above, ¶ 98.
178 Exhibits R-10 and R-11. See also above, ¶¶ 99 and 101.
179 See above, ¶¶ 96-99 and 101.

237. The Tribunal is accordingly comfortable to consider the letter of the PMU Director of 20 June 2017 to the IDB as further evidence of the real and joint intention of the Parties in agreeing to Contract Amendment No. 7, particularly where he notes that due to the failure to timely appoint a DB, the DB-procedure cannot be followed in relation to any kind of dispute and the Parties have to refer directly to arbitration and therefore:[180]

> *… the Parties have started considering the amendment of the Contract (see the attached draft), in order to practically add a procedure similar to the DAB procedure, before the matter is referred to the arbitration. We are considering to establish a panel, which will be called the Amicable Dispute Resolution Board (ADRB).*
>
> *This panel will be appointed for each dispute and by taking into account the context it might have from time to time. The appointment procedure is similar to the one provided for in relation to the DAB in the existing contract provisions. In setting out this procedure we have tried to give to the panel enough time for its decision and we have also taken into account that it is for the benefit of all involved Parties, if it does not take very long. The decision of the ADRB will be binding for the Parties and if they disagree with it they have the possibility to refer to the said disagreement to the arbitration.*
>
> *It becomes clear that with the proposed amendment the Parties are trying to introduce a procedure to the Contract, which is similar to the DAB procedure. We remind you at this point that, because of the non-timely appointment of the DAB, all disputes have to be referred directly to arbitration. However, there is no doubt that it is better to have a procedure (similar to DAB) before the arbitration. This was also the original provision of the Contract.*
>
> *Such a procedure might offer a determination upon a dispute, which will be issued rather fast and will not be as expensive as the arbitration. Furthermore, and provided that the ADRB issues a decision, which is reasoned properly, it will probably convince the Parties in relation to its correctness and lead them to avoid triggering the arbitration procedures.*
>
> *To sum up the above, we believe that the proposed amendment is in total agreement with the original will of the Parties to have a panel of experts to decide upon a dispute. Before referring the matter to arbitration. (…)*

238. The Tribunal concludes from the above and absent any indications otherwise in the conduct of the Parties following the conclusion of the contract that, contrary to the assertions of Respondent and in line with the assertions of Claimants, it is sufficiently established that in Contract Amendment No. 7 the Parties agreed, *inter alia*, that:

(a) the Parties are to appoint pursuant to the arrangements in Sub-Clauses 20.2 to 20.4 an *ad hoc* dispute board, called the Amicable Dispute Resolution Board (ADRB), to resolve disputes under the Segment 3 Contract;

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180 Exhibit C-71 (in the letter the Dispute Board as per Sub-Clauses 20.2 to 20.4 is defined as "DAB").

(b) the ADRB will render a decision within 56 days, or such other period proposed by the ADRB and agreed to by the Parties;

(c) if either Party is dissatisfied with the decision of the ADRB, then either Party may within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration and, except as stated in Sub-Clause 20.6, neither Party shall be entitled to commence arbitration unless such notice has been given;

(d) if no notice of dissatisfaction has been given by either Party within 28 days after receiving the decision, the decision shall become final and binding upon the Parties and in the event that a Party fails to comply with such decision of the ADRB that has become final and binding, then the other Party may refer the failure itself directly to arbitration under Sub-Clause 20.5.

(b) Contract Amendment No. 12

239. Contract Amendment No. 12 was signed on 24 July 2017 for Respondent by its general director Mr Xhika and the PMU Director Mr Alite as representing ARA. In the recitals, express reference is made to the correspondence of the Parties of 17 and 18 July 2017. Article 1 specifies the purpose of the contract amendment as to determine the procedure for the Dispute Resolution Board (DRB). To that effect the Parties wished according to Article 2 to modify the Segment 1 Contract in relation to the Sub-Clauses, which relate to the DAB and the amicable settlement and amended Sub-Clauses 20.2 to 20.8 of the Segment 1 Contract as follows:

(a) The standing DB to be appointed within 28 days of the Contract Date as provided for in Sub-Clause 20.2 is replaced by an *ad hoc* DRB to be appointed each time there is a dispute. The quality requirements for each of the three members of the ADRB remain unchanged. The original appointment method of the DB members (each Party to nominate one member for the approval of the other Party and the first two members to recommend and the Parties to agree upon the chairman) is replaced by a nomination by each Party of one member within 21 days after notification of a dispute according to Sub-Clause 20.1, who will then appoint the chairman within 7 days of appointment of the second member of the DRB. The terms of remuneration and replacement of members have not changed. The paragraph on termination of the appointment of any member has been deleted in the amended Sub-Clause 20.2.

(b) Sub-Clause 20.3 [Failure to agree on the composition of the Dispute Board] is amended to reflect the amended appointment method of the DRB members and again introduces the President of FIDIC instead of the ICC as appointing authority.

(c) Sub Clause 20.4 [Obtaining the Dispute Board's Decision] is amended to reflect that the *ad hoc* DRB must first be appointed before a dispute can be referred to it. The DRB is to give its decision within 70 days after receiving such reference, thus reducing the 84 days available to the original DB, but extending from the 56 days available to the ADRB. The stipulation that the decision of the DB shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised by an arbitral award

also is applicable to the DRB decision. The final paragraph providing that if the DB had given its decision as to the matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DB's decision, then the decision shall become final and binding upon the Parties is repeated in Contract Amendment No. 12 for DRB decisions.

(d) Sub-Clause 20.5 [Amicable Settlement] is now maintained as the standard FIDIC sub-clause regarding attempts to settle the dispute amicably before commencement of arbitration within 56 days.

(e) Some minor editorial changes were made to Sub-Clause 20.6 [Arbitration], without change to its scope and meaning.

(f) Sub-Clause 20.7 [Failure to comply with Dispute Board's Decision], renumbered as (the second) Sub-Clause 20.6, is in essence repeated in Contract Amendment No. 12, in that the Parties again stipulate that in the event a Party fails to comply with a decision of the ADRB, which has become final and binding, then the other Party may refer the failure itself directly to arbitration under Sub-Clause 20.5.

(g) Sub-Clause 20.8 [Expiry of the Dispute Board's Appointment] was deleted.

240. The Tribunal finds the pre-contractual correspondence between the PMU Director and the First Claimant in line with the revised wording of Sub-Clauses 20.2 to 20.8. Upon receipt of the Engineer's position, both Parties were again confronted with the situation that no DB had been timely appointed. On 17 July 2017, the PMU Director expressed to the Contractor the Employer's dissatisfaction with the decision of the Engineer and wrote:[181]

> *As Employer (and on IDB advice), we are asking to the Contractor to accept for Claims of Segment 1 the same procedure (settle a dispute board for this case) as it is now in place for Claims for Segment 3. This way, the Employer will be able to have a "second independent and professional determination" before being able to make a final decision in this regard.*
>
> *(...)*
>
> *Anyway if the Contactor will agree we can attempt to amend the Contract by deleting the current provisions referred to above for DB and first go to a new dispute board to refer the Claims for Segment No. 1 and have a dispute board decision under Sub-Clause 20.4.*

In its response letter of 17 July 2017, the Contractor agreed to negotiate on a contract amendment concerning the appointment of the Dispute Board, based on the already settled procedure for claims under the Segment 3 Contract.[182] The Respondent's letter of 18 July 2017 to the Contractor (ref.no: 273) as referred to in the recitals of Contract Amendment No. 12 is not part of the record. According to Respondent it contains language similar to the language in

181 Exhibits C-13 and R-16. See also above, ¶ 106.
182 Exhibit C-14. See also above, ¶ 107.

its letter of 7 June 2017 in respect of the Segment 3 Contract as quoted above.[183] Contract Amendment No. 12 was subsequently signed by the Parties on 20 July 2017.

241. The Tribunal notes that the correspondence of 17 July 2017 referred to in the previous paragraph was again copied to the Albanian Minister of Transport and Infrastructure, the General Director of ARA, Mr Xhika, and the IDB.[184] There is no indication or evidence in the record that any of these parties raised any objections to the contents of the correspondence. The reference of the Employer in the 17 July 2017 letter to asking the Contractor "*on IDB advice*" to accept for claims under the Segment 1 Contract the same procedure as agreed in Contract Amendment No. 7 rather suggests that in fact the IDB: (i) had agreed to the procedure as set by Contract Amendment No. 7; and (ii) had advised Respondent to adopt a similar procedure for claims under the Segment 1 Contract.

242. The Tribunal again notes that, in spite of Respondent's reservations on the authority of the PMU Director, Mr Alite, to bind ARA, it is not in dispute between the Parties that Contract Amendment No. 12 has been validly signed for ARA by its General Director. Respondent itself extensively quotes from the referred correspondence by the PMU Director of 17 and 18 July 2017, which was copied the General Director of ARA, as evidence for its position regarding the real and joint intention of the Parties in agreeing to Contract Amendment No. 12. As already held in paragraph 236, any reservations regarding the authority of the PMU Director to bind ARA do in the Tribunal's opinion not preclude the use of correspondence by the PMU Director as evidence of the intent of the Parties when ARA agreed to be bound by Contract Amendment No. 12 by the signature of its General Director.

243. The Tribunal therefore considers the letter of the PMU Director of 21 July 2017 to the IDB, containing similar wording as his letter of 20 June 2017 regarding Contract Amendment No. 7 as referred to above, also as further evidence of the real and joint intention of the Parties in agreeing to Contract Amendment No. 12.[185]

244. The Tribunal concludes from the above and absent any indications otherwise in the conduct of the Parties following the conclusion of the contract that, contrary to the assertions of Respondent and in line with the assertions of Claimants, it is sufficiently established that in Contract Amendment No. 12 the Parties agreed, *inter alia*, that:

(a) the Parties are to appoint pursuant to the arrangements in Sub-Clauses 20.2 to 20.4 an *ad hoc* dispute board, called the Dispute Resolution Board (DRB), to resolve disputes under the Segment 1 Contract;

(b) the DRB will render a decision within 70 days, or such other period proposed by the DRB and agreed to by the Parties;

(c) if either Party is dissatisfied with the decision of the DRB, then either Party may within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction

183 SoD, ¶¶ 49-50. See above, ¶ 233.
184 See above, ¶¶ 106-107.
185 Exhibit C-73, see above, ¶ 235.

and intention to commence arbitration and, except as stated in Sub-Clause 20.6 [Failure to comply with the decision of the DRB], neither Party shall be entitled to commence arbitration unless such notice has been given;

(d) if no notice of dissatisfaction has been given by either Party within 28 days after receiving the decision, the decision shall become final and binding upon the Parties and in the event that a Party fails to comply with such decision of the DRB that has become final and binding, then the other Party may refer the failure itself directly to arbitration under the (first) Sub-Clause 20.6.

Conclusion

245. The Tribunal holds that in the Contract Amendments the Parties agreed:

(a) to appoint pursuant to the arrangements in the respective Sub-Clauses 20.2 to 20.4 an *ad hoc* (A)DRB to resolve disputes under the Contracts;

(b) the ADRB would render a decision in 56 days, the DRB in 70 days, or such other period proposed by the (A)DRB and agreed to by the Parties;

(c) if either Party is dissatisfied with the decision of the (A)DRB, then either Party may within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration and, except as stated the Sub-Clause [Failure to comply with the decision of the (A)DRB], neither Party shall be entitled to commence arbitration unless such notice has been given;

(d) if no notice of dissatisfaction has been given by either Party within 28 days after receiving the decision, the decision shall become final and binding upon the Parties and in the event that a Party fails to comply with such decision of the (A)DRB that has become final and binding, then the other Party may refer the failure itself directly to arbitration under the relevant Sub-Clause.

246. Having established the scope and meaning of Contracts Amendments No. 7 and No. 12, the Tribunal will now turn to the contractual impediments raised by Respondent against the validity of the Contract Amendments.

E. Validity of the Contract Amendments under the Contract Terms

247. Claimants submit that it is common practice that in case parties fail to appoint a standing dispute board within the specific time limit and only turn their attention to the appointment when a dispute arises, the parties are free to turn the standing dispute board to an *ad hoc* dispute board. In its submissions, Respondent has raised various contractual impediments against turning a standing dispute board as envisaged in the Contracts into an *ad hoc* dispute board after the time period for appointing a standing dispute board has expired. In this Sub-Section, the Tribunal will analyse and discuss whether the Contract Amendments must be deemed invalid for contractual reasons.

248. Any impediments to their validity arising from ratification of the ratification of the Istisna'a Agreement and the Agency Agreement and/or arising from the Contracts being qualified as administrative contracts will be discussed in the subsequent Sub-Sections F and G.

Respondent's Position

249. Respondent argues that the (A)DRB Decisions are not dispute board decisions as provided for by the standard FIDIC contracts. Instead of resetting the DB in time, the Contract Amendments have incorrectly deleted Sub-Clause 20.8 and created two totally new procedures for handling disputes in a way not envisaged in the FIDIC contracts and the FIDIC Contracts Guide. The FIDIC contract system only allows, according to Respondent, amendment of the General Conditions through appropriate Particular Conditions at the time of entering into the Contracts.[186]

250. Respondent also argues that the Agency Agreement provides in its Section 3 "Selection of Contractors and other procurement matters" that the contracts would be procured by the project implementing agency, which would act as the employer (ARA), by following the procurement rules and guidelines of the IDB and the contract model and terms should be approved by the bank. The Standard Bidding Documents for Procurement of Works (SBD) and its User's Guide as provided by IDB and used by ARA, are FIDIC based models. The SBD, which bidders have accepted and signed, provide in PART 3, Section VII General Conditions (GC):[187]

> *This Section contains the general clauses to be applied in all contracts. The text of the clauses in this Section shall not be modified. The General Conditions may be amended only through Particular Conditions, during the negotiation process, before signing the Contract.*

251. Respondent submits that the Contract Amendments were made against the provisions of the Standard Bidding Documents for Procurement of Works, its User's Guide, the FIDIC Contracts Guide and common practice.[188] Appointment of the chairman by the first two members instead of the Parties agreeing on the chairman upon recommendation of the two members carries the risk of abuse and is contrary to the FIDIC contract system and common practice.[189] Reduction of the time for the DB to issue its decision from 84 days to 56 days (Segment 3 Contract), respectively 70 days (Segment 1 Contract) is contrary to the General Conditions, the FIDIC Contracts Guide and common practice.[190] Finally, the deletion of the amicable settlement procedure in Contract Amendment No. 7 would prevent the Parties from seeking a settlement in case of a notice of dissatisfaction to the DRB decision and makes "*the whole procedure groundless, unstable and contested*".[191]

252. According to Respondent, the Contract Amendments are also not effective because they have not modified the Particular Conditions with respect to DB (the constitution of the DB within 28

186 SoD, ¶¶ 19-20, 66, 98-100 and 110; Rejoinder, ¶ 3, 6, and 16; PHB Respondent, ¶ 20.
187 Rejoinder, ¶¶ 14-15; PHB Respondent, ¶ 6.
188 Rejoinder, ¶ 16.
189 Rejoinder, ¶ 60; PHB Respondent, ¶¶ 21-22.
190 Rejoinder, ¶ 61; PHB Respondent, ¶ 23.
191 Rejoinder, ¶ 62; PHB Respondent, ¶¶ 27-28.

from the Commencement Date), which prevails over any amendment to the General Conditions.[192] Moreover, the Amicable Dispute Resolution Board Agreement and the Dispute Resolution Board Agreement between the Employer, the Contractor and the members of the (A)DRB are contrary to Sub-Clause 20.2 as they are not concluded with each of the members, but "*constitute an agreement between five parties, in contradiction with the contract and the guide rules*".[193]

253. Respondent argues that the Contract Amendments created an *ad hoc* DB that was not set up and did not function in real time of the claims submitted by the Contractor. The standing DB provided for in the Contracts is well equipped to provide a decision within 84 days, but an *ad hoc* DB may not be able to achieve a decision within such timeframe.[194]

254. In the view of Respondent, the Contract Amendments do not establish a DB as envisaged in the FIDIC contracts. The constitution of (A)DRB lacks contractual ground and is in breach of the procedure and the good practice in resolving disputes relating to FIDIC construction contracts. Therefore, the Segment 1 Decision and the Segment 3 Decision are not and should never be construed as DB decisions, as provided for in the FIDIC Contract.[195] According to Respondent, they should be seen as recommendations as an outcome of an amicable settlement process, with which the Parties are not obliged to comply.[196]

255. Respondent moreover argues that the amendment of Sub-Clauses 20.2 to 20.8 of the General Conditions therein constitutes a deviation from the DB constitution procedure per the General Conditions of the FIDIC contract and the process of obtaining a DB decision, and accordingly, notwithstanding that the Contract Amendments have been signed by both Parties, lacks an appropriate legal and/or contractual basis and therefore cannot lead to legitimate claims. The FIDIC form of contracts do allow for variations in Sub-Clause 13, but lack any provision providing the Parties the right to amend the General Conditions, particularly the DB procedure. By signing the Contracts in 2012, the Parties have agreed to abide by the terms set forth therein, where the General Conditions shall not be modified and the Particular Conditions take precedence where there is discrepancy between the two. Respondent concludes that the Contracts may only be amended to the extent permitted and in the form required by their terms.[197]

Claimants' Position

256. Claimants submit that the Segment 1 Contract has been validly amended 14 times and the Segment 3 Contract 7 times and that the Contract Amendments were in fact initiated and proposed by the Employer, to which proposal Claimants agreed in good faith.[198] Moreover, there is no requirement under the FIDIC books to accept a specific model of dispute board and the

192 Rejoinder, ¶ 63.
193 Rejoinder, ¶ 64.
194 Rejoinder, ¶¶ 67-69; PHB Respondent, ¶¶ 24-26.
195 Rejoinder, ¶¶ 70-74.
196 Rejoinder, ¶ 73.
197 Rejoinder, ¶¶ 22-25.
198 SoC, ¶¶ 259-269 and 280-283; Reply, ¶¶ 91-94.

parties may modify the nature of the dispute board, even if they miss the deadline for the appointment of a standing dispute board.[199] It was Respondent who asked for the dispute board to be brought back, Respondent appointed a member both in the ADRB and in the DRB and also entered into contracts with the members of the boards.[200] According to Albanian law, contracts like the Contracts can be validly altered or modified upon mutual consent of the parties (Article 690 ACC), and therefore, as the Tribunal understands Claimants' position, the Contract Amendments can also be deemed to have altered the provisions in the IDB Standard Bidding Documents and Particular Conditions referred to by Respondent.[201] Claimants argue that Section 4 of the Agency Agreement,[202] which requires the IDB's consent for making amendments, alterations or modifications of the Contracts, in fact rather shows that the parties thereto accepted that post-conclusion amendments to the Contracts were possible.[203] Except for nullity and being declared void by the courts, the Contract Amendments remain valid and binding.[204]

257. Claimants argue that the ADRB (Segment 3 Contract) and the DRB (Segment 1 Contract) have the same form and the same competence as the DB initially foreseen and that the Parties have not departed from the FIDIC contract requirements.[205]

The Tribunal's Analysis and Discussion

258. In FIDIC contracts, like the Segment 1 Contract and the Segment 3 Contract, the Conditions of Contract, governing the rights, liabilities and obligations of the Parties, are the central element of the contracts, bringing together the other documents and defining their significance and effect. The Conditions of Contract comprise the standard General Conditions published by FIDIC and any Particular Conditions that are specific to the individual contract. Any amendments to the General Conditions are intended to be set out in the Particular Conditions, which are of higher priority under Sub-Clause 1.5. Consequently, the General Conditions must be read in conjunction with the Particular Conditions to produce the Conditions of Contract.[206] Pre-conclusion, the parties to a FIDIC contract can therefore in principle amend any of the terms of the standard General Conditions by agreeing Particular Conditions to such effect.

259. Clause 13 [Variations and Adjustment] of the Contracts provides a contractual mechanism for settling changes to the works to be carried out and other matters to which Clause 13 is specifically held to apply. Variations under FIDIC contracts are not, however, the mechanism by which the terms of the Contracts are amended by the Parties.[207]

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199 SoC, ¶¶ 270-275; Reply, ¶¶ 81-86.
200 Reply, ¶¶ 88-90.
201 SoC, ¶¶ 284-285 and 292-293.
202 Exhibit R-30. Section 4 of the Agency Agreement provides: "*The Agent shall not, without the prior written consent of the IDB, make any amendments, alterations or modifications of the Contract which may (a) result in an increase in the Contract Price or (b) result in an extension of the completion date or (c) result in a change of the specification, or (d) not be in accordance with usual good practice.*"
203 Reply, ¶¶ 46-49.
204 Reply, ¶¶ 95-102.
205 Reply, ¶¶ 69-74.
206 See, *e.g.* E. Baker et al, *FIDIC Contracts: Law and Practice* (2009), p. 33.
207 Baker, p. 118.

260. In fact, the General Conditions do not contain any provision regarding amendment of the terms of the Contracts. Respondent's position that in the absence of any such mechanism in the Conditions of Contract, the only way in which the General Conditions in the Contracts can be amended is through appropriate Particular Conditions at the time of entering into the Contracts is, however, rejected by the Tribunal. Although it is correct that the FIDIC Contracts Guide emphasizes the use of Particular Conditions in the tender phase to adapt the General Conditions for each individual contract,[208] that does in the Tribunal's opinion not exclude that the Parties may agree to amend the terms of such individual contract at a later stage, including amendment of the applicable General Conditions through appropriate further Particular Conditions or otherwise. The FIDIC Contracts Guide's main emphasis is on providing guidance on selecting the appropriate FIDIC contract form and on adapting through Particular Conditions the standard FIDIC General Conditions to the circumstances of a specific project in order to properly draft the construction contract for the tender phase. The Tribunal finds nothing in the FIDIC contracts or the FIDIC Contracts Guide that would preclude amendment after conclusion of the contract.

261. Respondent's argument that a contractual impediment against such amendment can be found in PART 3, Section VII General Conditions, of the Standard Bidding Documents, which were accepted by Claimants, fails. The phrase that "*General Conditions may be amended only through Particular Conditions, during the negotiation process, before signing the Contract*" cannot be found in PART 3, Section VII General Conditions of the Bidding Documents for the Segment 1 Contract and the Segment 3 Contract,[209] nor in the bids submitted by the First Claimant.[210] The Procurement of Works & User's Guide of the IDB does provide in the Summary Description in Part 3, Section VII General Conditions: "*This Section contains the general clauses to be applied in all contracts. The text of the clauses shall not be modified*", but recognises in Section VIII Particular Conditions that these may modify or supplement the General Conditions.[211] The User's Guide itself merely emphasises that the standard text of the General Conditions chosen must be retained intact to facilitate its reading and interpretation by bidders and its review by the bank and that any amendments and additions to the General Conditions, specific to the contract in hand, should be introduced in the Particular Conditions.[212] The Procurement of Works & User's Guide expressly stipulates, however, that the User's Guide is not part of the Bidding Document.[213]

262. In sum, the Tribunal cannot find any term or indication in the IDB Standard Bidding Documents for Procurement of Works, its User's Guide, the FIDIC contracts, or the FIDIC Contracts Guide that prescribes that the Conditions of Contract are after conclusion of the contract carved in stone and thus any amendment of the Conditions of Contract after conclusion of the contracts is precluded. That such post-conclusion amendment would be against common practice and therefore invalid has not been substantiated by Respondent. Section 4 of the Agency Agreement, which requires the IDB's consent for making amendments, alterations or modifications of the

208 *The FIDIC Contracts Guide* (Exhibit R-26), p. 2.
209 Exhibit R-02.
210 Exhibits R-24, R-34 and R-35.
211 Exhibit R-33.
212 User's Guide (Exhibit R-33), p. 28.
213 Exhibit R-33, p. 4.

Contracts, and the reference of Claimants to the literature of turning a standing DB into an *ad hoc* DB in case the members of the standing DB are not appointed within the specified time,[214] rather suggest the opposite.

263. In the absence of specific contract terms, the governing law (Sub-Clause 1.4) determines the validity and enforceability of the contract and its terms, the rights and liabilities of the parties and the legal remedies as a consequence of breaches of the contract. It may imply terms into the contract. It will also provide the principles for interpreting contracts to determine the exact scope of the parties' agreement set out in these documents and their legal effect.[215]

264. The governing law of the Contracts is Albanian law.[216] Under Albanian contract law, contracts can in principle be validly altered or modified upon mutual consent of the parties (Article 690 ACC).[217] As no evidence has been provided that the Parties specifically agreed not to amend or modify the Contracts after their conclusion, or only if certain requirements were met, the Tribunal holds that Albanian contract law allows the Parties to amend the Contracts after their conclusion.[218]

265. As set out in the previous Sub-Section D, the Parties in essence agreed in the Contract Amendments to replace the FIDIC model standing DB by a FIDIC model *ad hoc* DB, but for the appointment method of the chairman, reductions of the decision time for the (A)DRB, and deletion of the amicable settlement procedure for the Segment 3 Contract in Contract Amendment No. 7. The Tribunal finds nothing in the agreement of the Parties or Albanian contract law that would preclude the Parties from effectuating a joint intent: (i) to replace a standing DB by an *ad hoc* DB, also if the term for appointment for the members of the standing DB has expired; (ii) to have the chairman of the DB appointed by the first two members; (iii) to reduce the time for the DB to reach its decision to 56 days or 70 days, also in view of the fact that the DB retains the possibility to propose another period; and (iv) to delete the amicable settlement procedure. The fact that the FIDIC standard documents as common practice provide otherwise is no impediment for the Parties to agree to adapt the applicable Conditions of Contracts to the particular circumstances of the case in the Contract Amendments. It may be the case that the *ad hoc* DB thus created did not function in real time of the claims submitted by the Contractor, but that is again no impediment to the Parties agreeing to create an *ad hoc* DB in such circumstance as an alternative to a direct reference to arbitration.

266. The Tribunal rejects Respondent's argument that the Contract Amendments are not effective, because the Particular Conditions relating to the DB have not been modified. The agreed Particular Conditions relating to Sub-Clause 20.2 are meant to supplement the General Conditions. Sub-Clauses 20.2 referred prior to their amendment to the Parties appointing a DB "by the date stated in the Contract Data" and the DB being comprised, "as stated in the Contract

214 Reply, ¶ 81, referring to Baker, ¶ 9.52.
215 Baker, ¶ 2.128.
216 Sub-Clause 1.4 and Particular Conditions A.
217 Reply, ¶¶ 96, 99, and 113; Rejoinder, ¶ 24, and 83; PHB Claimants, ¶ 51.
218 This conclusion does not address the consequences, if any, of the ratification of the Agency Agreement and of the potential qualification of the Contracts as administrative contracts, which will be discussed in the following Sub-Sections.

Data", of one or three members.[219] The new Sub-Clauses 20.2 no longer contain such references and therefore the Particular Conditions relating to Sub-Clauses 20.2 lack any meaning, they have become 'loose blanks'. Moreover, the Tribunal finds that, as in the contractual system of FIDIC contracts Particular Conditions are meant to be used to amend the General Conditions of Contract to form the applicable Conditions of Contract, the Contract Amendments must properly be construed as amending the applicable Conditions of Contract, *i.e.*, the General Conditions and the Particular Conditions.

267. It is not explained by Respondent, nor clear to the Tribunal, what the effect is on the validity of the Contract Amendments of Respondent's claim that Sub-Clause 20.2 precludes the Amicable Dispute Resolution Board Agreement and the Dispute Resolution Board Agreement from being entered into by the Employer, the Contractor and the three members of the (A)DRB in single documents instead of separate documents for each of the members. First, the Contract Amendments have been agreed prior to conclusion of the (A)DRB Agreements. Second, Sub-Clauses 20.2 as amended by the Contract Amendments no longer contains the fourth paragraph of the previous Sub-Clauses 20.2, which specifically refers to an agreement between the Parties and each of the three members.[220] Third, there is even in the previous Sub-Clauses 20.2 nothing that precludes the agreement between the Parties and each of the three members individually to be consolidated in one single contract document.

268. The Tribunal therefore holds that the Contract Amendments do not lack an appropriate legal and contractual basis, and accordingly neither the agreement between the Parties nor provisions of Albanian contract law impede upon the validity of these amendments.

Conclusion

269. The Tribunal concludes that there are no contractual impediments against the Parties validly agreeing the Contract Amendments, including agreeing that their disputes can be bindingly adjudicated by an (A)DRB and that if no notice of dissatisfaction has been given by either Party within 28 days after receiving the (A)DRB decision, the decision shall become final and binding upon the Parties and in the event that a Party fails to comply with such decision of the (A)DRB that has become final and binding, then the other Party may refer the failure itself directly to arbitration.

270. The Tribunal will next address whether, as argued by Respondent, the ratification of the Agency Agreement provides such impediment.

F. Validity of the Contract Amendments and IDB's Prior Consent Requirement

271. Respondent submits that in the absence of prior consent of the IDB the Contract Amendments were entered into in breach of Section 4 (Alterations and Amendments of the Contracts) of the

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219 Contract Data refers to Part A of the Particular Conditions (see Sub-Clause 1.1.1.10).

220 The fourth paragraph of the original Sub-Clauses 20.2 provides: "*The agreement between the Parties and either the sole member or each of the three members shall incorporate by reference the Genera! Conditions of Dispute Board Agreement contained in the Appendix to these Genera! Conditions, with such amendments as are agreed between them.*"

Agency Agreement, which provides that Respondent shall not, without the prior written consent of the IDB, make any amendments, alterations or modifications of the Contracts which may not be in accordance with usual good practice. Respondent's position is that the Contract Amendments are not in accordance with usual good practice. As the Financing Agreement was ratified by law, Section 4 became a mandatory provision of Albanian law. Pursuant to Article 92 ACC, the Contract Amendments are therefore null and void.

272. Claimants submit that the Contract Amendments are in accordance with usual good practice and the IDB has in fact given its consent. Moreover, ratification of the Financing Agreement does not turn Section 4 of the Agency Agreement into a mandatory provision of Albanian law.

Respondent's Position

273. Respondent argues that the Contract Amendments, which were made without prior written consent of the IDB, were null and void because such written consent is required under Section 4 of the Agency Agreement, which became a mandatory provision of Albanian law as a result of the ratification of the Financing Agreement by Law no. 10419 of 26 May 2011.[221]

274. Respondent points out that, although the PMU Director asked the IDB for consent for Contract Amendment No. 7, Contract Amendment No. 7 was executed on 4 July 2017 without any response received from the IDB. Contract Amendment No. 12 was according to Respondent in fact already executed on 20 July 2017, whilst the PMU Director informed the IDB about the intention to make a similar amendment to the Segment 1 Contract only a day later, on 21 July 2017. The IDB's reply of 25 July 2017 was no 'prior written consent', it only addressed the Segment 1 Contract, it required that the accepted dispute resolution mechanism must be valid for all sections (whereas Contract Amendment No. 7 created a different mechanism for the Segment 3 Contract), and it required compliance with the requirements and receipt of the executed agreements before implementing.[222] All other Contract Amendments required and specifically referred to prior consent of the IDB.[223]

275. The Contract Amendments are according to Respondent inconsistent with common good practice and therefore in breach of Section 4 of the Agency Agreement, because the General Conditions cannot be amended as this does not find a contractual basis in the FIDIC contract itself, there is no procedure specified in the contract itself and modification of the General Conditions is expressly prohibited by the IDB Standard Bidding Documents for Procurement of Works (SBD) and its User Guide, which bidders have accepted and signed, particularly in PART 3, Section VII General Conditions (GC).[224]

276. Respondent submits that in the absence of a definition of common good practice in the Agency Agreement the phrase must be interpreted "*case by case in harmony and in accordance with the generally applicable principles*".[225] This means that if a contract amendment entails certain

221 SoD, ¶¶ 103-105; PHB Respondent, ¶¶ 34-37.
222 Rejoinder, Section IV.
223 Transcript Hearing Day 1, 40:16-21.
224 PHB Respondent, ¶ 6.
225 PHB Respondent, ¶ 7.

substantive changes that affect the behaviour of the parties, contract rules or mechanisms and bring significant consequences, such as price increases, technical changes, deadlines or consequences that affect the performance of the contract and project, then it must be deemed inconsistent with common good practice. According to Respondent, the purpose of referring to common good practice is to see it in the sense of interpreting the practice as a whole.[226]

277. Respondent argues that the (A)DRB Decisions themselves and the decision-making in that context have financial implications. This means that the contract amendments indirectly consist of establishing a mechanism that will judge the decision of the engineer bearing financial costs and reach a decision with financial obligation and as such will lead to a modification of the contract price, a situation in which it is expressly stipulated that the Parties are obliged to seek prior written consent of the IDB.[227]

278. The mission of a standing DB, as originally provided for in the Contracts, is to be available from the beginning, to get acquainted with the project, the claims, to get site visits, to have the time and complete overview of the situation in order to truly give professional and right decisions. In the absence of a timely constituted DB, the Parties could exercise their rights under Sub-Clause 20.8 in a more guaranteed dispute settlement process than the process offered through the Contract Amendments. Appointment of the chairman of the (A)DRB by the other two members is contrary to common practice, as is the reduction of the decision period for the (A)DRBs. An *ad hoc* DB, like the (A)DRB, can simply not achieve the purposes of a standing DB and, moreover, the (A)DRB addressed in 2017 claims related to the period 2013-2016. Respondent finally notes that deletion of the amicable settlement procedure in Contract Amendment No.7 prevents the Parties from finding common agreement before resorting to arbitration.[228]

279. Respondent also refers in this respect to audits by the Ministry of Infrastructure and Energy and by the Public Finances Inspection of the Ministry of Finance, which found "illegitimacy and illegality" in implementing the Contract Amendments, and a criminal case filed with the Prosecution Office,[229] where the Contract Amendments are being considered as illegitimate actions in violation of the contract and the law.[230]

Claimants' Position

280. Claimants submit that the aim of the requirement of prior written consent by the IDB is to avoid increase of the contract price and, if that could possibly occur, it wishes as financier to have the possibility to examine and approve it. The Contract Amendments, relating to the dispute resolution procedure, are financially neutral and merely reinstate a DB arrangement that was already in the Contracts. According to Claimants, this may also be the reason that the IDB,

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226 PHB Respondent, ¶¶ 8-9.
227 PHB Respondent, ¶ 14.
228 PHB Respondent, ¶¶ 20-27.
229 Criminal Proceedings No. 9076/1 of 2018 requested by the Prosecutor's Office of the Tirana Judicial District against the defendants Dashamir Jika, Aksel Qorduka and Albens Alite for committing the criminal offense set forth in Articles 248 and 25 of the Albanian Criminal Code (see Exhibit R-28).
230 Rejoinder, ¶¶ 11-12; Transcript Hearing Day 1, 34:15-35:10.

unlike to all the other amendments, which clearly had financial impacts to the Projects, did not reply immediately and Respondent had to send several reminders.[231]

281. Moreover, the Contract Amendments are in the Claimants' view examples of good practice. With the amendments the Parties rectified their failure to timely appoint a DB by restoring the initial arrangement in the Contracts. The change to an *ad hoc* board was caused by both projects being almost completed and the lower costs of the procedure. Reinstituting the dispute boards is completely in line with the FIDIC Golden Principles, particularly GP 5, which provides that all formal disputes must be referred to a DB for a provisionally binding decision as a condition precedent for arbitration.[232]

282. Claimants argue that the mere fact that the Financing Agreement is ratified by law, whereby the Albanian State acknowledged the existence of the debt and committed itself to honour it, does not qualify the requirement of prior written consent by the IDB therein as a mandatory legal provision of Albanian law binding on other persons than the parties to the Financing Agreement. In addition, the IDB has expressed its non-objection to the Contract Amendments and thus ratified their execution.[233]

283. Claimants finally submit that the audit report referred to by Respondent was made by a state authority with no competence to control or issue decisions with respect to the Contracts and which cannot replace the authority of the Tribunal. As to the pending criminal case, Claimants note that the charges for passive bribery and corruption have been dropped and that the criminal court has asked for expertise on the properness and correctness of the Contract Amendments.[234]

The Tribunal's Analysis and Discussion

284. Under the terms of the Istisna'a Agreement, the IDB has agreed with the Council of Ministers of the Republic of Albania to construct the Construction Works for the Tirana-Elbasan Road-Project as described in Annex I thereof. In the Agency Agreement, the IDB agreed with the Council of Ministers of the Republic of Albania (defined therein as the "Agent") that the Agent shall, on behalf of the IDB conclude the Contract with the Contractor and supervise the construction of the Works. Pursuant to Sub-Section 3.2(f) thereof, the negotiation and conclusion of the Contract by the Agent on behalf of the IDB is subject to the written approval of the IDB to the terms and conditions of the negotiated Contract, which shall be obtained before the conclusion by the Agent of the Contract. Section 4 (Alterations and Amendments of the Contracts) of the Agency Agreement provides in line therewith:[235]

> *The Agent shall not, without the prior written consent of the IDB, make any amendments, alterations or modifications of the Contract which may (a) result in an increase in the Contract Price or (b) result in an extension of the completion date or (c)*

231 PHB Claimants, ¶¶ 104-106.
232 PHB Claimants, ¶¶ 107-109.
233 PHB Claimants, ¶¶ 111-125.
234 Transcript Hearing Day 1, 88:13-89:25
235 Exhibit R-30.

> *result in a change of the specification, or (d) not be in accordance with usual good practice.*

285. Law no. 10419 of 26 May 2011 ratifying the Financing Agreement describes (in its English translation) Section 4 of the Agency Agreement as:[236]

> *The Agent shall not make any amendament, alteration or modification of the Contract, without the prior written consent of IDB, that may: a) result in an increase in the contract price; or b) at an extension of the termination date; or c) in a change of the specification, or d) is inconsistent with common good practice.*

286. The Tribunal understands Respondent's position in essence to be that: (i) the Contract Amendments are not in accordance with usual good practice; (ii) therefore the absence of prior written consent by the IDB for the Contract Amendments breaches Section 4 of the Agency Agreement; and (iii) as a result of the ratification of the Agency Agreement such breach results in nullity of the Contract Amendments under Article 92 ACC.

287. The Tribunal notes the discrepancy between the wording of Section 4 of the original Agency Agreement and the wording of that Section 4 in Law no. 10419, which may be caused by retranslation of the Albanian text of Law no. 10419 into English. As Respondent asserts that through ratification, Section 4 of the Agency Agreement became a mandatory provision of Albanian law, the Tribunal will base its analysis on the wording of Section 4 of the original Agency Agreement. The discrepancy is in any event minimal and non-substantive.

288. As it is common ground between the Parties that the Contract Amendments comprise "amendments, alterations or modifications" of the Contracts, the issue before the Tribunal is whether these changes may not be in accordance with usual good practice.

289. The Tribunal will start its analysis with the observation that it is generally accepted in international arbitration that the responsibility for proving a particular allegation is upon that party that makes the allegation. This is in line with Albanian law.[237] As Respondent relies in support of its defence on the assertion that the Contract Amendments may not be in accordance with usual good practice, the burden of proving this assertion lies with Respondent.

290. Respondent claims that: (i) contract amendments entailing substantive changes that affect the behaviour of the parties, contract rules or mechanisms and bring significant consequences, such as price increases, technical changes, deadlines or consequences that affect the performance of the contract and project, must be deemed inconsistent with usual good practice; and (ii) the purpose of referring to usual good practice is to interpret the practice as a whole. The Tribunal will accordingly examine whether the facts cited by Respondent in support of its assertion that the Contract Amendments may not be in accordance with usual good practice amount to

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236 Exhibit R-31.

237 Article 12 Albanian Code of Civil Procedure provides: "*The party asserting a right shall be subject to the obligation of establishing the facts whereon he/she bases its claim in compliance with the law*." See, https://euralius.eu/index.php/en/library/albanian-legislation/send/51-civil-procedure/257-civil-procedure-code-en.

substantive changes with significant consequences that affect the performance of the contract and/or the project against the general background of this project.

291. Respondent's first argument that the Contract Amendments are inconsistent with usual good practice because General Conditions can, absent a contractual basis in the FIDIC contract itself, not be amended, fails to convince the Tribunal. The Tribunal already found that there is nothing in a FIDIC contract that prevents the Parties to agree under applicable national law to amend the terms of such contract after conclusion thereof, including amendment of the applicable General Conditions through appropriate further Particular Conditions or otherwise.[238] Respondent does also not explain how any amendment of the General Conditions must by definition amount to substantive changes with significant consequences affecting the performance of the contract or the project. Respondent's alternative argument, that modification of General Conditions is expressly prohibited in the IDB Standard Bidding Documents for Procurement of Works and its User's Guide, has already been dismissed by the Tribunal for want of any term or indication in the IDB Standard Bidding Documents, its User's Guide, the FIDIC contracts, or the FIDIC Contracts Guide that prescribes that the Conditions of Contract are after conclusion of the contract carved in stone and thus any amendment of the Conditions of Contract after conclusion of the contracts is precluded.[239] The assertion that any post-conclusion amendment affecting the General Conditions may not be in accordance with usual good practice and therefore subject to prior written consent by the IDB has not been substantiated by Respondent. It may in the Tribunal's view even be deemed good practice not to stick to the General Conditions as being carved in stone in all circumstances, but rather to amend the Conditions of Contract after conclusion of the Contracts if the circumstances so require to allow the Parties to appropriately adapt such terms to allow proper performance of the Contracts and the project.

292. Respondent's additional argument raised in its post-hearing brief that the decision-making by the (A)DRB and the (A)DRB Decisions themselves may have financial implications potentially resulting in a modification of the Contract Price and that the Contract Amendments are therefore subject to prior written consent by the IDB does not make clear whether Respondent intends to raise the – new and therefore belated – argument that prior written consent by the IDB is also required under Section 4 sub (a) of the Agency Agreement (amendments which may result in an increase of the Contract Price) or intends to argue that the amendments are not in accordance with usual good practice (Section 4 sub (d)) because they may potentially result in an increase in the Contract Price. In both cases Respondent's argument fails, because it is not the decision-making and the (A)DRB Decisions themselves that have financial implications, but rather the claims of the Contractor pursuant to the terms of the Contracts. At that time there were two decisions of the Engineer regarding claims of the Contractor with financial implications, in relation to which both Parties issued notices of dissatisfaction and which disputes has to be resolved in arbitration via Sub-Clause 20.8 as the Parties had failed to timely appoint a DB. Both Parties agreed in the Contract Amendments to institute the (A)DRB's as an intermediate step to prevent the substantial costs of arbitration proceedings, whilst maintaining the possibility to

238 See above, ¶ 257.
239 See above, ¶¶ 250-251.

resort to arbitration in case of dissatisfaction with the decisions of the (A)DRB. Accordingly, it remained in the Parties' own hands whether the claims of the Contractor pursuant to the terms of the Contracts, regardless of the decisions of the (A)DRB, would have consequences for the Contract Price. Even after the Contract Amendments, arbitration remained the final decision making process whereby consequences for the Contract Price would be decided, and, in consequence, the Tribunal does not accept that the Contract Amendments did have the potential to result in an increase of the Contract Price. Also, the original Contracts provided for a DB and the Tribunal fails to see how re-instituting a DB, albeit under somewhat different conditions, which the Tribunal will address below, may have resulted in substantive changes with significant consequences that affect the performance of the contract and/or the project.

293. Respondent's further arguments that the Contract Amendments may not be in accordance with usual good practice can be summarised as it not being in accordance with usual good practice: (i) to re-institute a DB after the Parties failed to timely appoint a DB; and/or (ii) to replace a standing DB by an *ad hoc* DB; and/or (iii) to have the chairman appointed by the first two members as opposed to recommendation by the first two members and agreement by the Parties; and/or (iv) to reduce the time period for the DB to give its decision from 84 days to 56 days (Segment 3 Contract) and 70 days (Segment 1 Contract); and/or (v), for the Segment 3 Contract, to delete the amicable settlement phase prior to commencement of arbitration.

294. The Tribunal finds helpful support for its analysis in the Claimants' reference to the FIDIC Golden Principles ("GP" or "GPs").[240] The GPs, developed in 2019 by a Task Group of FIDIC, identify the essential elements of a FIDIC contract. FIDIC considers it misleading and inappropriate to refer to a contract using the FIDIC General Conditions that does not comply with the GPs as a "FIDIC contract". FIDIC writes in the introduction to the GPs:[241]

> *The brand of FIDIC, amongst other things, represents fair, balanced and well recognised forms of construction and engineering contract and agreement forms. FIDIC GCs are based on fair and balanced risk/reward allocation between the Employer and the Contractor and are widely recognised as striking an appropriate balance between the reasonable expectations of these contracting Parties. Accordingly, a contract recognised as a FIDIC Contract has real commercial value to both the Employer and the Contractor, both at the tendering stage, and during execution of the Contract.*

The GPs are underpinned by a number of key considerations, including that "disputes are avoided to the extent achievable, minimised when they do arise, and resolved efficiently".[242]

295. Of the five GPs, the Tribunal considers GP4 and GP5 to be of particular importance for the Contract Amendments. GP4 provides that "all time periods specified in the contract for Contract Participants[243] to perform their obligations must be of a reasonable duration." Changes must be justifiable and the changed time period must be reasonable for and proportionate to the

240 See, https://fidic.org/sites/default/files/_golden_principles_1_12.pdf.
241 FIDIC Golden Principles (1st Ed., 2019), p. 6.
242 FIDIC Golden Principles (1st Ed., 2019), p. 7.
243 Defined as "*All the persons referred to in a FIDIC Contract, including the Contractor, Employer, Engineer, Employer's Representative, Dispute Adjudication Board, Subcontractors, etc*."

performance of the corresponding obligation. GP5 provides that, unless there is a conflict with the governing law of the contract, "all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration." The Dispute Avoidance/Adjudication Board (DAAB)/ Dispute Adjudication Board (DAB) has according to FIDIC evolved as an important mechanism to provide the Parties with a procedure for resolving disputes (at least provisionally) at much lower cost and in much less time than required for arbitration. FIDIC considers the availability of an independent and impartial DAAB or DAB to (provisionally) resolve disputes is fundamental to a fair and balanced contract.[244] As guidance, the FIDIC Golden principles state:[245]

> *GP5 requires that the Contract provide for a DAAB (or a DAB) to give a provisionally binding decision on any formal dispute, as a condition precedent to referring a dispute to arbitration. Compliance with GP5 (and GP1) entails retention of the GCs clauses referring to the role and operation of the DAAB/DAB, and not significantly changing its role, duties, obligations and rights as defined therein.*

296. The Contracts provided for a standing DB to be appointed within 28 days after the Commencement Date. The Parties failed to appoint a DB within this time period. The Tribunal finds re-instituting a DB through amendment of the Contracts to be perfectly in line with GP5 in that it re-introduces a DB to give a provisionally binding decision on the pending disputes, as a condition precedent to referring a dispute to arbitration instead of a direct reference to arbitration under Sub-Clause 20.8. Respondent failed to explain in its submissions how re-introducing a DB, where the Parties had agreed to a DB in their contract, but failed to appoint such DB in time, amounts to a substantive change with significant consequences that affect the performance of the Contracts. The Tribunal therefore finds that Respondent failed to demonstrate that re-instituting a DB through amendment of the Contracts may not be in accordance with usual good practice. It rather seems the opposite to the Tribunal.

297. The Contract Amendments did, however, not re-introduce a standing DB, but an *ad hoc* DB. Respondent correctly states that a standing DB has certain benefits over an *ad hoc* DB, notably with respect to dispute avoidance, but that is negated the fact that when the Engineer rendered his decisions in May and July 2017, the works for both Segments were in a final phase. At that time, there was no longer any apparent benefit in appointing a standing DB over an *ad hoc* DB to resolve the disputes pending between the Parties. Dispute avoidance had become moot and a standing DB appointed at that time would not have any better view or knowledge of the case than an *ad hoc* DB appointed at the same time. As noted by Respondent, the claims reviewed by the (A)DRB related to period 2013-2014 and 2015-2016 and by the time when the ADRB and the DRB were established the claims we already filed and determined by the Engineer.[246] It may be the case, as argued by Respondent, that arbitration via Sub-Clause 20.8 would have resulted in a "more guaranteed" dispute settlement process, but the Parties, including Respondent, decided otherwise, whilst expressly leaving open access to arbitration in case a

244 FIDIC Golden Principles (1st Ed., 2019), p. 12.
245 FIDIC Golden Principles (1st Ed., 2019), p. 13.
246 PHB Respondent, ¶ 26.

Party would timely issue a notice of dissatisfaction regarding the decisions of the (A)DRB. The Tribunal notes that GP5 does not prescribe any particular form of DB. GP 5 only refers to availability of an independent and impartial DB to (provisionally) resolve disputes as being fundamental. Where replacement of a standing DB by an *ad hoc* DB could arguably be qualified as a substantial change, Respondent failed to demonstrate how re-introducing in 2017 an *ad hoc* DB in the Contract Amendments to cure the lack of timely appointment in 2012 of a standing DB entails significant consequences that affect the performance of the Contracts. For these reasons the Tribunal holds that Respondent failed to demonstrate that in the given circumstances replacing the standing DB as agreed, but not effectuated, in 2012 by an *ad hoc* DB in 2017 may not be in accordance with usual good practice.

298. Respondent's further argument that appointment of the chairman of the DB by the first two members as opposed to recommendation by the first two members and agreement by the Parties is contrary to usual good practice, in that it removes the Parties' right to consent to the chairman and carries the risk of abuse, also fails to convince the Tribunal. First, Respondent ignores that the Parties freely agreed to waive such right and thus accepted the increase in authority of the first two members. Second, GP5 puts emphasis on the availability of an independent and impartial DB. Independence and impartiality of the DB members is safeguarded by the members accepting in the (A)DRB-Agreements with the Employer and the Contractor to be bound by the General Conditions of Dispute Adjudication Agreement, particularly the extensive provisions regarding independence and impartiality set forth as the general obligations of the member in Clause 4 thereof. Third, compliance with GP5 entails according to FIDIC not significantly changing the role, duties, obligations and rights of the DB as defined in the General Conditions.[247] A change in the appointment method of the chairman does not qualify as such. Fourth, Respondent failed to explain what concrete "risk of abuse" arises from the first two members appointing the chairman in these circumstances. Fifth, Respondent failed to explain how the Parties agreeing to have the first two members appointing the chairman as opposed to them recommending a chairman for the Parties to agree on, amounts to a substantive change with significant consequences, let alone that the consequences, if any, affect the performance of the contract. The Tribunal concludes that Respondent failed to demonstrate that the change in appointment method of the chairman in the Contract Amendments may not be in accordance with usual good practice.

299. Reduction of the time period for the DB to render its decision is not precluded by GP4, as it only requires that such time period must be of reasonable duration. FIDIC distinguished between "fixed" and "default" time-frames in its General Conditions, depending on whether they are qualified by a phrase such as "unless the parties agree otherwise" or its import. Fixed time-frames (*i.e.*, those that are not qualified by a phrase such as "unless the parties agree otherwise" or its import) should not be significantly changed from the value in the General Conditions. Default time-frames (*i.e.*, those that are qualified by a phrase such as "unless the parties agree otherwise" or its import) may be amended, but should not provide unreasonably short (*i.e.*, insufficient time for the Contract Participant to perform its duties properly) or unreasonably

247 FIDIC Golden Principles (1st Ed., 2019), p. 13.

long timeframes.[248] The Contracts initially provided that the DB shall give its decision within 84 days after receiving the reference, or within such other period as may be proposed by the DB and approved by both Parties, which in the Tribunal's view amounts to a "default" time-frame. The issue then is whether the reduction of the decision period to 56 days (Segment 3) or 70 days (Segment 1) would provide sufficient time to the (A)DRB to perform its duties properly. The Tribunal finds this to be the case. First, at the time the respective reductions were agreed in the Contract Amendments, the Engineer had made the determinations of the Contractor's claims and the Parties had expressed their dissatisfaction and the scope of their remaining disputes was known. The Parties were therefore in a position to make a reasoned estimate of the time required for the (A)DRB to render a decision on these specific disputes. Second, the Parties maintained in the Contract Amendments the option for the (A)DRB to propose for agreement by the Parties a different time period, so that the (A)DRB could request an extension of the time period in case it would deem it insufficient to do its work properly. Third, the (A)DRB Decision were in fact given well within the respective 56-day and 70-day time periods. Also in this case, Respondent failed to elaborate on any significant consequences of the change in the decision periods for the (A)DRB and how those consequences would have affected the performance of the Contracts. Therefore, also in respect of the change in the Contract Amendments of the original decision period for the DB of 84 days to 56 days for the ADRB in the Segment 3 Contract and to 70 days for the DRB in the Segment 1 Contract the Tribunal finds that Respondent failed to demonstrate that such change may not be in accordance with usual good practice.

300. The final issue which, according to Respondent, is not in accordance with usual good practice is the deletion of the amicable settlement sub-clause in Contract Amendment No. 7. Again, the Tribunal is not persuaded. Contrary to what Respondent argues, deletion of the sub-clause does not prevent the Parties from finding common agreement before resorting to arbitration. There is nothing that prevents the Parties from doing so in the absence of Sub-Clause 20.5 [Amicable Settlement]. In fact, the FIDIC forms do not even restrict the Parties' attempt to reach amicable settlement to this period: the parties are free at any time to pursue settlement. This may be after referral of a dispute to the DB for a decision, during and in parallel to the referral to the DAB, or after any arbitration has been commenced.[249] The effect of Sub-Clause 20.5 is to create a waiting period of 56 days after notice of dissatisfaction has been given for the Parties to attempt to achieve a settlement. In case of Contract Amendment No. 7, the Parties have apparently considered this additional waiting period moot, considering that they could also discuss amicable settlement during the ADRB procedure or at any time afterwards. The Tribunal also attached importance to the fact that the amicable settlement procedure in Sub-Clause 20.5 is according to FIDIC not a contract principle to be considered "inviolable and sacrosanct" as it is not addressed in the context of the GPs. Respondent failed to explain the consequences of deletion of Sub-Clause 20.5 as well as how those consequences, if any, would have affected the performance of the Segment 3 Contract. Respondent accordingly failed to demonstrate that deletion of Sub-Clause 20.5 in Contract Amendment No. 7 may not be in accordance with usual good practice.

248 FIDIC Golden Principles (1st Ed., 2019), p. 13.
249 See, *e.g.*, Baker, ¶ 9.177.

301. The Tribunal has also considered whether any combination of the issues raised by Respondent as not being in accordance with usual good practice could qualify as such. After due deliberations, the Tribunal finds this not to be the case.

302. In reaching the above conclusions, the Tribunal has also taken into consideration that the relevant correspondence referred to by the Parties regarding the conclusion of the Contract Amendments and the involvement of the IDB therein has been copied to the Minister of Transport and Infrastructure, the General Director of ARA and the IDB.[250] There is no indication in the record that the Minister, ARA of the IDB ever made comments to or disagreed with the contents of these letters. To the contrary, in the letter of 17 July 2017 the PMU Director writes on behalf of the Employer to the Contractor:[251]

> *As Employer (and on IDB advice), we are asking to the Contractor to accept for Claims of Segment 1 the same procedure (settle a dispute board for this case) as it is now in place for Claims for Segment 3.*

This rather suggests to the Tribunal that the IDB, which had received the Contract Amendment No.7 on 4 July 2017,[252] agreed to its contents and even advised Respondent to enter into a similar arrangement for the Segment 1 Contract. It does not in any manner suggest that the IDB considered the Contract Amendment not to be in accordance with usual good practice.

303. The Tribunal has also considered the relevance and implications of the audits by the Ministry of Infrastructure and Energy and by the Public Finances Inspection of the Ministry of Finance, which found "illegitimacy and illegality" in implementing the Contract Amendments, and a criminal case filed with the Prosecution Office, as referred to by Respondent. Respondent has not submitted a copy of the audit by the Ministry of Infrastructure and Energy. From the parts of the audit report by the Public Finances Inspection of the Ministry of Finance that were translated into English,[253] the Tribunal concludes that the audit was limited to Contract Amendment No. 12 and moreover was based on the assumption that Contract Amendment No. 12 required prior written consent of the IDB without providing any explanation for this assumption. The Tribunal concludes from the translated part of the report of the criminal investigation submitted by Respondent that the investigation by the Public Prosecutor's Office is still in progress.[254] This was confirmed by the Parties at the hearing.[255] Respondent has referred to these audits and the criminal investigation, without explaining their ramifications for the analysis to be performed by the Tribunal. The Tribunal finds in the exhibits submitted by Respondent no reason to amend or reconsider its findings above.

Conclusion

304. The Tribunal holds for the above reasons that Respondent has failed to demonstrate that the Contract Amendments may not be in accordance with usual good practice. To the extent that

250 Exhibits C-13, C-14, C-19, C-20, C-71-74, R-5-11, and R-16.
251 Exhibit R-16 (underlining by the Tribunal).
252 Exhibit C-72.
253 Exhibit R-27.
254 Exhibit R-28.
255 Transcript Hearing Day 1, 89:11-35 and 104:4-12.

Respondent intended to rely also on Section 4 (a) of the Agency Agreement, the Tribunal holds that Respondent has also failed to demonstrate that the Contract Amendments may result in an increase in the Contract Price.

305. As Respondent's reasoning already fails at its first step, Respondent failed to establish that the absence of prior written consent by the IDB for the Contract Amendments does result in a breach of Section 4 of the Agency Agreement. The Tribunal therefore no longer needs to consider whether as a result of the ratification of the Agency Agreement such breach results in nullity of the Contract Amendments under Article 92 ACC.

306. Next, the Tribunal will consider Respondent's argument that the (A)DRB Decisions lack any effect due to lack of involvement of Respondent in the selection of its (A)DRB member and in the proceedings before the (A)DRB.

G. Involvement of Respondent in the (A)DRB Decisions

307. Respondent submits as a further defence that is not bound by the (A)DRB Decisions, because: (i) the ADRB and the DRB were not created in accordance with the contractual stipulations as – without authorisation to such effect – the PMU, and not Respondent, selected the Employer's representative; and (ii) Respondent did not participate in the process as – without authorisation to such effect – the PMU, and not Respondent, made submissions to the ADRB and to the DRB.[256]

308. Claimants respond that the PMU is fully in charge of the projects, is part of the Employer and is as such authorised to represent the Employer. The actual appointment of the members of the (A)DRB and the granting of power to the (A)DRB is through the Dispute Adjudication Agreements signed by ARA. The fact that ARA has always signed the Contracts and the Contract Amendments together with PMU represents the will of ARA on their content and ratifies also the rightful action of PMU to have signed them as part of the Employer. The submissions to the (A)DRB were made by the PMU, the entity which is defined as Employer's representative in the Dispute Adjudication Agreements.[257]

Respondent's Position

309. Referring to letters of 6 and 24 July 2017 by the PMU Director to Mr Werner Michallek,[258] which were copied to, *inter* alia, ARA and the IDB, in which Mr Michallek was invited to accept appointment as ARA representative in the (A)DRB, Respondent claims that in its quality as Employer, it did not take part in the selection of the Employer's representative in the ADRB and in the DRB. Instead, the selection was made by the PMU though its director without authorisation or delegation from ARA to the PMU Director to such effect.[259]

256 Rejoinder, ¶¶ 27-51.
257 PHB Claimants, Section 6.
258 The exhibits submitted by Respondent do not include a copy of these letters.
259 Rejoinder, ¶¶ 35-36 and 46-47.

310. Respondent's position finds support in the Queleshi Report, in which Ms Queleshi opines that the consequence of the procedure and appointment of the ADRB member and the DRB member done by the PMU without the delegation of ARA as part of the contracts is the invalidity of the procedure.[260]

311. Referring to letters of 31 July 2017 and 10 August 2017 by the PMU Director to the ADRB and the DRB, in which, according to Respondent, the PMU Director has submitted its statement with regard to the Engineer's evaluations of the Contractor's claims,[261] Respondent claims that in its quality as Employer, it did not take part in the (A)DRB procedures. It was just the PMU through its director who took part in the procedures before the (A)DRB without authorisation or delegation from ARA to the PMU Director to such effect. Respondent asserts that ARA had no representation in the process.[262]

312. Respondent asserts that for these reasons the (A)DRB Decisions do not cause any consequence for Respondent.[263]

Claimants' Position

313. Claimants submit that the PMU is part of the Employer. It signed the Contracts in the name and on behalf of the Employer. The PMU is as part of ARA specified as the Employer in the Particular Conditions of the Contracts.[264] Order No. 57 of 8 May 2011 gave the PMU as tasks, *inter alia*: (iii) financing and management of the entire project of Tirana - Elbasan Road, including also the tunnel in this road segment and administration aspects including contract management and disbursement; (iv) evaluation, monitoring and reporting on overall project implementation; and (v) any other task specified under the Financing Agreement. The latter agreement defines the PMU's responsibilities as, *inter alia*: (ii) project finance and administration aspects including contract management and disbursements; and (iii) evaluation, monitoring and reporting on overall project implementation. In line therewith the Contracts and the Amendments thereto are all signed by the PMU as part of the Employer/ARA. Claimants submit this makes clear that the PMU as part of the Employer is fully in charge of the projects.[265]

314. Claimants dispute that the PMU appointed the second members of the (A)DRB; it merely nominated them. The actual appointment and the granting of power to the ADRB and the DRB was made in the respective (A)DRB-Agreements, which were signed by ARA and in which the Parties empowered the (A)DRB to act as DB and to make binding decisions. ARA (the Employer) has according to Claimants agreed on the selection of its (A)DRB member, since ARA together with PMU signed both the Contract Amendments the Dispute Adjudication Agreements for the appointment of DB Member, and did not challenge such selection until these proceedings, either on contractual basis or legal basis.[266]

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260 PHB Respondent, ¶ 53; Queleshi Report, ¶ 40.
261 Exhibits C-25 and C-32.
262 Rejoinder, ¶¶ 37-38 and 48-49.
263 Rejoinder, ¶ 49.
264 PHB Claimants, ¶¶ 64-67.
265 PHB Claimants, ¶¶ 68-75.
266 PHB Claimants, ¶¶ 76-91.

315. In respect of the written submissions made to the (A)DRB, Claimants submit in addition to the above that both (A)DRB-Agreements signed by ARA define the PMU as Employer's representative.[267]

316. Claimants finally argue that Respondent created, throughout the whole contractual period and not only in relation to the disputes, the impression, and the Claimants reasonably accepted it, that the Employer is being represented by the PMU. The proper representation of the Employer was never questioned either during the procedure before the dispute boards or after their decisions were issued. This means according to Claimants that, even if there would be an issue with the representation of the Employer in the procedure, it has been rectified because of the unreserved participation and by the fact that this issue was not a reason for the challenging of the decisions of the (A)DRBs.[268]

The Tribunal's Analysis and Discussion

317. The Parties' experts Ms Queleshi and Mr Lazimi disagree whether the PMU must be considered an administrative organ or authority subject to the provisions of the Albanian Administrative Procedures Code. Ms Queleshi submits that any claim, allegations and/or documents signed by the PMU outside the competencies delegated to this body by Order No. 57 of 8 May 2011, or without any other authorization/delegation by the administrative body (*i.e.*, ARA as the Employer) is in infringement of Articles 28 and 29 AAPC,[269] and as a result it does not bring any consequence for Respondent.[270] Mr Lazimi opines that these provisions do not apply as the PMU is not an administrative authority. The PMU is in his view part of Employer because this

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267 PHB Claimants, ¶ 92.

268 PHB Claimants, ¶¶ 94-96.

269 Quoted in the Queleshi Report, ¶ 38, as Article 28 AAPC providing:

1. *The competent public bodies may delegate their competencies to another public body.*
2. *The competent public bodies may delegate their competencies provided to them by means of law or bylaws to their subordinated bodies.*
3. *The collegial bodies of the public administration may not delegate their competencies to their heads.*
4. *The delegated body shall be prohibited to subdelegate to a third body the competencies, which it has obtained through delegation.*
5. *Any decision of the delegating body, the aim of which is to authorize the delegated body to sub-delegate the sub-delegated competencies shall be invalid.*

And as Article 29 AAPC providing:

1. *When permitted by law, the delegation of competencies shall be made at any case upon a decision of the delegating body to the bodies under its subordination, and upon a decision or agreement in those cases where the delegated body is under the subordination of the delegating body.*
2. *The act of delegation shall define the following:*
   a) *the delegated competencies;*
   b) *the financing of the delegated tasks;*
   c) *the institution assigned with the supervision, as well as the scope and supervisory instruments;*
   d) *the criteria of interruption and mechanisms for the performance of delegated tasks in the case of interruption of delegation;*
   e) *the starting date of the exercising the delegated competencies.*
3. *The delegation of the competencies shall be published in the "Official Journal" or in the public announcement bulletins. In the case of local administration (…)*

270 Queleshi Report, ¶¶ 36-41.

unit created by law is vested with administration and management functions of contract just like ARA. Such representative authority is given to the PMU by law.[271]

318. Both experts seem to agree, however, that Order No. 57 of the Minister of Public Works and Transport of 8 May 2011, which was according to its heading made in accordance with the powers granted by law, is determinative for the authority granted to the PMU.[272]

319. Mr Lazimi submits that the responsibilities of the PMU under the Financing Agreement, included in Order No. 57 by reference, for financing of the project and administration aspects, including the contract management and disbursements, and evaluation, monitoring and reporting functions regarding general implementation of the project already entail representative authority to appoint the Employer's (A)DRB member and make submissions to the (A)DRB. Contract management includes, according to Mr Lazimi, the administration of pre arbitral steps, one of which is the establishment of a DB, either standing or on an *ad hoc* basis. The key principle of contract management is to establish a dispute resolution mechanism and resolution of disputes, through multi-tiered dispute resolution processes in accordance with the Contracts.[273]

320. Ms Queleshi bases her opinion on Order No. 57 of 8 May 2011, but in a version lacking the PMU's obligation for "Financing and management of the entire project of Tirana - Elbasan Road, including also the tunnel in this road segment and administration aspects including contract management and disbursement" as included in the complete version of Order No. 57 as submitted by Respondent as Exhibit R-32 at the specific request of the Tribunal.[274] As Ms Queleshi bases her report on the material made available by Respondent,[275] the Tribunal must conclude that her opinion is based on an incomplete version of Order No. 57. During the hearing it became clear that Ms Queleshi's report was based on the assumption that proper authority of the PMU Director to appoint (A)DRB members and make submissions to the (A)DRB was lacking:[276]

> Dr Skouris: *(...) So this was signed after the appointment of Mr Michallek and before all submissions before the dispute board, time-wise speaking. Are you still of the view that ARA has not been either a party properly represented, or included in the procedure before the two dispute boards?*
>
> Ms Queleshi: *First let me clarify the fact that I have answers to the questions posed to me by my instructor, presuming that the question is correct. So -- and the answer given is based on the question posed, whether the authorisation that Mr Albens Alite had from ARA was the right one, there was any authorisation or not, it is up to you to debate as legal counsellors and of the tribunal to decide. I was posed the question whether in the*

271 Lazimi Report, ¶¶ 5.3-5.5.
272 See above, ¶ 86.
273 Lazimi Report, ¶¶ 5.2 and 5.5.
274 Queleshi Report, ¶ 36.
275 Queleshi Report, ¶ 36 ("*As stating by the material made available to me by my instructor, PMU was established by means of the Decision of the Council of Ministers no.57, dated 08.05.2011.*") and ¶ 5 ("*For the preparation of this report I have examined the main documents put at my disposal my instructor, the State Advocates Office of the Republic of Albania, as list of exhibits*.")
276 Transcript Hearing Day 2, 70:11-71:17

> *situation when Mr Alite does not have any authorisation and the PMU is not -- sorry, and ARA is not part of the -- has not participated in choosing the members of the DAB and following the procedure, whether this situation would be legal or not, would be valid or not, and my answer in paragraphs 33 and 35 is based -- sorry, not 33 and 35, in 35 and up to 39 is based on this presumption.*

She was not asked to opine on the existence of sufficient authorisation to such effect.[277]

321. The Tribunal holds that appointments of members of the (A)DRB and making of submissions to the (A)DR, if not already contract management responsibilities as referred to under sub (i) of Order No. 57, must in any event be considered responsibilities that are covered by the PMU's wider responsibility for financing and management of the entire project as granted under sub (iii) of Order No. 57.[278] Already for this reason, the Tribunal rejects Respondent's claim that such appointments and submissions do not cause any consequence for Respondent for lack of proper authorisation.

322. But even if such authorisation would be lacking, Respondent's argument fails.

323. Regardless whether, as argued by Claimants, the appointment is actually effectuated in the (A)DRB-Agreements, the signing by ARA of these agreements between the (A)DRB members, the Employer and the Contractor must in any event be considered an approval by Respondent of Mr Michallek's appointments as member of the ADRB and as member of the DRB. Such later approval by ARA cures pursuant to Article 78 ACC any lack of authority of the PMU and/or its director in this respect.[279]

324. Even if the PMU was not authorised to make submissions to the (A)DRB and even if these submissions are made, as argued by Respondent, in infringement of Articles 28 and 29 AAPC and therefore without any consequences for Respondent, the (A)DRB Decisions based on these submissions remain decisions pursuant to Sub-Clauses 20.4 of the Contracts and the (A)DRB-Agreements, and are binding on both Parties pursuant to these Sub-Clauses. Absent any notice of its dissatisfaction within 28 days after receiving the (A)DRB Decisions, which was not given by any of the Parties, the (A)DRB Decisions have become final and binding upon Respondent, irrespective of an alleged lack of authority to make submissions on behalf of Respondent.

325. The Tribunal has again considered the relevance and implications of the audit by the Public Finances Inspection of the Ministry of Finance, which found "the procedures that have been followed by the Project Management Unit for the establishment of the Dispute Board in order to adjudicate the Contractor's claims" non-legitimate, and a criminal case filed with the Prosecution Office, as referred to by Respondent. From the parts of the audit report by the Public

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277 Transcript Hearing Day 2, 70:20-71:17.

278 See above, ¶ 86.

279 Lazimi Report, ¶ 5.6; Article 78 ACC provides: "*When a natural or legal person acts as a representative without having this quality, as well as when the representative exceeds the rights conferred to him, the legal acts carried out in these conditions are not compulsory for the person on whose behalf they have been conducted, unless he has approved them later*" (https://euralius.eu/index.php/en/library/albanian-legislation/send/71-civil-code/231-civil-code-en).

Finances Inspection of the Ministry of Finance that were translated into English,[280] the Tribunal concludes that the submission made to the (A)DRB by the PMU Director was considered to be made exceeding his competences without providing any reasoning, particularly without any analysis of the scope of the PMU's authority as granted by Order No. 57. The translated part of the report of the criminal investigation merely shows that the investigation is still in progress.[281] The Tribunal finds in the exhibits submitted by Respondent no reason to amend or reconsider its findings above.

Conclusion

326. The Tribunal concludes that Respondent failed to demonstrate that it is not bound by the (A)DRB Decisions because the ADRB and the DRB were allegedly not created in accordance with the contractual stipulations, and Respondent did not participate in the process.

327. In the following Sub-Section, the Tribunal will analyse the consequences, if any, of Respondent's qualification of the Contracts as "administrative contracts".

H. Qualification as Administrative Contracts

328. The Parties disagree whether the Contracts, including the Contract Amendments, are to be qualified as administrative contracts under Albanian law, and, if so, what are the consequences of such qualification. Respondent submits that the Contract Amendments are null and void, as the Contracts as administrative contracts can only be modified pursuant to Article 123 AAPC, which was not done in this case. Moreover, the acts undertaken by the PMU during the negotiation of the Contract Amendments and their execution were not in compliance with the Financing Agreement and the Order No. 57 of 8 May 2011 and therefore in breach of Articles 119 and 120 AAPC, rendering the Contract Amendments null and void.

Respondent's Position

329. In its Rejoinder, Respondent raised the argument that the Contracts, including the Contract Amendments, are to be considered as administrative contracts subject to the provisions of the Albanian Administrative Procedures Code. Only to matters not expressly regulated by the AAPC, the corresponding provisions of the Albanian Civil Code shall apply.[282]

330. Unlike private contracts, the public authority's freedom of contract in administrative contracts is limited. Respondent submits that in this case its authority is limited by Law No. 10419 of 26 May 2011 ratifying the Financing Agreement, which stipulates that written approval of the IDB for the negotiated contract terms is required prior to signature by the Agent and the choice of the Contractor is also subject to the IDB's approval. Respondent submits that amendment or modification of an administrative contract cannot be based on principles of the Albanian Civil Code.[283] According to Respondent, any modification of the conditions of the Contracts (as the

280 Exhibit R-27.
281 Exhibit R-28.
282 Rejoinder, ¶¶ 93-103
283 Rejoinder, ¶¶ 104-109.

Tribunal understands without IDB's approval), despite being with the Parties' consent, does directly infringe the principle of IDB procurement procedure and as a consequence is forbidden by the latter. [284]

331. Respondent submits that any contract modification outside Article 123 AAPC, which provides for amendment or dissolution of the contract in case of unforeseen circumstances, is illegal and does not oblige the public contracting authority to apply the modification of contract terms despite of the fact that it has agreed to do so by signing the contract amendment. [285]

332. Respondent argues that Claimants have omitted to refer to Article 122 AAPC, which provides that the invalidity of an administrative contract shall be governed by the provisions of the Albanian Civil Code on the invalidity of the legal actions and shall also be invalid in case the requirements of Articles 119 and 120 AAPC have not been complied with. Respondent finds that all acts undertaken by the PMU during the negotiation of the Contact Amendments and their execution were not in compliance with the requirement of prior IDB consent under the Financing Agreement and the authority granted to the PMU in Order No. 57 of 8 May 2011 and therefore the Contract Amendments are null and void. [286]

333. In support of its position, Respondent submitted with its Rejoinder the Queleshi Report.

334. In its Post-Hearing Brief, Respondent neither addressed the qualification of the Contracts as administrative contracts nor the consequences thereof.

Claimants' Position

335. Claimants in essence argue that the Contracts as FIDIC model contracts do not have the essential characteristics of an administrative contract. Exorbitant clauses are lacking. [287]

336. In support of their position, Claimants submitted and relied on the Lazimi Report.

The Tribunal's Analysis and Discussion

337. During the hearing the issue whether the Contracts should be qualified as administrative contracts was extensively discussed.

338. During direct examination, Ms Queleshi expressed as her opinion, in line with Mr Lazimi (but contrary to Respondent's position that administrative law contracts can only be amended pursuant to Article 123 AAPC)[288] that administrative contracts can be amended, but that it

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284 Rejoinder, ¶ 110.
285 Rejoinder, ¶¶ 111-112.
286 Rejoinder, ¶¶ 113-120.
287 Transcript Hearing Day 1, 4:10-20, 20:25-22:7 and 22:17-23:17; PHB Claimants, ¶ 4.
288 Translated as per the Queleshi Report by SIGMA (http://www.sigmaweb.org/publications/Legal Commentary-by-SIGMA-on-the-Codeof-Administrative-Procedures-of-the-Republic-of-Albania-April-2018-edition.pdf) as:
1. *If due to circumstance arising after the conclusion of the contract, and unforeseeable at the time of its conclusion, the continuation of the execution of the contract obligations becomes extremely*

depends on the type of contract and on the specific procedure that the law governing the contract provides. In this context she mentioned as an example the obligation to take prior consent or prior report from the State Advocature and, assuming it is a legal requirement according to the Agency Agreement, the no-objection from the IDB to the Contract Amendments.[289] The Tribunal concludes from both experts' confirmations that administrative contracts can be amended or modified outside Article 123 AAPC and accordingly the public authority is bound by such amendment or modification if the relevant other requirements are met.

339. Respondent's argument that its authority is limited by Law No. 10419 of 26 May 2011 ratifying the Financing Agreement, particularly by the IDB procurement procedure, fails to convince the Tribunal. It may be the case that the selection of the Contractor and the terms of the Contracts are subject to approval of the IDB, but those requirements apply to the procurement process leading to the conclusion of the Contracts. The only relevant limitation deriving from Law No. 10419 of 26 May 2011 would be the requirement of prior written consent by the IDB in case of an amendment which may not be in accordance with usual good practice. In Sub-Section F above, the Tribunal already concluded that Respondent failed to demonstrate that the Contract Amendments may not be in accordance with usual good practice.

340. At the hearing, Ms Queleshi confirmed that a breach of Law No. 10419 of 26 May 2011 when entering into a contract would make such contract void, regardless of its qualification as private or an administrative contract. Administrative contracts may be void or invalid if Article 119 AAPC[290] was not complied with or – similar to private contracts – in the cases covered by Article 92 ACC.[291] As conflict with a mandatory provision of law, like, as argued by Respondent, the requirement of prior IDB consent under the Financing Agreement and the

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difficult for one of the contracting parties, they may agree on the amendment, or termination of the contract.

2. *The public body may unilaterally withdraw from the administrative contract in order to avoid or stop the violation of the public interests.*
3. *The withdrawal shall be made through a written and reasoned administrative act against compensation for the damage suffered by the other party.*

289 Transcript Hearing Day 2, 21:20-22:21 and 46:5-47:19.

290 Quoted in the Queleshi Report as Article 119 AAPC providing:

1. *A public body, in order to fulfil a public interest, which it serves to, but without affecting the interests or rights of the other parties, may conclude an administrative contract, provided that the following conditions are met:*
   a. *the contractual form is not explicitly prohibited by law, or does not come against to the nature of the administrative case itself; and*
   b. *the public body is authorized by law to decide on the case with discretion;*
2. *The administrative contract shall be concluded in writing, save for cases when the law has provided another special form.*
3. *The contract shall be signed by the parties or representatives manually or electronically, in line with the modalities defined by the legislation in force. The signature on behalf of the public organ shall be based on an authorization issued of the respective body.*

291 Article 92 ACC provides:

Invalid legal transactions do not create any legal consequences. As such are those which:

a) Come in conflict with a mandatory provision of law;
b) Are performed to deceive law;
c) Are committed by minors under the age of fourteen;
d) Are made in agreements between the parties without aiming to bring legal consequences (fictitious or simulated).

authority granted to the PMU in Order No. 57 of 8 May 2011, renders legal transactions invalid under Article 92 ACC, it is immaterial whether the Contracts are qualified as administrative or private.[292]

341. As to the claimed lack of involvement of Respondent in the appointment of its members of the (A)DRB and in the proceedings before the (A)DRB, Ms Queleshi explained during the hearing that the relevant issue, irrespective of the qualification of the Contracts, is the authority to represent ARA pursuant to Order No. 57 or another form of authorisation, and accordingly the issue is one of representation or delegation that is to be solved by public law independent of whether the Contracts are administrative or private.[293] The Tribunal agrees that irrespective of whether the Contracts are qualified as administrative or as private, the relevant issue is the PMU Director's authority to represent ARA, which the Tribunal holds to exits.[294]

Conclusion

342. The Tribunal concludes for the above reasons that its findings in Sub-Sections F and G above will not change by qualification of the Contracts, including the Contract Amendments, as administrative or private. Absent any other specific grounds for invalidity based on a qualification as administrative contracts being invoked by Respondent, the Tribunal does not need to decide whether the Contracts must be qualified as administrative contracts.

343. The Tribunal also concludes that all of the defences raised by Respondent against the binding character of the (A)DRB Decisions as agreed between the Parties in the Contract Amendments fail and therefore the Tribunal will declare, as requested by Claimants, that the Segment 1 Decision and the Segment 3 Decision are final and binding upon Respondent.

344. Claimants submit that a Final Statement with respect to the amount determined in the Segment 3 Decision was issued to the Employer on 17 November 2017 and subsequently approved by the Engineer in accordance with the provisions of the Segment 3 Contract, and as a result the amount of USD 11,665,552.31 became due and payable to the First Claimant on 3 January 2018 pursuant to Sub-Clause 14.7(c) of the Segment 3 Contract. Claimants further submit that Interim Payment Certificate 36 with respect to the amount determined in the Segment 1 Decision was issued to the Engineer on 17 November 2017 and subsequently approved by the Engineer in accordance with the provisions of the Segment 1 Contract, and as a result the amount of USD 25,220,016.37 became due and payable to the First Claimant on 12 January 2018 pursuant to Sub-Clause 14.7(b) of the Segment 1 Contract.[295] This has not been disputed by Respondent.

345. The Tribunal finds in the record that a Final Statement with respect to the amount determined in the Segment 3 Decision was issued by the First Claimant and received by the Employer not on 17 November 2017, but on 18 October 2017.[296] It was subsequently approved by the Engineer

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292 Transcript Hearing Day 2, 76:5-77:11 and 80:18-81:1.
293 Transcript Hearing Day 2, 81:2-83:25.
294 See above, ¶ 321
295 See above, ¶ 128.
296 The First Claimant issued the Final Statement to the Employer by letter of 18 October 2017, see Exhibit C-42. There is no evidence in the record of receipt by the Employer on 17 November 2017.

in accordance with the provisions of the Segment 3 Contract,[297] and as a result the amount of USD 11,665,552.31 became pursuant to Sub-Clause 14.7(c) of the Segment 3 Contract due and payable to the First Claimant 56 days later, on 14 December 2017.

346. The Tribunal finds that Interim Payment Certificate 36 with respect to the amount determined in the Segment 1 Decision was indeed issued to the Engineer on 17 November 2017 and subsequently approved by the Engineer in accordance with the provisions of the Segment 1 Contract, and as a result the amount of USD 25,220,016.37 became pursuant to Sub-Clause 14.7(b) of the Segment 1 Contract due and payable to the First Claimant 56 days later, on 12 January 2018.[298]

347. Having determined these amounts to be due and payable by Respondent, the Tribunal will next address whether these must be increased with VAT as claimed by Claimants.

I. VAT

348. The Parties expressed differing opinions on whether the amounts which the (A)DRB found Contractor entitled to in the (A)DRB Decisions can be increased with VAT in an award in these proceedings.

Claimants' Position

349. Claimants submit that the Contractor's claims are considered for the purpose of VAT application as compensations directly connected to the performed works and therefore to be included in the taxable supply, which is subject to 20% VAT in Albania. Claimants are accordingly entitled to add VAT on the claimed amounts.[299]

350. In respect of the Segment 1 Decision, Claimants are therefore entitled to add USD 5,044,003.27 for VAT to the claimed amount of USD 25,220,016.37.[300] Similarly, in respect of the Segment 3 Decision, Claimants are entitled to add USD 2,333,110.46 to the claimed amount of USD 11,665,552.31.[301]

Respondent's Position

351. In its Answers to the Requests for Arbitration, Respondent notes that the (A)DRB Decisions do "not provide the VAT applicable to the amount granted to the Claimant".[302] Respondent did not further elaborate on this in its subsequent written submissions.

352. When asked by the Tribunal for clarification, Respondent submitted at the hearing that the Claimants' prayer for relief outlined in the Terms of Reference in essence only request the

297 Exhibit C-43.
298 Exhibits C-38 and C-39.
299 SoC, ¶¶ 215-219 and 236-240; Transcript Hearing Day 1, 100:4-19.
300 SoC, ¶ 220.
301 SoC, ¶ 241.
302 Answer ICC 23998 dated 31 December 2018, footnote 2, and Answer ICC 24011 dated 2 January 2019, footnote 2.

Tribunal to determine the binding character and finality of the (A)DRB Decisions. Therefore no VAT should be applicable upon the (A)DRB Decisions.[303]

The Tribunal's Analysis and Discussion

353. The Tribunal finds that Respondent does not dispute that the amounts which the (A)DRB found the Contractor entitled to in the (A)DRB Decisions must be deemed directly connected to the performed works and therefore to be included in the taxable supply. The Contracts have been concluded on the basis of a Contract Price free of VAT.[304] Respondent has also not denied that the agreed works, including any claims in relation to those works, are VAT taxable supply and that such VAT was routinely added and included in approved Interim Payment Certificates.[305]

354. In fact, Respondent's only argument seems to the Tribunal to be that the prayers for relief outlined in the Terms of Reference "in essence only request the Tribunal to determine the binding character and finality of the (A)DRB Decisions". Claimants' prayers for relief as set forth in paragraph 79 of the Terms of Reference indeed request the Tribunal to affirm by declaration the binding character and the finality of the (A)DRB Decisions, but also expressly request as a consequence of that determination an order for payment of the amounts which the (A)DRB found the Contractor entitled to in the (A)DRB Decisions, including the VAT due over these amounts.[306]

355. Claimants have explained that according to the applicable VAT legislation, *i.e.*, Articles 39 and 40 of Law 92/2014 "On VAT in Albania", and Article 29 of the Instruction of Minister of Finance, no. 6, dated 30 January 2015, referring and defining the taxable value of the supply of construction works, the taxable value of such supply shall be the transaction value. Included in the taxable value of the supply are all the amounts, payments, goods and services received or that will be received by the supplier in the future for the equivalent value of the supply toward the buyer as well as direct subventions connected with the price of the supply. Additionally, the value of damages, penalties, compensations or indemnities payable to the supplier, having direct or indirect relation to the taxable supply are considered as construction cost and are also included in the VAT taxable value of the supply.[307] Claimants submit that the fiscal practice applied so far in the State of Albania since in the year 2000 recognises penalties or compensations directly or indirectly related to the supply, as part of the supply value, and therefore as values subject to VAT at a rate of 20%.[308] The Tribunal is satisfied and agrees that for the purpose of VAT application, Contractor's claims should be considered as compensations directly connected to the performed works, and as such to be included in the taxable supply, which is subject to VAT at a rate of 20% in Albania according to Law 92/2014.

303 Transcript Hearing Day 1, 106:4-13, referring to Procedural Order No. 2, ¶ 16.
304 Exhibits C-08, C-15 and R-04.
305 Transcript Hearing Day 1, 100:4-19.
306 See above, ¶ 132.
307 SoC, ¶¶ 217 and 236.
308 SoC, ¶¶ 218 and 237.

Conclusion

356. As: (i) Respondent has not disputed that the amounts which the (A)DRB found the Contractor entitled to in the (A)DRB Decisions are deemed taxable supply subject to VAT and that such VAT has routinely been added to payments due under the Contracts; (ii) Claimants have expressly included the VAT due on the amounts which the (A)DRB found Contractor entitled to in the (A)DRB Decisions in their claims, and (iii) the Tribunal is satisfied and agrees that for the purpose of VAT application, Contractor's claims should be considered as compensations directly connected to the performed works, and as such to be included in the taxable supply, the Tribunal will award VAT at a rate of 20% over the amounts which the (A)DRB found the Contractor entitled to in the (A)DRB Decisions.

J. Conclusion

357. It is not in dispute between the Parties that: (i) the Parties entered into the Segment 1 Contract; (ii) the First Claimant submitted a claim for extension of time and additional costs to the Engineer; (iii) the Engineer determined that the First Claimant was entitled to receive a compensation of USD 25,889,644,92 for its claim; (iv) both the First Claimant and Respondent expressed dissatisfaction with the Engineer's determination; (v) Contract Amendment No. 12 was signed on 24 July 2017 by the First Claimant and Respondent; (vi) in the Segment 1 Decision of 9 October 2017, the DRB found that the First Claimant is entitled to the sum of USD 25,220,016.37; (vii) Respondent gave no notice of dissatisfaction within 28 days after it received the Segment 1 Decision; (viii) the First Claimant submitted an Interim Payment Certificate for this amount, which was approved by the Engineer; and (ix) the amount of USD 25,220,016.37 has not been paid by Respondent.[309]

358. It is also not in dispute between the Parties that: (i) the Parties entered into the Segment 3 Contract; (ii) the First Claimant submitted a claim for extension of time and additional costs to the Engineer; (iii) the Engineer determined that the First Claimant was entitled to receive a compensation of USD 12,475,892.16 for its claim; (iv) both the First Claimant and Respondent expressed dissatisfaction with the Engineer's determination; (v) Contract Amendment No. 7 was signed on 4 July 2017 by the First Claimant and Respondent; (vi) in the Segment 3 Decision of 7 September 2017, the ADRB found that the First Claimant is entitled to the sum of USD 11,665,552.31; (vii) Respondent gave no notice of dissatisfaction within 28 days after it received the Segment 3 Decision; (viii) the First Claimant submitted a Final Statement for this amount, which was approved by the Engineer; and (ix) the amount of USD 11,665,552.31 has not been paid by Respondent.[310]

359. Respondent in essence disputes for various reasons: (i) the jurisdiction of the Tribunal; (ii) the scope and meaning of the arrangements in the Contract Amendments; (iii) the validity of the Contract Amendments; (iv) the validity of the (A)DRB Decisions; and (v) the increase of amounts payable by VAT.

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309 See above, ¶ 171.
310 See above, ¶ 172.

360. The Tribunal held in Sub-Section C above that it has jurisdiction to hear and determine Claimants' claims and that it has jurisdiction over Copri and Aktor in their capacity of members of the First Claimant as simple partnership.

361. In Sub-Section D above, the Tribunal held that in the Contract Amendments the Parties agreed:

(a) to appoint pursuant to the arrangements in the respective Sub-Clauses 20.2 to 20.4 an *ad hoc* (A)DRB to resolve disputes under the Contracts;

(b) the ADRB would render a decision in 56 days, the DRB in 70 days, or such other period proposed by the (A)DRB and agreed to by the Parties;

(c) if either Party is dissatisfied with the decision of the (A)DRB, then either Party may within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration and, except as stated in the Sub-Clause 20.6 [Failure to comply with the decision of the (A)DRB], neither Party shall be entitled to commence arbitration unless such notice has been given;

(d) if no notice of dissatisfaction has been given by either Party within 28 days after receiving the decision, the decision shall become final and binding upon the Parties and in the event that a Party fails to comply with such decision of the (A)DRB that has become final and binding, then the other Party may refer the failure itself directly to arbitration under the relevant Sub-Clause.

362. The Tribunal concluded in Sub-Section E above that there are no contractual impediments against the Parties validly agreeing the Contract Amendments, including agreeing that their disputes can be bindingly adjudicated by an (A)DRB and that if no notice of dissatisfaction has been given by either Party within 28 days after receiving the (A)DRB decision, the decision shall become final and binding upon the Parties and in the event that a Party fails to comply with such decision of the (A)DRB that has become final and binding, then the other Party may refer the failure itself directly to arbitration.

363. In Sub-Section F above, the Tribunal held that Respondent has failed to demonstrate that the Contract Amendments may not be in accordance with usual good practice or may result in an increase in the Contract Price. and therefore no breach of Section 4 of the Agency Agreement resulting in the invalidity of the Contract Amendments has been demonstrated.

364. The Tribunal concluded in Sub-Section G above that Respondent failed to demonstrate that the (A)DRB Decisions are invalid and Respondent is therefore not bound by these decisions because the ADRB and the DRB were allegedly not created in accordance with the contractual stipulations, and Respondent did not participate in the process.

365. In Sub-Section H above, the Tribunal found that its findings in Sub-Sections F and G above will not change by qualification of the Contracts, including the Contract Amendments, as administrative or private.

366. The Tribunal concluded on the basis of the analysis in these Sub-Sections that Claimants' request to declare that the Segment 1 Decision and the Segment 3 Decision are final and binding can and will be granted and that the amounts claimed by the First Claimant are indeed due and payable.

367. The Tribunal finally held in Sub-Section I above that VAT can be claimed as being due over the amounts which the (A)DRB found Contractor entitled to in the (A)DRB Decisions.

368. For these reasons, the Tribunal holds that, pursuant to the terms of the Contracts, including Contract Amendments No. 7 and No. 12, Respondent is obliged to pay USD 25,220,016.37 and USD 11,665,552.31, each amount to be increased with applicable VAT, to the First Claimant. As considered above, the Tribunal lacks the power to hear and determine the Claimants' requests for monetary relief to the extent that such relief requests the Tribunal to require Respondent to make payments to Copri and/or Aktor.[311]

369. The Tribunal will therefore order Respondent to pay to the First Claimant: (i) an amount of USD 25,220,016.37 as determined in the Segment 1 Decision of 9 October 2017 increased with USD 5,044,003.27 for 20% VAT, therefore a total amount of USD 30,264,019.64; and (ii) an amount of USD 11,665,552.31 as determined in the Segment 3 Decision of 7 September 2017 increased with USD 2,333,110.46 for 20% VAT, therefore a total amount of USD 13,998,662.77 and determine that such payment must be made immediately, as both amounts are due and payable.[312] .

370. As its final task, the Tribunal will proceed to rule on the costs of the Arbitration Proceedings.

VIII. COSTS

371. In accordance with Article 37(4) of the Rules, the Tribunal decides on the allocation of (i) the costs fixed by the Court, and (ii) the costs and expenses incurred by the Parties in these Arbitration Proceedings.

Claimants' Position

372. In their prayers for relief, Claimants request the Tribunal to order payment by Respondent of Claimants' costs of and incidental of these Arbitration Proceedings (including but not limited to, lawyers' and experts' fees).[313]

373. Claimants claim EUR 462,421.92 as compensation for its costs in relation to these Arbitration Proceedings, which claim can be summarised as:[314]

311 See above, ¶ 220.
312 See above, ¶ 345 and 346.
313 See above, ¶ 132.
314 The Tribunal notes that the specification in Claimant's Cost Submissions, ¶ 3, adds up to EUR 462,873, whereas Claimants claim a lower amount of EUR 462,421.92.

Cost Item	Amount (EUR)
Legal fees	148,814.75
Costs of expert witness	10,000.00
Disbursements	14,972.88
Payments to the ICC	271,210.36
Expenses of the Hearing	17,875.94
Total	**462,873.93**

374. Claimants submit that they are entitled to recover their costs of the arbitration from Respondent, as the rule that cost follows the event has become a prevailing approach in international commercial arbitration. Because of Respondent's non-payment of the (A)DRB Decisions, Claimants were left with no other choice than to seek such payment through the pending arbitration. Moreover, Claimants fully acted in good faith and repeatedly asked for payment of the awarded amount for a significant amount of time, before commencing these Arbitration Proceedings. To all those requests, no reply was received, and this happened only, after the Requests for Arbitration were submitted. The consequence of Respondent's wrongful decision to deny Claimants' entitlement is according to Claimants that the Respondent should be held liable for all of their costs.[315]

375. Claimants submit that all of the claimed costs fall within the frame of Article 38(1) of the Rules. The costs claimed have been reasonably incurred in the conduct of the arbitration and are reasonable in amount, considering the subject at hand, the time spent by the arbitrators and all of the relevant circumstances of the case.[316]

376. Claimants claim their costs as from 15 October 2018 (the date of submission of the first Request for Arbitration). The expenses of the hearing have been fully paid by Claimants, because Respondent expressed inability to contribute its share. The costs of legal representation include an amount of EUR 120,556.75 for Dr Panagiotis Skouris, reflecting the amount due under his contract with the First Claimant for the whole period of the Arbitration Proceedings. The Claimants submit that the work that was undertaken by Claimants' expert Mr Lazimi was independent, thorough, properly explores the issues and has been of assistance for the Arbitral Tribunal, its costs are reasonable and therefore ought to be paid by Respondent.

377. Claimants confirmed by e-mail of 19 March 2020 that they had no comments on Respondent's costs submission.

Respondent's Position

378. Respondent requests the Tribunal to order Claimants to pay EUR 66,609.50 and US$ 302,500 for Respondent's costs, which claim can be summarised as follows:[317]

315 Claimants' Costs Submission, ¶¶ 10-15.
316 Claimants' Costs Submission, ¶¶ 17-24.
317 Respondent's Costs Submission, p. 4.

Cost Item	Amount (USD)	Amount (EUR)
Legal fees		51,896.00
Costs of expert witness		10,000.00
Disbursements		4,713.50
Payments to the ICC	302,500.00	
Total	**302,500.00**	**66,609.50**

379. In respect of Claimants' costs submission, Respondent recognises that that the prevailing principle in international arbitration is indeed that "costs follow the event", but at the same time notes that the legal fees claimed by Claimants are out of proportion and unreasonably high. Until 18 March 2020 the only counsel nominated by Claimants themselves is according to Respondent Dr Skouris. Respondent cannot be obliged to pay the salary of Claimants' employee Dr Skouris. The other counsel have only participated in the main hearing and their fees are therefore extremely high. Because this has not been made known to the Tribunal and Respondent, these costs are unacceptable. As to invoice no. 19 of 13 February 2020, Respondent notes that it finds no connection between Ms Katragjini, who participated in the hearing, and Ms. Denita Kërluku who appears to be according to the invoice, the person that released this invoice. Claimants' arguments in their Submission on Costs are therefore according to Respondent to be rejected in their entirety.[318]

The Tribunal's Analysis and Discussion

380. The Tribunal's decision on costs is governed by Article 38 of the Rules, which provides in its relevant parts:

> 1. *The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.*
>
> *(...)*
>
> 4. *The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.*
>
> 5. *In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.*

381. On this basis, the Tribunal will decide on the allocation of (i) the costs fixed by the Court, *i.e.*, on the ICC administrative expenses and the fees and expenses of the arbitrators; and (ii) the legal fees and expenses incurred by the Parties.

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318 Respondent's Comments on Claimants' Costs Submissions dated 18 March 2020.

382. It is generally accepted that Article 38 of the Rules grants arbitrators broad discretion in allocating the costs of the arbitration. In doing so, arbitrators may consider, in particular, the outcome of the case, the relative success of the parties' claims and defences as measured against the relief sought, the reasonableness of the parties' positions, and the procedural conduct of the parties.

383. The Parties agree that, in exercising its discretion, the Tribunal should be guided by the principle that costs follow the event, as expressly permitted under Article 38(5) of the Rules

(a) Allocation of the ICC Administrative Expenses and the Arbitrators' Fees and Expenses

384. On 17 January 2019, the Court fixed the advance on costs at an aggregate amount of USD 605,000 pursuant to Article 37(2) of the Rules.

385. According to the Financial Table dated 23 August 2019, the Court has received payment of the full advance on costs in the amount of USD 302,500 from each Party, *i.e.*, a total amount of USD 605,000.[319]

386. On 30 July 2020, the Court fixed the fees and expenses of the arbitrators at a total amount of USD 502,649 and the ICC administrative expenses at a total amount of USD 90,351.

387. As all of the defences raised by Respondent as well as its application for interim measures were dismissed and Claimants' claims were fully granted, the Tribunal decides in the exercise of its discretion that Respondent shall therefore bear the entire costs related to the ICC administrative expenses and the arbitrators' fees and expenses fixed by the Court at USD 593,000.

388. Consequently, Respondent will be ordered to reimburse Claimants for the share Claimants have paid on the advance on costs, minus the amount of USD 6,000 thereof returned to Claimants by the ICC, *i.e.*, USD 296,500. Claimants have incurred these costs in Euro and request repayment in Euro. As Respondent has not opposed such request and the exchange rates applied, the Tribunal will order Respondent to reimburse Claimants for the share Claimants have paid on the advance on costs by payment of EUR 261,556.75.[320]

(b) Allocation of Legal Fees and Disbursements

389. With respect to the legal fees and disbursements of the Parties, the Tribunal also follows the principle of "costs follow the event" and the above considerations, in particular the outcome of the case as well as the issue of the unsuccessful interim measures application.

390. For this reason, the Tribunal first concludes that Respondent must bear all of its own legal fees and disbursements.

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319 The amount of USD 605,000 does not include the non-refundable and non-transferable filing fee in ICC Case 24011/MHM/HBH, which was not transferred to the consolidated case as per the Court's practice.

320 EUR 271,210.36 (total amount claimed by Claimants) – EUR 4,360.72 (filing fee ICC Case 24011/MHM/HBH)) x 296,500 / 302,500 = EUR 261,556.75.

391. Second, Respondent shall in principle also bear the entirety of Claimants' legal fees and disbursements because Claimants justified in bringing their claims in the present arbitration.

392. However, the reimbursement of Claimants legal fees and other expenses is subject to Article 38(1) of the Rules, which limits a claim for reimbursement to the "*reasonable legal and other costs incurred by the parties for the arbitration*".

393. Claimants' costs incurred for the interim measures and the main proceedings have been challenged by Respondent on: (i) the reasonableness of Claimants' legal costs; and (ii) the relationship between the claimed invoice no. 19 of 13 February 2020 and the services performed by Ms Katragjini.

394. Respondent's challenge of Claimants' legal costs is foremost based on the difference between the claimed legal costs of Claimant (EUR 148,814.75) and the legal costs incurred by Respondent itself (EUR 51,896.00). The Tribunal first notes as a general observation that an amount of EUR 148,814.75 for the legal costs of bringing a claim in excess of USD 40 million in ICC arbitration is in itself not unreasonable at first glance. The comparison to the legal costs claimed by Respondent seems to the Tribunal skewed by the fact that the State Advocates charge hourly fees in the range of EUR 60-80, which is considerably lower than the usual hourly rates for counsel in international arbitration.

395. A large part of Claimants' legal costs consists of the salary costs of EUR 120,556.75 of Dr Skouris for the 17 months between October 2018 and February 2020. Such costs for in-house lawyers are increasingly recognised as legitimate and reimbursable.[321] The Tribunal sees no reason in principle not to award internal costs, since, if not organised and performed internally, the matters usually encompassed within these type of costs would likely be incurred at higher costs from external providers. As Claimants have not provided details on the allocation of Dr Skouris' time between arbitration and non-arbitration activities and the Tribunal on the one hand recognises that the development of the case required substantial work, also because of Respondent's developing defence in the course of the arbitration, but on the other hand is not convinced that this arbitration has fully occupied Dr Skouris for 17 months, the Tribunal believes it appropriate to reduce these internal costs by 25 percent to EUR 90,417.56.

396. The external legal fees in the amount of EUR 28,258 for the three external counsel present at the hearing are considered reasonable by the Tribunal, also in view of the fact that due to the belated raising of the argument by Respondent that the Contracts were in fact administrative contracts and the belated submission of the Queleshi Report, which argument and report should appropriately have been raised and submitted with Respondent's Statement of Defence instead of shortly before the hearing, enlisting the help of external counsel for the hearing was reasonable. Taking into account that counsel had to prepare for the hearing, their costs of EUR 28,258 are in the Tribunal's view not unjustified or extremely high. Finally, there is no indication that Prof. Pamboukis, Mr Maravelis and Ms Katragjini were not nominated by Claimants and the Tribunal and Respondent were timely advised of their addition to Claimants' legal team. Finally, the fact that a Ms. Denita Kërluku sends an invoice for services rendered by

321 J. Fry et al, *The Secretariat's Guide to ICC Arbitration* (2012). ¶ 3-1491.

Ms Katragjini is an internal issue between them; Respondent has not disputed that the amount of EUR 6,000 charged in the invoice relates to Ms Katragjini's services in this arbitration and it is therefore appropriately included in Claimants' incurred legal costs.

397. For the above reasons, Respondent shall bear the reasonable legal fees and disbursements of Claimants, which the Tribunal finds to be:

Cost Item	Amount (EUR)
Legal fees	118,675.56
Costs of expert witness	10,000.00
Disbursements	14,972.88
Expenses of the Hearing	17,875.94
Total	**161,524.38**

398. Accordingly, Respondent must reimburse Claimants for the total amount of EUR 161,524.38.

Conclusion

399. In conclusion, Respondent shall bear: (i) the entirety of the ICC administrative expenses and the arbitrators' fees and expenses in the total amount of USD 593,000; (ii) its own legal fees and disbursements; and (iii) the reasonable legal fees and disbursement of Claimants in the amounts of EUR 161,524.38.

400. Respondent will therefore be ordered to pay to Claimants (i) Claimants' share of the advance on costs paid to and not reimbursed by the ICC, *i.e.*, EUR 261,556.75; and (ii) the amount of EUR 161,524.38 for legal fees and disbursements.

IX. OPERATIVE PART

401. On the basis of the facts and legal grounds set forth above, the Tribunal makes, in accordance with the rules of law, the following final award:

(1) The Tribunal *finds* that it has jurisdiction to hear and determine Claimants' request for declaratory relief and to hear and determine Claimants' request for monetary relief insofar as it requests the Tribunal to order Respondent to make payments to the First Claimant;

(2) The Tribunal *declares* that the "Amicable Dispute Resolution Board ("ADRB") Decision" of 9 October 2017 regarding Segment 1 and the "Amicable Dispute Resolution Board ("ADRB") Decision" of 7 September 2017 regarding Segment 3 are final and binding upon Respondent;

(3) The Tribunal *orders* Respondent to immediately pay to the First Claimant:

(a) an amount of USD 25,220,016.37 as determined in the Segment 1 Decision of 9 October 2017 increased with USD 5,044,003.27 for 20% VAT, therefore a total amount of USD 30,264,019.64; and

(b) an amount of USD 11,665,552.31 as determined in the Segment 3 Decision of 7 September 2017 increased with USD 2,333,110.46 for 20% VAT, therefore a total amount of USD 13,998,662.77.

(4) Respondent shall *bear* the arbitration costs fixed by the Court at USD 593,000 and Respondent shall therefore *pay* to the First Claimant EUR 261,556.75 as reimbursement for Claimants' share of the advance toward the ICC Court administrative fees and the Tribunal's fees and expenses;

(5) Respondent shall *pay* to the First Claimant EUR 161,524.38 as reimbursement of the legal and other costs incurred by Claimants in this arbitration; and

(6) All other and further requests and claims are *rejected*.

Place of arbitration: Paris, France

Dated: 1 September 2020

Dr Eduardo Silva Romero
Co-Arbitrator

Mr Peter Rees QC
Co-Arbitrator

Mr Willem van Baren
President