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A Case Note on the ICSID Tribunal's Decision in Hydro and Others v. Albania: Indirect Expropriation and Proportionality

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This case note delves into the complexities of balancing state regulatory authority and investor protections in the context of indirect expropriation, as exemplified in Hydro and Others v. Albania. The commentary scrutinizes the inherent structural bias of the Tribunal, which favored the sole effects doctrine over the police powers doctrine, thereby slanting the scale towards investor interests. This focus often leaves states defending not just the merits of their regulations but also the extent to which these regulations impact the investor, shifting the tribunal's attention from regulatory intent to merely quantifying investor detriment. Building on the notion of managerialism, the note argues that this bias makes it challenging for the Tribunal to shift away from its initial pro-investor stance. To restore balance, the commentary advocates for a framework guided by the police powers doctrine, enriched by the principle of proportionality. The note concludes by discussing the ramifications of continued bias, including the erosion of the regime's legitimacy, evidenced by several countries, including Albania, reconsidering or severing their affiliations with ICSID, thus signaling an urgent need for recalibration to preserve the legitimacy of the international arbitration regime.

Keywords

Indirect Expropriation – Legitimacy Crisis in Investment Arbitration – Sole Effects Doctrine – Police Powers Doctrine – Structural Bias – Principle of Proportionality – Host State Sovereignty – Investor Protection – Balkans in International Investment Arbitration – Managerialism

1 INTRODUCTION

In the dispute of Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania (*Hydro and Others v. Albania*), the key contention concerned an alleged expropriation and unfair and inequitable treatment of the claimants' investments. These spanned the Kalivaç Project (a hydroelectric venture), a wind farm

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in southern Albania, and Agonset Sh.p.k. (a broadcasting company). The Tribunal, constituted under the aegis of the International Centre for Settlement of Investment Disputes (ICSID), ruled it lacked jurisdiction over the wind farm dispute, as it did not fulfill the investment criteria.[2] The Tribunal dismissed all other jurisdictional challenges posed by Albania.[3] On the merits, the Tribunal upheld the expropriation claim associated with Agonset Sh.p.k.,[4] awarding certain claimants a total of €99,487,000 EUR in damages,[5] while all other claims were dismissed.

The crux of this case concerns the Tribunal's characterization of Albania's criminal proceedings and ensuing actions[6] as a form of creeping expropriation – suggesting that the cumulative effect of Albania's actions led to the destruction of the claimants' investment.[7] The tension here emerges from the juxtaposition of Albania's rationale for asset seizure – asserting it as a sovereign act[8] possibly linked to concerns over money laundering in Agonset's financing[9] – with the Tribunal's perspective, viewing these actions as politically motivated expropriation.[10] The Tribunal's methodological choice to employ the sole effects doctrine – treating the police powers doctrine as an exception rather than as the main analytical lens – arguably signifies an inherent structural bias. This bias, which angles towards the safeguarding of investor interests, invites scrutiny into the larger implications of the sole effects doctrine and the innate tensions between it and the police powers doctrine, as well as their interaction with a state's legitimate exercise of its sovereign powers. I advocate for a nuanced approach that integrates police powers and the principle of proportionality to balance investor and public interest needs in investment arbitration.

The implementation of the ICSID Award[11] was marked by Albania's non-compliance with its payment obligations.[12] This led to the submission of requests for recognition of the award across several jurisdictions, including Albania, Austria, the Netherlands, and Belgium. These requests

[2] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, Decision on Annulment, ICSID Case No. ARB/15/28, para. 4 (2 Apr. 2021).
[3] Ibid.
[4] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, Award, ICSID Case No. ARB/15/28, para. 697 (24 Apr. 2019).
[5] The Tribunal determined the appropriate commercial rate for pre-Award and post-Award interest as LIBOR +3 percent from 31 March 2018, compounded quarterly, supra n. 4, at paras. 879, 884, 885.
[6] The seizure of assets effectively shut down Agonset, following money laundering investigations, supra n. 4, at para. 688.
[7] Ibid., at paras. 667, 668, 686.
[8] Ibid., at para. 679.
[9] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, Order on Provisional Measures, ICSID Case No. ARB/15/28, para. 2.49 (3 Mar. 2016).
[10] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, supra n. 4, at para. 724.
[11] ICSID awards are final and binding and must be recognized and enforced in any ICSID Member State. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, arts. 53–54, Mar. 18, 1965, 17 U.S.T. 1270.
[12] Andi Memi & Selena Ymeri, *Guide to Arbitration Places (GAP) - Albania*, DELOS, 7-8 (2021).

have produced varied outcomes, with some decisions still pending.[13] Meanwhile, the *ad hoc* ICSID Annulment Committee upheld the award, rejecting Albania's arguments that the Tribunal had failed to sufficiently explain its reasoning concerning jurisdiction, the merits, and the quantum.[14] Lastly, the ICSID Tribunal refused to revise the Award, notwithstanding the subsequent criminal convictions of several claimants in the courts of Albania.[15]

The subsequent section aims to delineate the backdrop of the case alongside its procedural evolution leading up to the Award. This includes the judgment of District Judge Tempia of the Westminster Magistrates' Court regarding the suspension of the extradition proceedings against certain claimants and the decision concerning the claimants' Request for a Partial Award. The next section elucidates the reasoning behind the Award, covering the Tribunal's rulings on the Kalivaç Project, jurisdiction over certain claims, and the ordered compensation for creeping expropriation of interests in Agonset. Our final analysis advocates for a recalibrated approach that elevates the police powers doctrine from its relegated position, integrating it as a central framework for future evaluations and complemented by the principle of proportionality. In the context of waning legitimacy of the investment arbitration regime, neglecting to apply the police powers doctrine through a lens of proportionality serves to magnify the regime's oft-cited structural bias towards foreign investors, further undermining the regime's credibility.

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[13] Varied outcomes in enforcement include decisions by courts in Albania, Austria, Belgium, and the Netherlands. In Tirana, the court refused recognition, claiming the ICSID Award was not final (supra n. 12). In Austria, claimants sought enforcement against Albania's accounts, with approval up to EUR 25,000,000. See Djordje Vesic, Dorda Enforces ICSID Award in Austria Against Albania for Italian Investor Francesco Becchetti, CEE Legal Matters (Dec. 4, 2020), available at https://ceelegalmatters.com/austria/15311-dorda-enforces-icsid-award-in-austria-against-albania-for-italian-investor-francesco-becchetti (accessed Jun. 27, 2023); Jack Ballantyne, Austrian Court Enforces Award against Albania, Global Arbitration Review (Dec. 2, 2020), available at https://globalarbitrationreview.com/article/austrian-court-enforces-award-against-albania (accessed Jun. 27, 2023). In Brussels, the Court of Appeal maintained an attachment over Albanian air traffic control revenues, totaling EUR 65,000,000. See Susannah Moody, Brussels Court Maintains Albanian Asset Freeze, Global Arbitration Review (May 23, 2023), available at https://globalarbitrationreview.com/article/austrian-court-enforces-award-against-albania (accessed Jun. 27, 2023). Only in The Hague was the attachment over oil revenues nullified. See *Hydro SRL of Rome (Italy) et al.* v. *State of the Netherlands*, The Hague District Court C-09-602393-KG ZA 20-1081, Summary Judgment, paras. 4.12, 4.13, 4.15 (2021).

[14] Albania's three bases for its annulment application are: a) an alleged deficiency in justifying protection to indirect investors under the BIT (para 132); b) a perceived inconsistency in the Tribunal's terminology regarding Agonset entities (para 164); and c) the Tribunal's assumption of a projected 3 percent audience share for Agonset.it by 2020 in the damage's calculation (para 205). The Committee found the explanations provided by the Tribunal sufficient on all grounds, upholding the Award in its entirety. The Committee's analysis of the Tribunal's failure to state reasons can be found in paras 148-163 for jurisdiction, 174-204 for the merits, and paragraphs 212-229 for quantum, *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania,* supra n. 2.

[15] *Hydro S.r.l, Costruzioni S.r.l, Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v Republic of AlHydro S.r.l, et al.* v. *Republic of Albania*, ICSID Case No. ARB/15/28 – Revision, Decision on Claimants' Application to Dismiss the Revision Application under ICSID Arbitration Rule 41(5), Claimants' Request for Allocation of Advance Payments, Claimants' Requests for Security, and Respondent's Proposal for the Establishment of an Escrow Mechanism, at para. 173 (29 Mar. 2023).

2 FACTUAL AND LEGAL BACKGROUND

The *Hydro and Others v. Albania* dispute is an ICSID arbitration lodged on 10 June 2015, grounded upon a Bilateral Investment Treaty (BIT) between Italy and Albania on 12 September 1991.[16] The arbitration scrutinizes allegations of creeping expropriation against the claimants' investments – specifically, whether the expropriation emerged from a sequence of state actions that harmed the investment either directly or by targeting its supporting shareholders.[17] This challenges Albania's claim of legitimate authority and expands the purview of indirect expropriation in international investment law.

The claimants collectively comprise two Italian corporations, Hydro S.r.l (Hydro) and Costruzioni S.r.l (Costruzioni) (Corporate Claimants), and four individuals: Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, and Liliana Condomitti (Individual Claimants). Each of these entities and individuals possesses a direct or indirect ownership interest in the Corporate Claimants. The investments of these Corporate Claimants in the Republic of Albania, whether direct or indirect, are encapsulated within several Albanian entities: 400 KV Sh.p.k (400 KV), Cable System Sh.p.k (Cable System), Energji Sh.p.k (Energji), and Agonset Sh.p.k (Agonset). These entities are collectively referred to as the claimants' Albanian Entities.[18]

The claimants assert that the Respondent, the Republic of Albania, has enacted various actions to undermine their investments. Generally, the allegations encompass: (a) initiating tax audit proceedings against the claimants' Albanian Entities as a pretext for refusing VAT refunds; (b) providing preferential treatment to competitor Albanian corporations; (c) instigating money laundering investigations into both the claimants' Albanian Entities and the Individual Claimants; (d) seizing and sequestering the assets and bank accounts of the claimants' Albanian Entities, effectively rendering their operation infeasible; and (e) issuing arrest warrants against two of the Individual Claimants, Mr. Becchetti and Mr. De Renzis, as well as a business associate of theirs, Ms. Erjona Troplini.[19]

In response to the allegations, Albania has offered a sequence of counterarguments. Primarily, Albania contends the tax audits, intimately tied with the insolvency proceedings, took precedence

[16] *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 9, at para. 1.1.
[17] *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 4, at para. 697.
[18] *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 9, at paras. 1.2–1.3.
[19] Ibid., at para. 1.4.

over this and Other Arbitrations.[20] From Albania's perspective, these investigations cannot be construed as retaliatory; instead, they were undertaken within the purview of the Albanian tax authorities, possessing *bona fide* intent.[21]

Regarding the commencement of money laundering investigations, Albania casts suspicion on the transactions involving the claimants' Albanian Entities, notably the hydroelectric plant's concession entity.[22] The suspicion of potential money laundering activities is deepened by the fact that the capital used to finance the hydroelectric plant was sourced from abroad.[23]

On the matter of the arrest warrants against Mr. Becchetti and Mr. De Renzis,[24] Albania highlights the thorough justification provided by the District Court of Tirana for their issue.[25] According to Albania, these warrants were neither arbitrary nor lacking in detail; they were later endorsed by the Albanian Court of Appeal, underscoring their legality.[26]

Finally, on the subject of the sequestration orders against the Individual Claimants and the Albanian Entities, Albania argues that these orders were underpinned by a detailed judgment from

[20] The term 'Other Arbitrations' refers to two specific legal disputes: *ICSID Case No ARB/14/26* and *ICC Case No. 20564/EMT*, in addition to the current arbitration proceeding. These arbitrations involve controversies related to the same set of investments, ibid 2.5. In the arbitration proceeding of *ICSID Case No ARB/14/26*, the only document made public is the decision on the stay of enforcement of the award '*Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania*,' (ICSID Cases Database), available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/26, (accessed 1 Jan. 2024). Although the details of the Award and the Decision on Annulment are not publicly disclosed, it is known from the published document that the original Award was in favor of Albania, whereby the tribunal awarded EUR 2,326,601 in costs, plus interest, *Albaniabeg Ambient Sh.p.k, M Angelo Novelli and Costruzioni S.r.l v Republic of Albania*, ICSID ARB/14/26, Decision on the Applicants' Request for the Continuation of the Provisional Stay of Enforcement of the Award [26 (c)] (10 Aug. 2021). In the *ICC Case No. 20564/EMT*, the claimant, *Hydro S.R.L.* (Hydro), which is also a claimant in the current case, was subject to a Partial Award issued on 7 September 2018 concerning the Concession Agreement for the Kalivaç Project. The Tribunal's decision declared the claimant's claims for breach of Article 6 of the Concession Agreement inadmissible. Importantly, Albania's termination counterclaim was upheld, leading to the finalization of the Concession Agreement due to Hydro's breaches as of the date of the Partial Award. Hydro was ordered to pay delay penalties up to EUR 12.9 million and legal costs totaling EUR 1,208,642 and GBP 40,649.46. *HYDRO SRL (ITALY) v THE REPUBLIC OF ALBANIA*, ICC 20564/EMT/GR, Award, Chapter VII (2018). This Award laid the groundwork for further financial determinations in a Final Award, details of which, along with the subsequent Final Award on Request for Revision dated 11 February 2020, are not publicly disclosed, '*HYDRO S.R.L. (ITALY) V. REPUBLIC OF ALBANIA*' (INTERNATIONAL ARBITRATION DATABASE), available at https://arbitration.org/award/848, (accessed 1 Jan. 2024). The validity of the Tribunal's decisions was later reaffirmed by the Judgment of the Paris Court of Appeal on 31 May 2022, which rejected Hydro appeal against the revision award, see *Cour d'appel de Paris, Pôle 5, Chambre 16*, May 31, 2022, Décision déférée à la Cour: sentence arbitrale internationale sur la demande de révision rendue le 11 février 2020, dispositif 1, RG n° 20/06119 (Affaire CCI n° 22919/GR.

[21] *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 9, at para. 2.9.

[22] Ibid., at para. 2.28.

[23] Ibid., at para. 2.31(a).

[24] In addition to the arrest warrants issued against Mr. Becchetti and Mr. De Renzis, Albanian prosecutors also secured an arrest warrant against Ms. Erjona Troplini, a business associate of Messrs. Becchetti and De Renzis, ibid. at para. 2.30.

[25] Ibid., at para. 2.36.

[26] Ibid., at para. 2.37.

the District Court of Tirana.[27] Justifying the seizure of Agonset's assets, Albania posits the logical course of action was to seize them, given the prosecution's assertion that the assets may have been procured with laundered funds.[28]

Yet these actions led the claimants to raise concerns about the procedural integrity of the arbitration. The threat of potential incarceration in Albania for Mr. Becchetti, the central figure in the arbitration from the claimants' perspective,[29] and for Mr. De Renzis, risked their effective management of their businesses and substantial contributions to the arbitration.[30] This compelled the claimants to seek provisional measures from the Tribunal under Article 47 of the ICSID Convention and its Arbitration Rule 39(1).[31] Responding to this situation and balancing the principles of urgency, necessity, and proportionality, the Tribunal issued an Order on Provisional Measures (OPM) on 3 March 2016. The OPM recommended that Albania temporarily suspend – not withdraw – the specified criminal and pertinent extradition proceedings, submitted to the UK's Home Office on 21 July 2015, until the Final Award was issued.[32]

In the midst of these developments, Mr. Becchetti and Mr. De Renzis (the RPs)[33] filed an application to stay the extradition proceedings before the Westminster Magistrates' Court, citing an abuse of process,[34] 'given this [the extradition] would amount to a breach of international law'.[35] They argued that the Albanian Minister of Justice held the discretionary power to withdraw an extradition request,[36] a claim which the Albanian Government disputed, citing an existing judgment.[37] Despite acknowledging its obligation to comply with the OPM, Albania sought to adjourn the extradition proceedings *sine die*.[38] Ultimately, on 20 May 2016, District Judge Tempia

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[27] Ibid., at para. 2.44.
[28] Ibid., at para. 2.49.
[29] Ibid., at para. 3.18.
[30]Ibid., at para. 2.33.
[31] A party's request for provisional measures is now regulated under Rule 47(1) of the new ICSID Convention Arbitration Rules.
[32] *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 9, at paras. 3.20, 4.2.
[33] In the original judgment of the Westminster Magistrates' Court, Mr. Becchetti and Mr. De Renzis are referred to as 'the RPs,' an abbreviation that this paper will also adopt for consistency, Government of Albania (Judicial Authority) v *Francesco Becchetti and Mauro De Renzis* 1, Westminster Magistrates' Court, at para. 1 (20 May 2016).
[34] Ibid.,
[35] Ibid., at para. 22. Indeed, Judge Tempia supported this view based on *R v Horseferry Road Magistrates' Court ex p Bennet (No 1)*, [1994] 1 AC 42 (House of Lords).
[36] *Government of Albania (Judicial Authority) v. Francesco Becchetti and Mauro De Renzis*, supra n. 33, at para. 6.
[37] The Albanian Government noted that a prosecutor had issued a request for a remand in custody order, which was granted by the Tirana District Court. This decision was subsequently appealed and upheld by the Supreme Court, supra n. 33, at para. 13.
[38] The Tribunal's OPM explicitly recommended the suspension of the extradition proceedings against Mr. Becchetti and Mr. De Renzis, which was to remain in effect until the Final Award was issued, *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 9, at para. 5.1(b). Suspension, as per the OPM, and further clarified by Judge Tempia in

decided not to allow the extradition. She deemed Albania's argument inconsistent with international law, as the OPM explicitly called for a suspension of extradition and domestic proceedings to enable the RPs to engage with the ICSID arbitration.[39]

Notably, the judgment of the District Court prompted two requests from the disputing parties to the Tribunal. On one hand, the claimants made an Application for a Partial Award addressing the Respondent's refusal to comply with the OPM.[40] This specifically pertained to the suspension of criminal proceedings and the return of the assets of the claimants' Albanian Entities.[41] On the other hand, the Respondent applied to the Tribunal, pursuant to Rule 39(3) of the ICSID Arbitration Rules,[42] to revoke or alternatively modify the terms of the OPM.[43]

In response to these requests, the Tribunal replaced its previous OPM with differently worded recommendations, conditioned upon the issuance of the Final Award.[44] First, it recommended that Albania takes no steps in the proceedings identified as Criminal Proceeding No. 1564 to recommence extradition proceedings in the United Kingdom against Mr. Becchetti and Mr. De Renzis. Second, the Tribunal instructed Albania to take all necessary actions to maintain the suspension of the extradition proceedings currently stayed, and not to take any steps to resume those proceedings.[45]

With regard to the preservation of seized assets, the Tribunal refrained from issuing further recommendations. It did not consider it appropriate to determine at that procedural stage whether

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the Westminster Magistrates' Court decision, meant a temporary halt, not an indefinite adjournment (sine die). In the court's ruling, a suspension was interpreted to temporarily stop proceedings to allow the RPs to manage their businesses and participate in the arbitration process. An adjournment sine die would contradict this rationale, leading to an undetermined period of restrictions on the RPs, contrary to the intended temporary relief prescribed by the OPM, *Government of Albania (Judicial Authority) v. Francesco Becchetti and Mauro De Renzis*, supra n. 33, at paras. 43, 55, and 56.

[39] Furthermore, Judge Tempia highlighted the undue burden that would be placed on the RPs if they were to remain on bail, subject to the court's oversight and restrictions on their liberty. They would be required to return to court every three months, a process that would be both oppressive and vexatious, potentially spanning several years and resulting in significant financial implications, *Government of Albania (Judicial Authority) v. Francesco Becchetti and Mauro De Renzis*, supra n. 33, at para. 21.

[40] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures, ICSID Case No. ARB/15/28, para. 2.4 (1 Sept. 2016).

[41] Ibid., at para. 1.2.

[42] Rule 47(6) of the new ICSID Convention Arbitration Rules.

[43] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, supra n. 40, at para. 1.6.

[44] The main reason for this decision is that Mr. Becchetti and Mr. De Renzis, who were the subjects of extradition proceedings, were in the UK and not subject to any restraint. This allows them to fully participate in the arbitration, thus achieving the objective of OPM. Given this situation, the Tribunal saw no need for any provisional measures that could impair Albania's sovereign rights to exercise its police powers, including the investigation and, if warranted, prosecution of criminal offenses, ibid at para. 4.16.

[45] Ibid., at para. 4.18.

the assets had in fact been destroyed or expropriated.[46] The decision was also influenced by the fact that the claimants were no longer actively seeking the return of these assets.[47] Ultimately, the Tribunal concluded that any loss or damage to these assets could be adequately addressed through an award of damages, if the claimants prevailed in the arbitration.[48]

3 ANALYSIS OF THE ICSID TRIBUNAL'S RATIONALE

On 24 April 2019, the Tribunal ruled that the Kalivaç Project was not expropriated.[49] It also declared its lack of jurisdiction over the claims related to Energji's request to construct a wind farm.[50] In contrast, the Tribunal affirmed its jurisdiction over all other claims involved in the arbitration. Notably, the Tribunal ordered Albania to compensate Mr. Becchetti, Mr. De Renzis and Ms. Grigolon for creeping expropriation of their respective interests in Agonset, in breach of Article 5 of the BIT.[51]

The decision hinged on two core issues. The first was whether Agonset was "taken", which would be the case if its investors were entirely deprived of its value.[52] If such deprivation occurred, the second issue was to discern whether it represented a legitimate exercise of Albania's police powers.[53] This latter point essentially entailed an exploration of whether the use of criminal proceedings to seize Agonset's assets was merely an application of law enforcement or a politically motivated maneuver.[54] The Tribunal proceeded to examine the complaints as follows in the next three subsections.

3.1 Whether the Kalivaç Project was expropriated or deprived of fair and equitable treatment

[46] Ibid., at para. 4.26.
[47] The claimants affirmed their quest for full compensation during the opening of their Application to a Partial Award, ibid at para. 2.63.
[48] Ibid., at para. 4.26.
[49] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, supra n. 4, at para. 653.
[50] Ibid., at para. 655. The awarded damages were EUR 46,751,000, EUR 11,688,000, and EUR 41,048,000, respectively, Ibid., at para. 879.
[51] *Hydro S.r.l., Costruzioni S.r.l., et al.* v. *Republic of Albania*, supra n. 4, at paras. 681–682.
[52] Ibid., at para. 686.
[53] Ibid., at para. 684.
[54] Ibid., at para. 671.

The claimants asserted that Albania had expropriated their investments within the Kalivaç Project.[55] This contention was predicated on two factors: first, it was ascribed to Albania's failure to provide a substantive response to a correspondence from Kalivaç Green Energy Sh.p.k. (KGE)[56] dated on 19 June 2014,[57] whereby KGE requested Albania's reaffirmation of its commitment to the project.[58] Second, the claimants pointed to the actions taken by Albania to re-let the project in 2017 as a subsequent facet of expropriation.[59]

Contrary to the claimants' assertions, the Tribunal found that work on the Kalivaç Project had completely ceased from March 2013. By June 2014, it was evident that the claimants had abandoned the Project.[60] Therefore, they could not claim protection for rights they voluntarily relinquished. The Tribunal found it unreasonable to accept the claimants' assertion that Albania had withdrawn its support for the Project in June 2014, considering it had already been deserted.[61] This abandonment even predated the election of the Rama Government, prior to when the alleged harassment campaign began,[62] as further explained below.

In addition to the expropriation claim related to the Kalivaç Project, the claimants proffered a string of further allegations. They argued that Costruzioni, holder of 40 percent of Agonset Albania's shares,[63] had a legitimate expectation that the Kalivaç Project would not be expropriated,[64] a right they believed was violated, thus leading to a breach of fair and equitable treatment (FET) under Article 2(2) of the BIT.[65] They also suggested that delays in permit issuance had led to an unnecessary postponement of that project.[66] Further, they stated that Albania's

[55] On 24 May 1997, after nearly a year of negotiations, the Becchetti Energy Group (BEG) and the Authorized State Body signed the Concession Agreement for the Kalivaç Project. This agreement was designed to facilitate the 'financing, engineering, construction, management, and Transfer at the Concession expiring date, of a Hydro-Power Plant in Albania on a build, operate and transfer basis', ibid. at para. 176.

[56] KGE was fully acquired by Hydro S.r.l. (Hydro), a joint venture by BEG and Deutsche Bank AG, in July 2007 to build and operate the Kalivaç project. Since 2013, Hydro has been entirely owned by BEG, which is controlled by the Becchetti family, including claimants Francesco Becchetti and Liliana Condomitti. Stefania Grigolon, also a Claimant, holds a 10 percent share in BEG, ibid at paras. 8–9.

[57] The letter was directed to the Prime Minister, the Ministry of Energy and Industry and the Ministry of Transportation and Infrastructure, ibid. at para 255.

[58] Ibid., at para. 614 a.

[59] Ibid., at para. 614 b.

[60] Ibid., at para. 626.

[61] The Tribunal also highlighted the fact the claimants were also aware that further work to complete the Kalivaç Project was likely to cost approximately EUR 128 million and give an ultimate return of only EUR 12 million after 30 years, ibid. at para 625.

[62] Ibid., at para. 626.

[63] Ibid., at para. 16.

[64] Ibid., at para. 400b.

[65] Ibid., at para. 654a. Art. 2(2) of the BIT reads: 'Each Contracting Party will always ensure fair and equitable treatment for investors and investors of the other'.

[66] Ibid., at para. 632.

neglect to consider Energji's application to construct a transmission cable between Albania and Italy was a discriminatory action against Costruzioni. This, they contended, contravened the FET provision of the BIT, which resulted in the loss of value for Costruzioni's potential asset.[67] Concurrently, they posited that this neglect, alongside the subsequent delay of the Kalivaç Project, neglected Hydro's legitimate expectations, consequently blocking its acquisition of the Green Certificates, 'a financial incentive, for the production of renewable energy'.[68]

Upon assessing these claims, the Tribunal concluded that the claimants failed to establish that Albania had contributed to halting the Kalivaç Project.[69] Additionally, they failed to prove that Albania impacted the progress of the project or led to its suspension; thus dismissed the claimants' assertion that Costruzioni and Hydro had not been accorded FET with respect to its share of the profits that they would have made on project completion. As a result, the Tribunal affirmed that Article 2(2) of the BIT Treaty had not been breached.[70]

3.2 Whether Albania discriminated by refusing to consider Energji's request to build a wind farm

On 3 April 2009, Energji[71] proposed the construction of a wind farm near Kalivaç,[72] aiming to fortify their commitment to Albania's renewable energy sector.[73] This plan was to be realized through a partnership with Rener Sh.p.k..[74] However, despite the approval of seven other wind farm projects in the previous year, including one by Italian firm Moncada Energy Group, the Albanian authorities remained unresponsive to Energji's proposal.[75] Nonetheless, the Tribunal did not consider this projected wind farm an 'integral part' of the Kalivaç Project, nor did it classify it

[67] Ibid., at para. 654b.
[68] On this subject, the Tribunal examined whether the approval of the submarine transmission cable would have attracted enough financing to complete the project by the end of 2012 and benefit from the Green Certificates. The only evidence in support of this was the testimony of Mr. Becchetti. However, the Tribunal deemed this evidence speculative, pointing to the absence of expert testimony on the financial markets' state during the relevant period and the effect of the financial crisis on project financing, ibid., at para. 649.
[69] Ibid., at para. 644.
[70] Ibid., at para. 653.
[71] Energji, the project contractor on the Kalivaç Project and a company incorporated under Albanian law, is primarily owned by Costruzioni, which holds 80 percent of its shares, ibid., at para. 12.
[72] Ibid., at para. 252.
[73] Ibid., at para. 602.
[74] Rener is also owned by Costruzioni, holding 90 percent of its shares, ibid., at para. 15.
[75] Ibid., at paras 252–253.

as an investment under their jurisdiction.[76] Consequently, the Tribunal found that it lacked jurisdiction over the claims related to Energji's request.[77]

3.3 Whether Agonset has been expropriated

The analysis of Agonset's indirect expropriation hinged on the interpretation of two provisions of Article 5 of the BIT. These include Article 5(1), relevant to expropriatory instances of less than total loss, and Article 5(2), addressing cases of absolute and permanent expropriation.[78] The Tribunal, recognizing the claimants' investment in Agonset as being entirely and irrevocably lost, proceeded under Article 5(2).[79] In its assessment, the Tribunal chose to employ the sole effects doctrine as its main analytical tool, while the police powers doctrine was treated as an exception. Therefore, the critical questions were whether Agonset was "taken", meaning whether the investors of Agonset were wholly deprived of its value, and if so, whether this deprivation represented a legitimate exercise of Albania's police powers.[80]

3.3.1 Whether Agonset was "taken"

The Tribunal delved into the allegations of Agonset's indirect or creeping expropriation,[81] deploying criteria extracted from the *Plama v Bulgaria* award.[82] These criteria rest firmly within the framework of the sole effects doctrine, an approach with its own complexities, as discussed later. The key considerations were (i) the substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or identifiable, distinct parts thereof; (ii) the irreversibility and permanence of the contested measures; and (iii) the extent of the loss of economic value experienced by the investor.[83]

[76] Ibid., at para. 611.
[77] Ibid., at para. 914(1).
[78] Ibid., at para. 681.
[79] Ibid., at para. 682.
[80] Ibid., at para. 684.
[81] It is important to note that, when an expropriation takes place in stages, investment tribunals use the terms creeping expropriation and indirect expropriation interchangeably, see *UAB E energija (Lithuania) v. Republic of Latvia*, Award, ICSID Case No. ARB/12/33, para. 650 (22 Dec. 2017).
[82] *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of AlbHydro S.r.l., et al. v. Republic of Albania*, supra n. 4, at para. 686; *Plama Consortium Limited v. Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, para. 193 (27 Aug. 2008).
[83] The Tribunal based its analysis on *Plama Consortium Limited v. Republic of Bulgaria*, supra n. 82, at para. 193.

Relating to these considerations, the claimants posit that the criminal investigation and ensuing series of actions against them were politically charged and strategically deployed to seize the assets of or effectively incapacitate 400 KV, Fuqi, Cable System, and Agonset.[84] These actions encompassed the issuance of arrest warrants against Mr. Becchetti, Mr. De Renzis, and Erjona Troplini,[85] extradition requests,[86] INTERPOL Red Notices,[87] and seizure orders,[88] along with their execution.[89] The claimants maintain that these steps left them effectively incapable of exercising significant control over Agonset.[90] With the company's assets, including its bank accounts, falling under the purview of the Albanian Agency in Charge of Sequestered Assets (AASCP), they found themselves incapable of satisfying the accruing obligations and liabilities that precipitated Agonset's cessation of operations in April 2016.[91]

Building on this, the claimants further argue that the AASCP held a responsibility, mandated by Albanian law, to oversee the assets under its control, which includes payment using its own funds, if required.[92] They insist that the AASCP failed in its duty to meet Agonset's tax liabilities, pay Agonset's rent, staff salaries or electricity bills.[93] Consequently, they conclude that this failure led to the complete dissolution of the investment.[94]

Albania sought to refute the claimants' contention that their shareholdings in Agonset had been "taken".[95] Albania maintains its actions did not yield a permanent effect on these shareholdings; the claimants still own their shares, and Agonset Albania continues to own its assets, including broadcasting equipment and frozen account money.[96] The Respondent notes that the seizure decision temporarily blocks shares and subjects Agonset's assets to preventative seizure, which is contingent on the outcome of the ongoing money laundering criminal proceedings.[97] They

[84] *Hydro S.r.l., et al. v. Republic of Albania*, supra n. 4, at para. 668.
[85] Ibid., at paras. 393–398.
[86] As noted above, on 21 July 2015, Albania sent two Requests for Extradition to the Home Office of the UK for Messrs. Becchetti and De Renzis, ibid. at para. 403.
[87] Following the issuance of the arrest warrants, INTERPOL, at Albania's request, put forth Red Notices concerning Messrs. Becchetti and De Renzis. A Red Notice represents an appeal to INTERPOL's member states to apprehend or retain an individual, subject to forthcoming extradition procedures, ibid. at paras. 404–409.
[88] Ibid., at paras. 410–414.
[89] Ibid., at paras. 415–421.
[90] Ibid., at para. 668.
[91] On 25 April 2016, a Tirana Court mandated the eviction of Agonset from its premises, ibid. at para. 437.
[92] Ibid., at para. 669.
[93] Ibid.,
[94] Ibid., at paras. 668 and 672.
[95] Ibid., at para. 690.
[96] Ibid., at para. 690 a.
[97] Ibid., at para. 690 b.

emphasize that Agonset Albania's management has acknowledged the order's temporary nature.[98] Additionally, the Respondent insists that the company itself has neither been taken nor destroyed.[99] The claimants retain managerial powers,[100] the editorial direction of the channel remains unchanged,[101] the management continues to make regulatory applications,[102] the AASCP was denied being in control of Agonset,[103] and Agonset Albania actively pursues various legal actions.[104] Albania also highlights that Agonset Italy's management freely sold its Italian broadcasting license.[105]

However, the tribunal emphasizes – consistent with the sole effects doctrine – that the focus should be on the practical effects of the measures on the investments, regardless of their temporary nature.[106] If the claimants convincingly demonstrate that their investments' substantive value was significantly impacted, this would be sufficient.[107] Despite the seizure decisions being temporary, their practical effect resulted in the permanent destruction of the company's value due to an inability to pay its financial liabilities . This is sufficient to prove the expropriation of assets.[108] The Respondent argues that Albania's actions did not cause Agonset's closure, but rather it was an intentional commercial decision to "close a loss-making asset".[109] This was dismissed by the Tribunal, noting that practical impossibilities arose from the allegations that underpinned the seizure decisions.[110] According to the Tribunal, these practical impossibilities were evident, for example, when Agonset's attempts to pay its employees through foreign bank accounts were refused due to "bank policy," and further attempts to open any new accounts in Albania were projected to be frozen.[111] In this context, the Tribunal recognized that the deprivation of the substantial value of the investments in Agonset developed over a period of time and crystallized

[98] Ibid., at para. 690 c.
[99] Ibid., at para. 690 d.
[100] Ibid., at para. 691 a.
[101] Ibid., at para. 691 b.
[102] Ibid., at para. 691 c.
[103] Ibid., at para. 691 d.
[104] Ibid., at para. 691 e.
[105] Ibid., at para. 691 f.
[106] Ibid., at para. 692. Although the Tribunal did not explicitly mention each criterion from *Plama v Bulgaria* in their assessment of the current dispute, their influence on the decision-making process is nevertheless implicit. For example, when discussing that the investments' substantive value was significantly impacted, the Tribunal is implicitly referring to the first criterion. Similarly, the Tribunal's disregard for the temporality of the seizure decisions implicitly reflects the criterion of irreversibility of the contested measures. Lastly, the consideration of the extent of the loss of economic value is subtly suggested when the Tribunal refers to the effective cut-off of access to finance.
[107] Ibid.
[108] Ibid., at paras. 692–693.
[109] Ibid., at para. 694.
[110] Ibid., at para. 695.
[111] Ibid., at para. 696.

on or around 5 June 2015 with the seizure decisions.[112] At that point, access to finance was effectively cut off, which made the investment's continuation virtually impossible.[113]

3.3.2 Whether any taking was a legitimate exercise of Albania's police powers

Notably, the Tribunal chose to treat the police powers doctrine as an exception to the sole effects doctrine. With this approach, the Tribunal engaged in a complex discussion to determine the boundary between a state's *bona fide* regulation in the public interest and what could be classified as expropriation.[114] Albania, in its final submissions, posited that the claimants should first demonstrate that the disputed measures are deficient under Albanian law.[115] This, the Respondent views, is a prerequisite – though not exclusively sufficient – for discerning whether Albania was lawfully exercising its police powers.[116] However, the Tribunal asserts that a state cannot elude liability for infractions of international law simply by aligning its actions with domestic law.[117]

To substantiate this stance, the Tribunal invoked *ABCI v Tunisia*, which underscored the universal principle of respecting acquired rights, regardless of any domestic law provision or contract containing a stabilization clause.[118] Additionally, the Tribunal suggested, by referring to a series of cases,[119] that state actions causing asset loss or leading to creeping expropriation are not innately immune from constituting potential breaches of international obligations.[120] This signifies that domestic legal proceedings do not single-handedly dictate the interpretation and enforcement of international law.[121]

Against this backdrop, the Tribunal contends it is insufficient for the Respondent to merely confirm the Albanian courts' endorsement of the criminal investigations and ensuing actions.[122] Instead, a comprehensive evaluation of the measures is required, determining whether expropriation has taken place based on 'the real interests involved and the purpose and effect of

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[112] Ibid., at para. 697.
[113] Ibid.
[114] Ibid., at para. 698.
[115] Ibid., at para. 699.
[116] Ibid.
[117] Ibid., at para. 700.
[118] Ibid. *ABCI Investments NV v Republic of Tunisia*, Decision on Jurisdiction, ICSID Case No. ARB/04/12, paras. 127–128 (18 Feb. 2011).
[119] *OAO Tatneft v Ukraine*, Award on the Merits, PCA Case No. 2008-8, para. 461 (29 Jul. 2014); *Sistem Mühendislik Insaat Sanayive Ticaret AS v Kyrgyz Republic*, Award, ICSID Case No. ARB(AF)/06/1, paras. 118–119 (9 Sept. 2009); *Saipem SpA v People's Republic of Bangladesh*, Award, ICSID Case No. ARB/05/07, paras. 127–132 (30 Jun. 2009).
[120] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, supra n. 4, at para. 701.
[121] Ibid., at para. 702.
[122] Ibid.

the government measure'.[123] This implies that even if certain actions, like the issuing of arrest warrants, had a lawful basis under Albanian law, the matter is not conclusively resolved.[124] The core question to examine is whether the criminal actions were genuinely *bona fide* and if Albania's actions were motivated by a political vendetta against the claimants.[125]

In light of these considerations, the Tribunal infers that the seizure decisions culminated from a politically driven campaign against the claimants.[126] The money laundering criminal investigations were seemingly directed by a government closely associated with the claimants' commercial rivals, particularly against a broadcasting channel critical of the government.[127] Furthermore, a government representative hinted at these motivations by suggesting that Mr. Becchetti consult with a competitor to comprehend why the claimants' investments were scrutinized and subtly warned against opposing the state.[128] The Tribunal also noted significant factual inconsistencies in the allegations underpinning the criminal investigation, which Albania failed to justify to INTERPOL.[129] In an explicit show of power, following the issuance of the seizure decisions, Prime Minister Rama declared his 'war' against investors 'like the claimants' a 'success' and even threatened the judiciary for their implied involvement in the investors' alleged wrongdoings.[130]

In light of this, the Tribunal determined that these actions were a politically motivated maneuver, akin to a vendetta against the claimants. The Tribunal consequently concurred with the claimants' inference, determining that Albania's taking of Agonset constituted an inappropriate exercise of

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[123] Ibid.

[124] Ibid., at para. 703.

[125] Ibid., at para. 718. Although the Tribunal's analysis delves into the bona fides of Albania's actions, it is important to note that, even when conducted within the framework of the police powers doctrine, this assessment is treated as an exception to the sole effects doctrine. This methodological choice is problematic as it pulls the analysis back toward an investor-centric predisposition, a point further elucidated in juxtaposition with decisions like *Quiborax v. Bolivia* in the Commentary. In this context, the Tribunal's analysis could arguably be seen as incomplete for not fully exploring the implications of the res judicata effect of Albanian court decisions relating to these actions. This aspect gains significance when considering the *Helnan International Hotels A/S v Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/19, paras. 123–126 (3 Jul. 2008). Similarly, the *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, Award, ICSID Case No. ARB/07/14, para. 431 (22 Jun 2010) stressed that such decisions must be free from arbitrariness, gross unfairness, or lack of due process to merit consideration. Therefore, the *Hydro* Tribunal overlooks a nuanced analysis that respects both international and domestic legal orders by not assessing the res judicata effect of Albanian court decisions.

[126] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, supra n. 4, at para. 724.

[127] Ibid., at paras. 708, 709, 711, and 724 a.

[128] The Tribunal noted that 'Mr. Becchetti asked the Secretary General of Prime Minister Rama's cabinet, Mr. Agaçi, why those investigations were being pursued. Mr. Agaçi said Mr. Becchetti should speak to Enkelejd Joti, the General Manager of Top Channel, one of Agonset's incumbent competitors. When Mr. Becchetti asked why he should speak to Mr. Joti, Mr. Agaçi said "It is not a good idea to oppose the State", ibid. at paras. 712 and 724 b.

[129] Ibid., at paras. 719 and 724 c.

[130] Ibid., at paras. 714, 715, and 724 d.

its police powers, essentially amounting to expropriation, and therefore breaching Article 5 of the BIT.[131]

4 COMMENTARY

Indirect expropriation looms large in investment arbitration and investment law.[132] The crux of the matter revolves around the tension between investors' rights and states' regulatory powers.[133] When determining what constitutes indirect expropriation, this issue can be scrutinized under two analytical approaches: the sole effects doctrine and the police powers doctrine.[134] Under the sole effects doctrine, the economic impact of a host state's measures becomes the decisive factor in identifying indirect expropriation,[135] disregarding the host state's intent or purpose.[136] In contrast, the police powers doctrine concerns all forms of domestic regulation aiming to preserve public interest under the state's sovereign powers.[137] Within international investment law, this doctrine offers the host state a defense against claims of regulatory expropriation,[138] even when such regulations significantly or completely erode the value of the investment.[139]

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[131] Ibid., at para. 725.
[132] Catharine Titi, The Right to Regulate in International Investment Law 33 (Bloomsbury Publishing 2014).
[133] Christian Riffel, 'Indirect Expropriation and the Protection of Public Interests,' 71 Int'l & Comp. L.Q. 945, 946 (2022).
[134] Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law,' 15 Austl. J. Int'l L. 267, 267 (2008). Note that some scholars, like Titi and Malakotipour, propose three analytical approaches, including the Hull formula or proportionality, respectively (Catharine Titi, 'Chapter 14 Police Powers Doctrine and International Investment Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), General Principles of Law and International Investment Arbitration (Brill | Nijhoff 2018); Maryam Malakotipour, 'The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response,' 22 Int'l Community L. Rev. 235, 242 (2020)). While these perspectives are valuable, for the purposes of this analysis I align with Mostafa's suggested two approaches. I see the Hull formula more as a compensation method, rather than a tool to determine indirect expropriation (Omer Erkut Bulut, 'Drawing Boundaries of Police Powers Doctrine: A Balanced Framework for Investors and States,' 13 J. Int'l Dispute Settlement 583, 583 (2022)). The principle of proportionality, which I discuss below, serves as a heuristic model embedded within the police powers doctrine, aimed at assessing the legitimacy of state measures that restrict private property, see Benedict Kingsbury and Stephan W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality' in Stephan W Schill (ed), International Investment Law and Comparative Public Law (Oxford Scholarship Online 2011) 91.
[135] Veijo Heiskanen, 'The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal,' 8 J. World Inv. & Trade 215, 218 (2007); Malakotipour (n 134) 266; Aniruddha Rajput, Regulatory Freedom and Indirect Expropriation in Investment Arbitration 26 (Kluwer Law International 2019).
[136] Titi, supra n. 134, at 326.
[137] Noam Zamir, 'The Police Powers Doctrine in International Investment Law,' 14 Manchester J. Int'l Econ. L. 318, 327 (2017).
[138] Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration,' 15 J. Int'l Econ. L. 223, 225 (2012).
[139] Bulut, supra n. 134, at 584.

In the present case, the Tribunal opted to employ the sole effects doctrine – a reflection of the inherent structural bias favoring investor protection in investment arbitration. This selection, while legitimate in its own right, highlights a systemic predisposition that begs critical examination. My analysis probes the underlying rationale of the Tribunal's preference for the sole effects doctrine. I also assess the implications of not robustly applying the police powers doctrine in this specific case. I advocate for a recalibrated approach that does not relegate the police powers doctrine to the background, but instead promotes it as a primary framework for future evaluations, augmented by the principle of proportionality.[140]

Casting light on the structural bias of investment arbitration, particularly its predisposition towards the sole effects doctrine, illuminates an undeniable tilt towards safeguarding investors' rights.[141] This predisposition is no mere happenstance but a manifestation of the regime's roots. As Koskenniemi puts it, "a specialized institution is bound to see every problem from the angle of its

[140] My advocacy for the principle of proportionality should not eclipse other analytical frameworks within the police powers doctrine aiming to balance investors' rights and states' regulatory powers. For example, the concept of the margin of appreciation affords states considerable latitude in determining whether an expropriation serves a public purpose; see *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, Award, ICSID Case No. ARB/03/16, para. 435 (2 Oct. 2006); *Continental Casualty Company v The Argentine Republic*, Award, ICSID Case No. ARB/03/9, para. 181 (5 Sept. 2008); *Crystallex International Corporation v Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/11/2, para. 712 (4 Apr. 2016); *Bear Creek Mining Corporation v Republic of Peru*, Award, ICSID Case No. ARB/14/2, para. 467 (30 Nov. 2017); *Vestey Group Ltd v Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/06/4, para. 216 (15 Apr. 2016). Additionally, the concept of bona fide regulations has gained prominence in decisions such as those by the *Magyar Farming Tribunal*, which built on past rulings to conclude that if a state's regulation is enacted in good faith (bona fide), compensation for expropriation may not be warranted. Such regulations typically fall under one of two categories: a) Regulations that enforce legal obligations against the investor for infractions such as criminal, tax, or administrative penalties, as well as license and concession revocations; and b) Regulations aimed at mitigating risks posed by the investor's activities to public health, the environment, or public order; see *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, Award, ICSID Case No. ARB/17/27, para. 364 (13 Nov. 2019). The *Magyar Farming Tribunal* based its decision on a series of past rulings, which are cited as follows: *Invesmart v Czech Republic*, Award (UNCITRAL), para. 497 (26 Jun. 2009); *Señor Tza Yap Shum v The Republic of Peru*, Award, ICSID Case No. ARB/07/6, para. 173 (7 Jul. 2011); *Saluka Investments BV v The Czech Republic*, Partial Award (PCA UNCITRAL), para. 54 (17 Mar. 2006); *RosInvestCo UK Ltd v The Russian Federation*, Final Award, SCC Case No. 079/2005 (12 Sept. 2010); *Chemtura Corporation v Government of Canada* (formerly *Crompton Corporation v Government of Canada*), Award (UNCITRAL), para. 254 (2 Aug. 2010); *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL), paras. 7, 9, and 15 (3 Aug 2005); *AWG Group Ltd v The Argentine Republic*, Decision on Liability (UNCITRAL), para. 236 (30 Jul. 2010); *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, Award, ICSID Case No. ARB/10/7, para. 418 (8 Jul. 2016). However, it is important to acknowledge that some tribunals exhibit reluctance in employing these doctrines. For instance, the *von Pezold Tribunal* explicitly stated that the margin of appreciation doctrine has not yet achieved customary status and thus declined to apply it in its decision, see *Bernhard von Pezold and Others v Republic of Zimbabwe*, Award, ICSID Case No. ARB/10/15, para. 466 (28 Jul. 2015).

[141] Federico Ortino, The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness 53 (Oxford University Press 2019).

specialization".[142] It is no surprise, then, that investment arbitration, conceived as a protection against potential host state interference,[143] exemplifies this bias.

I argue that the bias is most prominently displayed through the lens of the sole effects doctrine. This doctrine, traced back to the Iran–US Claims Tribunal,[144] has been adopted and mirrored by investment tribunals,[145] including the *Hydro* Tribunal. The *Plama* Tribunal, whose interpretation of indirect expropriation and reliance on the sole effects doctrine heavily influenced the approach of the *Hydro* Tribunal,[146] serves as a case in point. The *Plama* Tribunal asserted that "expropriation can result from State conduct that does not amount to physical control or loss of title but that adversely affects the economic use, enjoyment, and value of the investment. This approach was adopted by the Iran–U.S. Claims Tribunal in the *Starrett Housing Corp* v. *Iran* case".[147]

Despite its effectiveness in safeguarding investor rights, this interpretation of expropriation has potential drawbacks, particularly when uncritically adopted. The Iran–US Claims Tribunal's decision to expand the definition of property seizure – to a degree that it could readily exert jurisdiction over almost any expropriatory claim – was justified by the terms of the Algiers Accord.[148] However, it also underscores the inherent problems when a system consistently prioritizes investor rights.

This potential downside brings us to an important consideration: for a man with a hammer, every problem looks like a nail. This metaphor becomes starkly relevant as I delve deeper into the operation of functional regimes, such as investment arbitration. These regimes, as autonomous social and epistemic entities, create their own form of mini-sovereignty.[149] They operate as clusters

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[142] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education,' 1 Eur. J. Legal Stud. 8, 11 (2007).

[143] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital 23–25 (Cambridge University Press 2013); John Linarelli, Margot E. Salomon & Muthukumaraswamy Sornarajah, The Misery of International Law: The End of Empire and the Search for Justice: NIEO and Beyond, 78–79 (Oxford University Press 2018).

[144] Muthukumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment 202 (Cambridge University Press 2015); Heiskanen, supra n. 135, at 218.

[145] Examples include: *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, para. 509 (24 Jul. 2008); *Fireman's Fund Insurance Company v The United Mexican States*, Award, ICSID Case No. ARB(AF)/02/1, para. 173 (17 Jul. 2006); *Electrabel SA v Republic of Hungary*, Award, ICSID Case No. ARB/07/19, paras. 6.59-6.63 (25 Nov. 2015).

[146] See, above, supra n. 81.

[147] *Plama Consortium Limited v. Republic of Bulgaria*, supra n. 82, at para. 191.

[148] Sornarajah, supra n. 144, at 202. See, also, Art. 2 of the Declaration on the Settlement of Claims attached to the Algiers Accord, 19 January 1981.

[149] Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A. Young (ed.), Regime Interaction in International Law: Facing Fragmentation 317 (Cambridge University Press 2012). Here, Koskenniemi explores the concept of "mini-sovereignty" within functional regimes. The term is used to describe the unique position of decision-making entities that operate with an autonomy comparable to that of states but within a narrower realm. The sociological

of interest and knowledge and, like states, they often act in solipsistic and imperial ways – coded to perceive only themselves, their own preferences, and to mechanically translate those preferences as universal.[150] If an arbitration tribunal sets out with the objective to find an economic impact on an investment, much like a fortune teller reading tea leaves, it is likely to find one and, consequently, find expropriation. This somewhat self-fulfilling prophecy inherent in the sole effects doctrine demonstrates its potential to skew the balance in investment disputes, often to the disadvantage of public interest and the diverse realities of host states.

In the present case, the Tribunal's decision to employ the sole effects doctrine not only reveals an overarching predilection towards fortifying investor protections but also effectively sets the stage. This predisposes the Tribunal towards a finding of expropriation, much like a predetermined narrative awaiting its cues. Through the Tribunal's lens, what stood out was not Albania's potential public interest motives but the tangible consequences of its measures: the economic repercussions of the seizing and sequestering of Agonset assets.[151] While there are palpable undertones of political motivations driving Albania's criminal investigations and subsequent actions,[152] the core

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understanding of sovereignty, as discussed by Koskenniemi, views it as the capacity vested in a collective that comes to be recognized as the ultimate decision maker. This conception is further developed in his work 'Conclusion: Vocabularies of Sovereignty – Powers of a Paradox' in Hent Kalmo and Quentin Skinner (eds.), Sovereignty in Fragments: The Past, Present and Future of a Contested Concept 229–230 (Cambridge University Press 2010). Here, he examines the rise of specialized legal communities that shape the notion of sovereignty in international law. These communities, and by extension the regimes they influence, often act in insular and self-affirming ways, perceiving and imposing their own norms and preferences as universally applicable. The reference to "mini-sovereignty" in this context alludes to the self-contained and self-referential nature of such regimes, including investment arbitration, which, like states, creates and enforces its own 'regimes of truth' and exhibits a form of agency akin to sovereignty.

[150] Koskenniemi, supra n. 149, at 317–318; Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 605–606 (Cambridge University Press 2009); Martti Koskenniemi, 'It's Not the Cases, It's the System: M. Sornarajah, Resistance and Change in the International Law on Foreign Investment. Cambridge: Cambridge University Press, 2015. Pp. Xx + 437. £80. ISBN 9781107096622,' 18 J. World Inv. & Trade 343, 351 (2017).

[151] Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization,' 15 Int'l J. Const. L. 671, 675 (2017). This aligns with Peters's views on fragmentation in international law, where she delineates between 'functional' and 'regional' fragmentation. Peters identifies institutional fragmentation (various treaties, organizations, bodies, courts) and ideational fragmentation (diverse objectives and values) as two critical facets that often converge. In the context of investment arbitral tribunals, such fragmentation manifest as an 'expertise-based bias', favoring the objectives and values inherent to the investment regime due to greater familiarity and specialization. This bias can predispose tribunals to detect economic impacts in line with the regime's investor-centric norms, potentially at the expense of broader public interest.

[152] Indeed, the circumstances surrounding this case indicate that the criminal actions – specifically the arrest warrants and seizure decisions – were driven by a political vendetta against the claimants. The allegations of overseas fund laundering appear weakened by documentation confirming a legitimate source for these funds. There are also notable inconsistencies within the claims behind the criminal investigations, discrepancies that Albania did not satisfactorily explain to INTERPOL. After implementing the seizure decisions, Prime Minister Rama publicized his campaign against investors, such as the claimants, as being successful and further intensified the discourse by indirectly threatening the judiciary, suggesting their involvement in the alleged investor wrongdoing, see *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, supra n. 4, paras 714, 715, 716 a, 718, 719, 724 c and 724 d.

issue at hand is not their economic repercussions. It is the Tribunal's foundational choice that acts as an anchor, resisting Albania's attempts to shift its viewpoint and thereby pulling it back toward its investor-centric predisposition.

The myopia of such an approach becomes even more pronounced when juxtaposed with decisions like *Quiborax v. Bolivia*. In *Quiborax*, the Tribunal prioritized its analysis differently: it first scrutinized whether the revocation of the claimants' mining concessions could find justification under the police powers doctrine before delving into the economic ramifications thereof (deprivation of economic value and whether the deprivation was permanent).[153] This priority sequencing in *Quiborax* ensured that the state's potential legitimate public interest motives were not sidelined in favor of mere economic considerations – even if the Tribunal eventually determined that the revocation of the claimants' concessions was not a legitimate exercise of Bolivia's police powers.[154]

By fixating solely on economic repercussions, however, the *Hydro* Tribunal inadvertently narrows its view, risking oversight of vital nuances and the broader arguments at play. The Tribunal's focus on economic impacts mirrors managerialism;[155] namely, prioritizing a regime's ethos – in this case, the protection of investors' rights – over normative questions about the legitimacy of state's regulatory measures.[156] Managerialism is not merely a matter of choice or preference; it is the by-product of structural biases within functional regimes themselves.[157] These biases subtly guide decision-making processes, leading to the neglect of the common good of the whole society in pursuit of a putative 'logic of functions' and the quantification of economic detriment to investments.[158] This tendency risks reducing complex legal and ethical issues to mere questions of efficiency and effectiveness.[159] For instance, could Albania's measures, even those with substantial economic impact, be justified as a legitimate exercise of sovereign authority in addressing potential money laundering, particularly given the affirmation of the criminal investigations by Albanian courts? Instead, we are left with an instrumentalized cog of compliance, where the objectives of

[153] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún* v *Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, para. 200 (16 Sept. 2015).
[154] Ibid., at para. 227.
[155] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics,' 70 Mod. L. Rev. 1, 26 (2007)
[156] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later,' 20 Eur. J. Int'l L. 7, 15 (2009).
[157] Koskenniemi, supra n. 142, at 12.
[158] Peters, supra n. 151, at 700.
[159] Koskenniemi, supra n. 156, at 15.

institutional action are predefined, and the primary concern becomes their optimal realization within the parameters of the regime[160] – the protection of investors' rights.

The situation reflects the fantasy position of the managerialist, akin to holding the prince's ear, where managerialism thinks of itself as a hill from which it is possible to see far.[161] In reality, it is more akin to a valley where the same direction is always looked upon, and all the interesting and significant questions lie unaddressed and forgotten behind our backs.[162] This metaphorical valley limits the tribunal's perspective, often obscuring the comprehensive view required for truly balanced and fair arbitration. Amidst this landscape of managerialism, the words of the *Hydro* Tribunal itself resonate with gravitas: 'When considering these matters [indirect or "creeping" expropriation], a tribunal must focus on the substance of the effect of the impugned measures on the protected investments.'[163]

Given the concerns around investment tribunals' legal reasoning,[164] a balanced and precise mechanism is essential.[165] The principle of proportionality, rooted in the police powers doctrine,[166] offers an apt framework to examine whether regulatory actions amount to indirect expropriation.[167] This principle serves as a bridge, drawing a coherent line between a state's objectives and its enacted measures.[168] Even though investment tribunals have yet to establish a standard approach to proportionality,[169] the analysis usually pivots on three evaluations:[170] first, determining if the measure is glaringly disproportionate;[171] second, confirming a tangible

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[160] Koskenniemi, supra n. 155, at 26.
[161] Koskenniemi, supra n. 149, at 324.
[162] Ibid.
[163] *Hydro S.r.l, Costruzioni S.r.l, et al.* v. *Republic of Albania*, supra n. 4, at para. 692.
[164] Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures,' 3 J. Int'l Dispute Settlement 31 (2012).
[165] This concern is underscored by the *Magyar Farming* Tribunal's observation, mirroring *Saluka v Czech Republic*: 'There is no comprehensive test that may be used to distinguish regulatory expropriation, for which compensation is required, from an exercise of police or regulatory powers, which does not give rise to a duty of compensation', *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, supra n. 140, at para. 365; see also *Saluka Investments B.V. v. The Czech Republic*, supra n. 140, at para 263.
[166] Henckels, supra n. 138, at 225.
[167] Gebhard Bücheler, Proportionality in Investor-State Arbitration 122–123 (Oxford University Press 2015).
[168] Kingsbury and Schill supra n. 134, at 85.
[169] Eric De Brabandere and Paula Baldini Miranda da Cruz, 'The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective,' 89 Nordic J. Int'l L. 471, 490–491 (2020).
[170] Alice Osman, 'Police Powers Doctrine' (Jus Mundi, September 2021), available at https://jusmundi.com/en/document/wiki/en-police-powers-doctrine (accessed 30 Aug. 2023)
[171] *Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA* v *Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, para. 818 (10 Apr. 2013); *El Paso Energy International Company* v *The Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 241 (31 Oct. 2011); *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc* v *Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, para. 195 (3 Oct. 2006).

relationship between the measure and its goal;[172] and third, assessing the measure's suitability and necessity for its legitimate purpose.[173] Proportionality transcends mere outcome assessment. It champions a comprehensive framework, ensuring that broader societal and state objectives are not overshadowed by investor-specific concerns.[174]

Moreover, the adoption and application of the sole effects doctrine in investment arbitration is riddled with complexities. First, the unpredictable nature of which approach a tribunal might take positions states and investors alike in uncertain terrain,[175] eroding the trust fundamental to a fair arbitration process. States often find themselves in a challenging predicament; they are left defending not only the merit of their regulations but also contesting the extent to which these regulations affected the investor – a daunting and often imbalanced battle. Second, virtually any regulation can be seen to burden an investor economically,[176] shifting the tribunal's attention from assessing regulatory intent to merely quantifying investor detriment. This narrow focus is aptly critiqued in *Casinos v Argentina*, where the tribunal remarked that merely gazing at the effect of a measure on the investment is a myopic endeavor.[177]

The third problem relates to the former. The *Hydro* Tribunal's application of the sole effects doctrine is symptomatic of a systemic trend; one that jeopardizes the delicate equilibrium between

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[172] *Azurix Corp* v *The Argentine Republic*, ICSID Case No. ARB/01/12, Award, para. 311 (14 Jul. 2006); *Técnicas Medioambientales Tecmed, SA* v *United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, para. 122 (29 May 2003); *Olympic Entertainment Group AS (Estonia)* v *Republic of Ukraine*, PCA 2019-18, Award, para. 97 (15 Apr. 2021).

[173] *Burlington Resources, Inc* v *Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, para. 529 (14 Dec. 2012); *Olympic Entertainment Group AS (Estonia)* v *Republic of Ukraine*, supra n. 172, at paras. 97–101; *PL Holdings* v *Poland*, SCC V 2014/163, Partial Award, para. 355 (28 Jun. 2017).

[174] My advocacy for the proportionality test does not aim to negate the arguments presented by Venzke and Ortino, who each suggest that the balance between investment protection and other public policy considerations can be resolved at the level of politico-legislative lawmaking. Indeed, this is evident in recent mega-regional trade agreements that have incorporated provisions expressly protecting the right to regulate. For example, the Protocol of the China, Japan, and Korea Trilateral Investment Agreement (2012) posits that non-discriminatory regulatory actions taken for the legitimate welfare of the public do not qualify as indirect expropriation, except under rare circumstances of egregious disproportionality relative to their intended purpose. This principle is reflected in various contemporary trade agreements such as the Eurasian Economic Union–Vietnam Free Trade Agreement (2015, Article 8.1), the Canada–EU Comprehensive Economic and Trade Agreement (CETA, 2016, Article 8.9), the United States–Mexico–Canada Agreement (USMCA, 2018, Article 14.10.3(g)), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, 2018, Article 10.8). That said, rather than perpetuating false dichotomies between judicial and legislative approaches, proportionality analysis can effectively operate at both levels, working in tandem to address concerns of legitimacy in arbitral decisions (cf. Ingo Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication,' 17 J. World Investment & Trade 374, 397 (2016); Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing,' 30 Leiden J. Int'l Law 71, 91 (2017).

[175] Henckels, supra n. 138, at 225.

[176] Elena Ketteni and Constantina Kottaridi, 'The Impact of Regulations on the FDI–Growth Nexus within the Institution-Based View: A Nonlinear Specification with Varying Coefficients,' 28 Int'l Bus. Rev. 415, 415–416 (2019).

[177] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/14/32, Award, para. 331 (5 Nov. 2021).

investor protections and states' regulatory autonomy. As indicated by the *Casinos* Tribunal: 'in determining whether a certain government measure qualified as an indirect expropriation, several tribunals have considered principally, at times even solely, the effects the measure had on the protected investment'.[178] Such an analytical lens is not confined to awards of yesteryears, as evidenced by early rulings like *Compañia v. Costa Rica*,[179] *Middle East Cement v. Egypt*,[180] or *Eureko v. Poland*.[181] It also permeates more recent decisions, including those in *UP and CD Holding v. Hungary*,[182] *Cavalum v. Spain*[183] and *Infinito Gold v. Costa Rica*.[184] This prevailing tendency disrupts the equilibrium between investor rights and sovereign prerogatives, complicating an already fraught landscape and eroding the very foundations upon which the legitimacy of international arbitration rests.[185]

It is precisely this erosion of legitimacy and perceived imbalance that has driven some states to reconsider their affiliations with the investment arbitration regime. Countries like Bolivia, Venezuela, Ecuador, and South Africa[186] have gone to the extent of exiting the ICSID Convention.[187] Similarly, the negative outcome of this dispute has pushed Albania to the brink of

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[178] Ibid 330.

[179] *Compañía del Desarrollo de Santa Elena SA* v *Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 77 (17 Feb. 2000).

[180] *Middle East Cement Shipping and Handling Co SA* v *Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, para. 105 (12 Apr. 2002).

[181] *Eureko BV* v *Republic of Poland*, Partial Award (ad hoc), para. 185 (19 Aug. 2005).

[182] *UP (formerly Le Chèque Déjeuner) and CD Holding Internationale* v *Hungary*, ICSID Case No. ARB/13/35, Award, para. 331 (9 Oct. 2018).

[183] *Cavalum SGPS, SA* v *Kingdom of Spain*, Decision on Jurisdiction, Liability and Directions on Quantum, para. 205 (31 Aug. 2020).

[184] *Infinito Gold Ltd* v *Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, para. 239 (3 Jun. 2021).

[185] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' 29 Eur. J. Int'l L. 551, 556 (2018); Rafael Quintero Godínez, 'A Habermasian Response to the Legitimacy Crisis of Investment Arbitration,' 1 ELTE L.J. 49, 59 (2022).

[186] Michael Waibel et al., 'The Backlash against Investment Arbitration: Perceptions and Reality,' in Michael Waibel et al. (eds.), The Backlash Against Investment Arbitration. Perceptions and Reality xlix (Kluwer Law International 2010); Mmiselo Freedom Qumba, 'South Africa's Move Away from International Investor-State Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?' 52 De Jure L.J. 358, 360 (2019); Langford and Behn, supra n. 185, at 556.

[187] In this context, it is noteworthy that there has been a significant trend of countries terminating investment treaties in recent years, dramatically reshaping the investment regime landscape. Within the last five years, at least 250 such treaties have been terminated. This change is primarily driven by several factors: the perceived imbalance in the treaty structures, concerns about national sovereignty, and conflicts between the treaty obligations and broader global objectives like sustainable development and climate change goals. Of particular interest is the fact that eight European Union member states have indicated their intention to withdraw from the Energy Charter Treaty, a treaty notorious for its high number of ISDS cases; see, Center for International Environmental Law, International Institute for Sustainable Investment and ClientEarth, 'Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment' (2023), available at https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-enivronment-submission-2023 (accessed 30 Aug. 2023).

severing its ties with ICSID.[188] This scenario underscores the challenge the investment arbitration regime faces: reconciling investment protections with broader societal and economic goals. Proportionality, in this context, is more than just a legal principle. It is a beacon, guiding the regime away from the inherent biases like those exhibited by the *Hydro* Tribunal. By adopting and meticulously applying this principle, tribunals can mitigate the risks of structural bias and managerialism. Failure to recalibrate risks not only a collapse of trust but also the very foundations of the international arbitration system itself.

5 CONCLUSION

The *Hydro and Others v. Albania* case serves as a microcosm of the broader challenges facing international investment arbitration, most notably the tension between states' regulatory powers and investors' rights. As dissected in our COMMENTARY, the Tribunal's choice to employ the sole effects doctrine – a methodological lens focusing primarily on economic impact – underscores the structural bias that perpetuates an investor-centric ethos in investment arbitration. This limited scope, which can be likened to a fortune teller fixated on reading tea leaves, invariably found Albania's regulatory actions to constitute expropriation. Such a focus not only distorts the framework of investment disputes but also risks sidelining the broader societal and state objectives in favor of niche investor interests.[189]

A critical assessment of the Tribunal's methodological orientation reveals a deep-seated inclination towards managerialism. This is not a merely preferential choice but a by-product of an entrenched structural bias within the arbitration regime itself. Such bias subtly steers decision making, overshadowing the broader societal good in favour of a narrow 'logic of functions' and an emphasis on investment protection. This managerialist tendency simplifies complex legal and ethical dilemmas into binary evaluations of efficiency and effectiveness. In the case at hand, one must ask: could the measures with significant economic impact be justified as legitimate exercises of sovereign authority, especially in light of Albania's efforts to address potential money laundering validated by its courts? However, under the overshadowing influence of managerialism, such

[188] Gjergj Erebara, 'Albanian PM Threatens to Quit International Arbitration Body,' Balkan Insight (7 April 2023), available at https://balkaninsight.com/2023/04/07/albanian-pm-threatens-to-quit-international-arbitration-body/, (accessed 30 Aug. 2023).

[189] Jasper Krommendijk and John Morijn, "'Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration,' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni (eds.), Human Rights in International Investment Law and Arbitration 433 (Oxford University Press 2009).

critical questions are sidelined as an exception rather than the primary analytical lens. The Tribunal's focus becomes an instrumentalized pursuit of compliance, rigidly adhering to predefined objectives that primarily centre around the protection of investors' rights. This implicit bias risks destabilizing the delicate balance between investor rights and states' sovereign prerogatives, endangering the long-term legitimacy of international arbitration – a point underscored by the growing skepticism and even threatened withdrawals by various states, including Albania.

To recalibrate this imbalance, our recommendation is the incorporation of the principle of proportionality for evaluating the legitimacy and necessity of state regulations, thereby offering a more nuanced approach to discerning indirect expropriation. Such a shift necessitates a reorientation of tribunal perspectives, pushing them to balance investor protections against broader societal, economic, and regulatory considerations. This recalibration is imperative for preserving the credibility and efficacy of investment arbitration in an increasingly complex and contentious global arena. Thus, we stand on the precipice of a new arbitration ethos, one that defies ossification while aiming for a higher synthesis – a rebirth forged in the crucible of critical revaluation, where states and investor alike can find more equitable outcomes.