

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

In the arbitration proceeding between

BURIMI SRL AND EAGLE GAMES SH.A

(Claimants)

v.

REPUBLIC OF ALBANIA

(Respondent)

ICSID Case No. ARB/11/18

AWARD

Members of the Tribunal

Mr. Daniel M. Price, President

Prof. Bernardo M. Cremades

Prof. Ibrahim Fadlallah

Secretary of the Tribunal

Mr. Marco Tulio Montañés-Rumayor

Representing Claimants:

Ms. Patrizia Di Nunno

Attorney-at-law, Brescia, Italy

Representing Respondent:

Mr. Hamid Gharavi

Ms. Sophie von Dewall

Derains & Gharavi, Paris, France

and

Ms. Ledina Mandia

Ministry of Justice, Tirana, Albania

Date of dispatch to the Parties: May 29, 2013

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Agreement for the Promotion and Protection of Investments concluded between the Republic of Italy and the Republic of Albania
CM	Respondent's Counter-Memorial [on the merits and jurisdiction] of September 17, 2012
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Exhibit C-#	Exhibit Claimant
Exhibit R-#	Exhibit Respondent
FIL	Albania's Foreign Investment Law No. 7764 of November 2, 1993
Financing Agreement	Loan agreement of August 24, 2004
Gambling Law	Albanian Law No. 8701 of December 1, 2000
2007 Gambling Law	Albanian Law No. 9744 of May 28, 2007
LA [C-L] [R-L]	Legal Authority [Claimant] [Respondent]
Mem	Claimants' Memorial [on the merits and jurisdiction] of June 4, 2012
Pledge Agreement	Pledge Agreement of August 24, 2004
Reply	Claimants' Reply of October 17, 2012
Rejoinder	Respondent's Rejoinder of November 28, 2012
Request	Request for Arbitration of June 15, 2011
Requesting Parties	Mr. Ilir Burimi, Burimi SRL, and Eagle Games SH.A
Tr. [page: line]	Transcript of the hearing held on January 21, 2013

I. FACTUAL BACKGROUND

A. The Parties

1. Claimants

1. Claimants are Burimi SRL and Eagle Games SH.A, and are hereinafter referred to as “Burimi SRL,” “Eagle Games,” or “Claimants.”
2. Burimi SRL is a company incorporated under the laws of Italy. Its business objective is “*intermediation and commercial representation.*”¹
3. Eagle Games SH.A is a company incorporated under the laws of Albania. Its objective is to organize games of chance.²
4. Claimants are represented in this arbitration by Ms. Patrizia Di Nunno, Attorney-at-law, Brescia, Italy.

2. Respondent

5. Respondent is the Republic of Albania and is hereinafter referred to as “Albania” or “Respondent.”
6. Respondent is represented by Mr. Hamid Gharavi and Ms. Sophie von Dewall, of Derains & Gharavi, Paris, France.
7. Claimants and Respondent are hereinafter collectively referred to as the “Parties.”

B. The Dispute

8. On December 1, 2000, the Albanian Government enacted Law No. 8701 on Gambling, Casinos, and Hippodromes (the “Gambling Law”).³ This law introduced a new regulatory

¹ Exhibit C-7.

² Exhibit C-1.

³ Exhibit R-6.

framework for the gambling industry and was aimed at reducing illicit gambling and associated practices.⁴

9. On March 29, 2004, Eagle Games was founded by two Albanian nationals, Ms. Alma Leka and Mr. Artan Serjani.⁵ Each owned 50 percent of the shares in the company.⁶ Eagle Games' objective was to organize games of chance, mainly through the sale of "scratch and win" instant lottery tickets.⁷ Mr. Fatjon Luniku, also an Albanian national, was appointed General Director of the company.
10. Pursuant to the Gambling Law, Eagle Games had to obtain a gambling permit from Albania's Finance Ministry before commencing its activities.⁸ To obtain a permit, Eagle Games had to comply with the following criteria:⁹ (i) be a private company registered in the commercial register, (ii) have gambling activity as its statutory object, (iii) have its headquarters in Albanian territory, (iv) identify its founders, directors, and key personnel, (v) provide itself the total investment for its gambling business, and (vi) guarantee the prize money by freezing a certain amount in its bank account.
11. On April 6, 2004, Eagle Games was registered in Albania.¹⁰
12. Soon thereafter, Eagle Games applied for a gambling permit. At that time, Eagle Games was an Albanian company, with two Albanian shareholders and an Albanian director.
13. On June 18, 2004, the Finance Ministry granted Eagle Games a 10-year permit to organize instant lottery games.¹¹ The permit fee was 10,000,000 Albanian Lek ("ALL") (80,334.19 euros ["EUR"]).¹²

⁴ Exhibit R-20.

⁵ Exhibits C-1 and C-2.

⁶ Exhibits C-1.

⁷ *Id.* ("The activity object of the company 'EAGLE GAMES' S.A. is the organization of the Lucky Games winning immediately.").

⁸ Exhibit R-6, Gambling Law, Article 6(1).

⁹ Exhibit R-5.

¹⁰ Exhibit C-2.

¹¹ Exhibit C-12.

¹² Request ¶ 13.

14. Albania submits that the permit provided nothing more than the legal framework within which Eagle Games was authorized to develop its gambling activities.¹³ For each instant lottery game that the company sought to introduce in the market, it had to meet certain conditions, namely: (i) the Gambling Commission needed to approve the standard and format of the tickets, and (ii) the Finance Ministry had to approve and supervise the printing of the tickets and control their distribution in the market.¹⁴
15. According to Claimants, Eagle Games commenced its business activities at the end of September 2004.¹⁵ Respondent disputes this fact.¹⁶
16. On August 24, 2004, Ms. Alma Leka, a shareholder of Eagle Games, entered into a loan agreement (“the financing agreement”) with Burimi SRL.¹⁷ The financing agreement was for an indefinite period of time. Under this agreement, Burimi SRL would finance all of the investments made by Ms. Alma Leka in Eagle Games. The agreement also distributed any prospective profits deriving from Eagle Games’ operations as follows: 90 percent to Burimi SRL and 10 percent to Ms. Alma Leka.¹⁸ Burimi SRL would absorb all of the losses incurred by Eagle Games.
17. On the same day, Ms. Alma Leka also entered into a “pledge agreement.”¹⁹ Under this agreement, Ms. Alma Leka pledged her shares in Eagle Games as a guarantee for Burimi SRL’s financing of those shares.²⁰ The term of this agreement was also for an indefinite period.
18. Claimants submit that pursuant to the financing and pledge agreements, Burimi SRL invested EUR 204,431.00 towards the development of Eagle Games.²¹

¹³ CM ¶ 50.

¹⁴ Exhibit R-6, Gambling Law, Article 6(5) and 6(6); CM ¶ 50.

¹⁵ Request ¶ 14. According to Claimants, Eagle Games placed its first lot of instant lottery tickets in the market in late September.

¹⁶ CM ¶ 52.

¹⁷ Exhibit C-4.

¹⁸ *Id.*

¹⁹ Exhibit C-5.

²⁰ *Id.*

²¹ Exhibit C-6; Request ¶ 7 and p. 6.

19. On September 9, 2004, Ms. Alma Leka and Mr. Artan Serjani each transferred 15 percent of their shares to Mr. Edmond Shoto, an Albanian national, notwithstanding Ms. Alma Leka's earlier pledge agreement and without any apparent consent of Burimi SRL. Thereafter, Eagle Games had the following structure: Ms. Alma Leka 35 percent, Mr. Artan Serjani 35 percent, and Mr. Edmond Shoto 30 percent.
20. On November 26, 2004, Eagle Games held a shareholders meeting. The company's board appointed Mr. Ilir Burimi, a national of Albania and Italy, as General Director, to replace Mr. Luniko. The board also authorized Ms. Alma Leka to represent the company in dealings with banks.²²
21. Mr. Ilir Burimi and Ms. Alma Leka are brother and sister, a fact which Respondent has accused Claimants of having kept intentionally hidden.²³
22. On June 1, 2005, Eagle Games' board appointed Mr. Adrian Kosturi, an Albanian national, as its new General Director in replacement of Mr. Ilir Burimi. In addition, the company's board revoked Ms. Alma Leka's power of attorney and conferred these powers upon Mr. Adrian Kosturi.²⁴
23. On July 4 and August 2, 2005, Eagle Games filed requests with the Gambling Commission²⁵ and the Finance Ministry²⁶ for the approval of the production of lottery tickets.
24. In September 2005, the new Albanian Government took office.²⁷ Around the same time, the Trade Ministry²⁸ was tasked with the supervision of games of chance, replacing the Finance Ministry.

²² Exhibit R-28.

²³ Rejoinder ¶ 14.

²⁴ Exhibit R-29.

²⁵ Claimants refer to the Commission as the "Directorate of Fortune Games."

²⁶ Exhibits R-30 and R-31.

²⁷ Request, ¶ 16.

²⁸ Ministry of Economy, Trade, and Industry. Also called the Ministry of Economics, Department of Trade and Industry.

25. On September 11, 2005, Eagle Games withdrew its July and August requests.²⁹ It also asked the Finance Ministry to unfreeze ALL 5,000,000—approximately USD 49,500—that served as security for amounts due to prospective lottery winners.³⁰
26. The Parties disagree on the reasons behind the withdrawal. Claimants contend that “since the beginning of the year 2005, the Albanian Ministry of Finance, do not conform to the law relating to the centralized printing of lottery tickets for all game of chance operators, preventing the issuance of new tickets by Eagle Games SH.A and preventing de facto the exercise of each activity.”³¹ Respondent argues that Eagle Games withdrew the requests because of “*internal reasons*,” in particular, lack of funding. In doing so, it prevented the Gambling Commission and the Finance Ministry from responding to Eagle Games’ petition.³²
27. On December 16, 2005, Eagle Games changed ownership and management once again. By resolution of its General Assembly, Mr. Artan Serjani and Mr. Edmond Shoto transferred their shares to Mr. Ilir Burimi.³³ Thereby, Mr. Ilir Burimi became the majority shareholder of Eagle Games with 65 percent of the shares. Mr. Ilir Burimi was also reappointed General Director. Ms. Alma Leka was granted another special power of attorney to represent the company in dealings with banks.
28. On November 30, 2006, Eagle Games submitted a new request for approval of the printing of a lottery ticket named “HAPPY NEW YEAR 2007.”³⁴
29. In December 2006, the Trade Ministry initiated the supervision of the games of chance.³⁵ Claimants contend that Eagle Games’ activity was blocked for more than one year because the Trade Ministry had not created the Gambling Commission in charge of authorizing the issuance of new tickets for games of chance.

²⁹ Exhibit R-32.

³⁰ *Id.*; CM ¶ 58.

³¹ Request, ¶ 15.

³² CM ¶¶ 57-58.

³³ Exhibit R-33. Claimants submit that the purchase of 65 percent of company shares was made by Mr. Ilir Burimi upon explicit request of Burimi SRL. (*See* Mem ¶¶ 9-10.)

³⁴ Exhibit R-34; CM ¶ 62.

³⁵ Mem ¶ 17.

30. On January 17, 2007, Eagle Games withdrew its November 2006 request, replacing it with a request for approval of an instant lottery ticket named “FORTUNE WITH YOU.”³⁶
31. On March 20, 2007, the Gambling Commission approved the ticket “FORTUNE WITH YOU” by Decision No. 5.³⁷ According to Claimants, upon receipt of the Commission’s approval, they “began preparing the new tickets by investing large amounts of money [...]”.³⁸
32. On or around that time, discussions took place in the Council of Ministers and Parliament about amending the Gambling Law.
33. On April 2, 2007, the Trade Ministry published on its website the main proposed amendments to the Gambling Law.³⁹ These included the creation of a centralized National Lottery that would replace the multiple lottery companies.
34. On April 11, 2007, Eagle Games wrote to the Trade Ministry regarding its pending request for approval of the instant lottery ticket “FORTUNE WITH YOU.”⁴⁰
35. On May 4, 2007, the Trade Ministry informed Eagle Games that for the time being, its request would not be considered further because of the amendments proposed in the draft bill. The Finance Ministry also released Eagle Games’ funds held as prize money of its “FORTUNE WITH YOU” game.⁴¹
36. On May 28, 2007, Albania adopted Law No. 9744 (the “2007 Gambling Law”).⁴² The new law introduced a single license for the exploitation of the National Lottery. It also revoked all existing permits and licenses for instant lotteries, including Eagle Games’ permit.⁴³ The revocation of Eagle Games’ permit is the subject of the present dispute.

³⁶ Exhibits R-34 and R-35.

³⁷ Exhibit R-36.

³⁸ Mem, ¶ 21.

³⁹ Exhibit C-16.

⁴⁰ *Id.*

⁴¹ Exhibit C-24; Request ¶ 20; Mem, ¶ 22.

⁴² Exhibit C-20.

⁴³ *Id.*

37. Article 20 of the 2007 Gambling Law provided that:

“1. [...] the state has the obligation to return to the entities the sums derived by such revocation.

2. The Council of Ministers defines the criteria, method and form of compensation for these companies.”⁴⁴

38. On June 23, 2010, the Finance Minister issued Order No. 21, setting out the criteria and method by which the affected companies had to apply for compensation.⁴⁵

39. On August 25, 2010, Eagle Games wrote to Albania, disagreeing with the compensation that it would be entitled to pursuant to Order No. 21.⁴⁶ According to Claimants, the compensation amounted to ALL 9,970,000, which was in their view “essentially only the reimbursement of the cost of obtaining the license of ALL 10,000,000.”⁴⁷ Claimants further note that Albania “has always rejected any request made [for compensation].”⁴⁸

40. Respondent submits that Eagle Games did not apply for compensation and instead “went straight to ICSID arbitration.”⁴⁹

II. PROCEDURAL HISTORY

41. On June 16, 2011, Mr. Ilir Burimi, Burimi SRL, and Eagle Games SH.A (the “Requesting Parties”) submitted a Request for Arbitration (the “Request”) to ICSID.⁵⁰

42. The Request invoked the consent to ICSID arbitration contained in: (i) the Agreement for the Promotion and Protection of Investments concluded between the Republic of Italy and the Republic of Albania (the “BIT”)⁵¹, which entered into force on September 12, 1991; and (ii)

⁴⁴ *Id.*

⁴⁵ Exhibit C-9.

⁴⁶ Exhibit C-14; CM ¶ 94.

⁴⁷ Request ¶ 27.

⁴⁸ Request ¶ 28.

⁴⁹ CM ¶¶ 68-69.

⁵⁰ Request was accompanied by Exhibits C-1 to C-25.

⁵¹ Exhibit C-21.

Albania's Foreign Investment Law No. 7764/93 (the "FIL")⁵², which entered into force on November 2, 1993.

43. On the same day, ICSID transmitted a copy of the Request to Albania in accordance with ICSID Institution Rule 5(2).

44. On June 22, 2011, ICSID wrote to the Requesting Parties as follows:

"We note that the Request was submitted by (i) Mr. Ilir Burimi, (ii) Burimi SRL, and (iii) Eagle Games SH.A.

(i) We understand from page 6 and exhibit 18 that Mr. Burimi is a dual national of Albania and Italy with his residence in Italy. In this respect, please note that, pursuant to the mandatory provisions of Article 25(1) and (2) of the ICSID Convention, jurisdiction under the Convention does not extend to "any person who on either date [of consent or registration of a request for arbitration] also had the nationality of the Contracting State party to the dispute." It would therefore appear that Mr. Burimi is manifestly ineligible to appear as a party in this case."

45. On June 28, 2011, ICSID sought the following clarification from the Requesting Parties:

"You have not confirmed that Mr. Ilir Burimi is not a national of Albania. If Mr. Burimi had the Albanian nationality on the date of consent or date of the request for arbitration (i.e. on 15 June 2011 according to your letter of 27 June), Mr. Burimi would be ineligible as a party under the ICSID Convention. This is irrespective of the provisions of any other treaty or law because Article 25 of the Convention is mandatory. Therefore, the Request for Arbitration would be manifestly outside ICSID's jurisdiction regarding Mr. Burimi."

46. On July 1, 2011, ICSID wrote to the Requesting Parties indicating that "[u]nless you confirm that Mr. Ilir Burimi is not a national of Albania, the Request for Arbitration would be manifestly outside ICSID's jurisdiction regarding Mr. Burimi."

47. On July 6, 2011, Mr. Ilir Burimi withdrew his Request, stating that:

"In relation to these proceedings, took note of your position in relation to Mr. [Ilir] Burimi [...], who, besides being an Italian citizen is also a citizen of Albania, today's defense waives the instance of Mr. [Ilir]

⁵² Exhibits C-19 and R-4.

Burimi, requesting that the arbitration procedure must be recorded in favor of the companies Eagle Games Sh.a and Burimi SRL.”

48. On the same day, ICSID took note of Mr. Ilir Burimi’s withdrawal as a Requesting Party.
49. On July 12, 2011, the Secretary-General of ICSID registered the Request (of Burimi SRL and Eagle Games SH.A) in accordance with Article 36 of the ICSID Convention. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.
50. In the absence of an agreement between the Parties, Claimants elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention.
51. On September 23, 2011, Prof. Bernardo M. Cremades, a national of Spain, accepted his appointment by Claimants. On October 4, 2011, Prof. Ibrahim Fadlallah, a national of Lebanon and France, accepted his appointment by Respondent. On November 22, 2011, Mr. Daniel M. Price, a national of the United States, accepted his appointment as Tribunal President by the Chairman of the Administrative Council in accordance with Article 38 of the ICSID Convention.
52. On November 22, 2011, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”) notified the Parties that the Tribunal was deemed to have been constituted on that date. Mr. Marco Tulio Montañés-Rumayor, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
53. Immediately thereafter, the Tribunal circulated the first session’s provisional agenda, inviting the Parties to agree on the items contained therein.
54. On December 23, 2011, Respondent requested a 60-day extension to comment on the provisional agenda.
55. On December 30, 2011, the Tribunal granted the extension but only until February 3, 2012.

56. On February 22, 2012, the Parties agreed to hold the first session outside of the 60-day period prescribed in Arbitration Rule 13(1), extending the 60-day period by 60 additional days.
57. On February 23, 2012, Respondent informed ICSID that it had instructed Mr. Hamid Gharavi of Derains & Gharavi to represent it in this proceeding.
58. On March 30, 2012, Respondent filed objections to jurisdiction pursuant to ICSID Arbitration Rule 41(1) and a request for bifurcation. It also submitted a request for provisional measures concerning security for costs pursuant to Article 47 of the ICSID Convention.
59. On the same date, the Tribunal invited Claimants to file their observations on both of Respondent's requests by April 9, 2012.
60. On April 3, 2012, Claimants requested an extension to file their observations by April 13, 2012. The Tribunal granted the extension on the same day.
61. On April 13, 2012, Claimants filed their response to the request for bifurcation. They also submitted observations on Respondent's provisional measures request, as well as a counter-application for provisional measures concerning security for costs.
62. On April 17, 2012, the Tribunal held a first session by telephone conference with the Parties. During that session, the Tribunal noted that the Parties, through their various prior comments, had reached agreement on most of the Draft Agenda items, leaving open for the Tribunal's decision only a few issues concerning time limits for pleadings and the question of bifurcation.
63. On April 18, 2012, the Tribunal issued Procedural Order No. 1 which recorded the Parties' agreements and resolved the outstanding first session matters. It also ruled on the Respondent's request for bifurcation, holding that:

“...the Tribunal believes that substantial questions on jurisdiction were raised, but that they are inextricably tied to issues of the merits (liability) and are best appreciated in that context.

Therefore, after deliberation among its Members, the Tribunal has decided to join the issue of jurisdiction to that of the merits (liability). However, given the significance of the jurisdictional questions, the Tribunal will defer consideration of damages until after it has reached a decision (or award) on jurisdiction and merits.”⁵³

64. On April 20, 2012, Respondent filed its observations on Claimants’ counter-application for provisional measures concerning security for costs.
65. On May 3, 2012, the Tribunal issued Procedural Order No. 2, denying the Parties’ requests for provisional measures concerning security for costs.
66. On June 4, 2012, Claimants filed a memorial on jurisdiction and merits (liability). [“Memorial” or “Mem”].⁵⁴
67. On September 17, 2012, Respondent filed a counter-memorial on jurisdiction and merits (liability) [“Counter-Memorial” or “CM”].⁵⁵
68. On October 17, 2012,⁵⁶ Claimants filed their reply on jurisdiction and merits (liability) [“Reply”].⁵⁷
69. On November 28, 2012, Respondent filed its Rejoinder on jurisdiction and merits (liability) [“Rejoinder”].⁵⁸
70. The Tribunal notes that written pleadings were submitted by Claimants in Italian, not an official language of ICSID. The English translations bordered on incomprehensible, despite repeated requests from the Secretariat for the submission of professional translations. It struck the Tribunal at times that the pleadings had been translated from Italian to English using a web-based translation service. The poor quality of Claimants’ English language pleadings posed great difficulties for the Tribunal in understanding the arguments advanced and for Respondent in formulating its rebuttal arguments.

⁵³ Procedural Order No. 1, item 13.2.

⁵⁴ Accompanied by Exhibits C-28 to C-33.

⁵⁵ Accompanied by Exhibits R-15 to R-43 and Legal Authorities R-L1 to R-L10.

⁵⁶ Although the Memorial was dated October 17, 2013 it was not transmitted to ICSID until October 22, 2013.

⁵⁷ Accompanied by Exhibit C-34.

⁵⁸ Accompanied by Exhibits R-44 to R-51 and the Legal Expert Opinions of Mr. Neritan Kallfa and Mr. Besnik Cobaj.

71. On December 12, 2012, the Tribunal ruled on an exchange between the parties concerning Claimants' intention to call for direct examination witnesses who had not submitted witness statements. The Tribunal held that no such witness testimony could be heard because Claimants' request ran contrary to the clear terms of the parties' agreements as reflected in Procedural Order No. 1 (see in particular item No. 14). The Tribunal decided that to hear such witnesses would be not only contrary to the Procedural Order, but also prejudicial to Respondent, which would not be in a position to prepare cross-examination.
72. On December 18, 2012, Claimants requested that the Tribunal (i) reconsider its Decision of December 12, 2012 not to allow oral testimony at the hearing of witnesses who had not submitted written statements, and (ii) exclude Respondent's expert reports submitted with its Rejoinder.
73. On December 20, 2012, Respondent objected to both of the above requests.
74. On January 8, 2013, the President of the Tribunal, on behalf of the Tribunal, convened a telephone conference with the Parties to discuss (i) outstanding procedural matters, (ii) issues relating to the hearing, and (iii) financial matters.
75. During the conference call, Claimants renewed their request (first stated in their Reply of October 17, 2012) for an in-person pre-hearing conference under Arbitration Rule 21(2) to seek an amicable settlement of the dispute. Respondent objected to this request both in its Rejoinder of November 28, 2012 and during the conference call.
76. On January 9, 2013, the Tribunal issued Procedural Order No. 3, which addressed outstanding procedural matters. First, regarding the request for reconsideration, the Tribunal confirmed its Decision of December 12, 2012 and held that "it will not permit the Claimants to present and examine witnesses at the hearing who have not previously submitted written statements as required by Procedural Order No. 1."⁵⁹
77. Second, regarding the request for exclusion of Respondent's expert reports, the Tribunal denied the request. The Tribunal concluded that the expert reports submitted by Respondent

⁵⁹ Procedural Order No. 3, item 1(a).

with its Rejoinder were “admissible because they are responsive to arguments made by the Claimants in their Reply of October 17, 2012.”⁶⁰

78. Finally, regarding the request for a pre-hearing conference, the Tribunal noted that Respondent did not join in Claimants’ request. Therefore, the Tribunal denied the request because there was no “request of the parties” as called for by Arbitration Rule 21(2).⁶¹
79. On January 21, 2013, a hearing on jurisdiction and merits (liability) was held in Paris, France. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimants:

Ms. Patrizia Di Nunno	Attorney-at-law
Mr. Italo Moreschi	Attorney-at-law
Mr. Denny Iacobazzi	Attorney-at-law

For Respondent:

Dr. Hamid Gharavi	Derains & Gharavi
Ms. Sophia von Dewall	Derains & Gharavi
Mrs. Carmela Viccaro	Derains & Gharavi
Mrs. Ledina Mandia	State Attorney General, Albania
Mr. Armer Juka	State Attorney, Albania

80. Mr. Moreschi presented oral arguments on behalf of Claimants. Mr. Gharavi and Ms. von Dewall presented oral arguments on behalf of Respondent.
81. The hearing was sound recorded and transcribed *verbatim*, and copies of the sound recordings and the transcripts were subsequently delivered to the Parties.
82. On January 28, 2013, Respondent filed minor corrections to the hearing transcript. Claimants did not file any corrections.
83. On January 31, 2013, Respondent filed its statement on costs.

⁶⁰ *Id.*, item 1(b).

⁶¹ *Id.*, item 1(c).

84. On February 5, 2013, Claimants filed their statement on costs.
85. The Tribunal has deliberated and carefully considered the arguments presented by the Parties. The Tribunal shall now proceed to summarize the Parties' positions (Part III), to analyze the arguments behind those positions (Part IV), and finally, on the basis of its analysis, to render its Award (Part V).

III. SUMMARY OF THE PARTIES' CONTENTIONS AND RELIEF SOUGHT

A. The Claims

86. Claimants submit that Respondent has effectively prevented Eagle Games from carrying out its business.⁶² In particular, Claimants contend that Albania, through its different instrumentalities—the Finance Ministry, the Trade Ministry, and the Gambling Commission, among others— (i) blocked and delayed Eagle Games from issuing new tickets, (ii) failed to promptly create the government entity in charge of authorizing the issuance of tickets, (iii) changed the regulatory framework governing the games of chance sector, and finally, (iv) revoked Eagle Games' permit in 2007.⁶³
87. As a result of the above measures, Claimants request that the Tribunal:
1. Declare that Albania expropriated the investments of Eagle Games and Burimi SRL, in violation of BIT Article 5, FIL Article 4, and customary international law;
 2. Declare that Albania breached the minimum standard of treatment pursuant to FIL Article 2(3); and thus
 3. Award compensation to Claimants in the sum of ALL 1,034,794,456 (approximately USD 10,244,465, corresponding to the company's actual value on December 31, 2004 (ALL 803,111,584 or approximately USD 8 million), plus

⁶² Request ¶ 21.

⁶³ *Id.* ¶¶ 16-23; Mem, unpaginated.

interest from January 1, 2005 to December 31, 2009 (ALL 231,682,872 or approximately USD 2.4 million).⁶⁴

88. Albania contends that the revocation of Eagle Games' gambling permit was fully justified as a matter of public policy.⁶⁵ It also denies the rest of the claims on the merits. Finally, it challenges ICSID jurisdiction.

B. The Objections to Jurisdiction

89. Albania advances the following objections to jurisdiction:

1. Eagle Games is an Albanian company owned by Albanian nationals and does not qualify as a national "of a Contracting State other than the State party to the dispute";
2. Burimi SRL is owned by Mr. Ilir Burimi, who is a national of both Albania and Italy; therefore, Burimi SRL is an Albanian company;
3. Burimi SRL has not made an "investment" in Albania and is not an "investor";
4. Claimants failed to comply with the best efforts negotiation provisions of the BIT and FIL.

90. Therefore, Albania asks the Tribunal:

"To declare that Eagle Games and Burimi S.r.l., individually and/or collectively, lack standing before this Tribunal, and to reject all of their claims for lack of jurisdiction *ratione personae* and/or *ratione materiae*, as the case may be, accordingly."⁶⁶

91. The Tribunal will refer to the Parties' positions in more detail in the course of its analysis.

⁶⁴ *Id.* pp. 13-15.

⁶⁵ CM ¶¶ 66-70.

⁶⁶ *Id.* ¶449.

IV. ANALYSIS

A. Law Applicable to the Jurisdiction of the Tribunal

92. Jurisdiction is governed by the relevant provisions of the (i) ICSID Convention and Rules, (ii) BIT, and (iii) FIL.

93. Article 25 of the ICSID Convention provides that:

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

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

94. Articles 1 and 8 of the BIT read as follows:⁶⁷

Article 1: Definitions

[...]

1. The term “investment” means, whatever the legal form chosen by the legal and reference, every asset invested by investors of one Contracting

⁶⁷ Exhibit C-21.

Party in the territory of the other, in accordance with the laws and regulations of the latter.

In this context of a general nature, the term investment shows in particular but not exclusively:

- (a) movable and immovable property and any real right, including, as it can be invested, mortgages, liens and privileges;
- (b) shares, bonds, shares and any other instruments of credit;
- (c) claims to money or any right arising from commitments or services having an economic value and an investment, as well as income reinvested;
- (d) intellectual property rights and hence the industry, including copyrights, trademarks, patents, industrial designs and know-how, trade secrets, business, trade names, goodwill and other similar rights;
- (e) any economic rights conferred by law, contract, license or administrative action including prospecting, cultivation, extraction and exploitation of natural resources.

2. The term “investor” means a natural person or legal entity of a Contracting Party which has made, granted or assumed to have obtained any necessary authorization, irrevocable obligation to make investments in the territory of the other Contracting Party shall, in accordance with the laws and regulations of the latter.

[...]

3. The term “income” means fees that are derived from an investment, especially profits, interest, capital gains, dividends, royalties and other income from investments.

[...]

Article 8: Regulation of disputes between investors and one of the Contracting Parties

1. Any dispute concerning investments arising between an investor and the other Contracting Party, including disputes concerning compensation for expropriation, nationalization, requisition and similar measures should be, wherever possible, resolved amicably.

2. If the dispute cannot be settled amicably within six months from the date of a request made in writing, the investor may, as its option, submit:

- (a) [...]
- (b) [...]

(c) The International Centre for Settlement of Investment Disputes relating to Disputes (ICSID) for the application of arbitration and conciliation procedures under the Washington Convention 18 March 1965 on “Settlement of Investment Disputes between States and Nationals of Other States” as soon as the contracting parties had validly accepted both, or of regulations concerning the "mechanisms" for the additional settlement of the arbitration of the International Center said.

For the purposes of Article 25 of the Washington Convention March 18, 1965 and as of the date on which this will be applicable for both Contracting Parties, a company having legal nationality of a Contracting Party to the dispute, but with a majority of capital owned by investors of the other Contracting Party or other third party, will be considered as having the nationality of the latter.

[...].

95. Articles 1 and 8 of the FIL provide in the relevant part:⁶⁸

Article 1: General Provisions

For the purpose of this law [...]:

- “Foreign investor” means:

- (a) Any natural entity who is a citizen of a foreign country, or
- (b) Any natural entity who is a citizen of the Republic of Albania, but who resides outside the country, or
- (c) Any legal entity established in accordance with the law of a foreign country, who directly or indirectly seeks to carry out or is carrying out an investment in the territory of the Republic of Albania in conformity with its laws, or has carried out an investment in conformity with its laws during the period from 31.07.1990 in continuation.

- “Foreign investment” means any kind of investment in the territory of the Republic of Albania, performed directly or indirectly by a foreign investor that consists of:

- (a) Movable or immovable, tangible or intangible assets, or any other kind of ownership;
- (b) A company, rights that derive from any kind of participation in a company, by stock shares etc.;
- (c) Loans, monetary obligations or obligations in an activity of an economic value and related to an investment;

⁶⁸ Exhibit C-19.

(c) Intellectual property, including literary and artistic, scientific and technological products, audio recording, inventions, industrial designs, schemes of integrated circuits, know how, trademarks, designs of trademarks and trade names;

(d) Any right recognized by law or contract, and any license or permission issued in accordance with the laws.

- “Dispute over foreign investment” means every disagreement or presumption caused by a foreign investment or that relates to it.

- “Revenue” means an amount of money that derives from or is associated with an investment, including profit, dividend, interest, reinvestment of the capital, costs of direction and administration, costs of technical assistance or other costs or contributions in kind.

[...]

Article 8: Dispute Resolution

[...]

2. If a dispute about a foreign investment arises between a foreign investor and the Albanian public administration, which has not been settled through an agreement, the foreign investor may submit the dispute for resolution to a competent court or arbitrator of the Republic of Albania, according to its laws. If the dispute relates to expropriation, compensation for expropriation or discrimination, as well as to transfers as provided in article 7 of this law, the foreign investor may submit the dispute for resolution to the International Center [*sic*] for the Settlement of Investment Disputes (“Center” [*sic*]), established by the Convention for the settlement of investment disputes between the states and citizens of other states, approved in Washington, on 18 March 1965.

3. [...].

B. The Objections to Jurisdiction

96. To summarize, Respondent argues that the Tribunal lacks jurisdiction: (i) *ratione personae* with respect to the claims of Eagle Games; and (ii) *ratione personae* and *ratione materiae* with respect to the claims of Burimi SRL. Respondent further argues that the claim is inadmissible because Claimants failed to comply with the best efforts negotiation provisions of the BIT and FIL.

1. Whether there is jurisdiction *ratione personae* with respect to the claims of Eagle Games

(i) Claimants' Position

97. Claimants argue that Eagle Games has standing before this Tribunal because it is an “investor” as defined in Article 1 of the BIT and the FIL.
98. Moreover, Claimants contend that Eagle Games has standing pursuant to ICSID Convention Article 25(2)(b). According to Claimants, although Eagle Games is an Albanian company, it should be treated as under the control of the Italian company Burimi SRL because Mr. Ilir Burimi, the General Director and sole shareholder of Burimi SRL, holds 65 percent of the shares in Eagle Games.⁶⁹
99. Therefore, Claimants conclude that the Tribunal has jurisdiction *ratione personae* with respect to the claims of Eagle Games.

(ii) Respondent's Position

100. Respondent argues that this Tribunal has no jurisdiction with respect to the claims of Eagle Games under the first or second clauses of ICSID Convention Article 25(2)(b), and that Burimi SRL does not own the 65 percent shareholding in Eagle Games.
101. First, there is no jurisdiction under the first clause of Article 25(2)(b) because Eagle Games is an Albanian company.⁷⁰ As such, it does not qualify as a national “of a Contracting State other than the State party to the dispute” (i.e., Albania).
102. Respondent further contends that Article 8(2)(c) of the BIT does not alter Eagle Games' Albanian nationality for purposes of the ICSID Convention.⁷¹ The majority of Eagle Games' capital is owned by Mr. Ilir Burimi, an Albanian national and the company's ultimate beneficial owner.⁷² Therefore, Eagle Games is an Albanian national under the first clause of

⁶⁹ Request ¶¶ 9-10 and pp. 5-8.

⁷⁰ CM ¶ 101 (“It is a matter of fact and record that Eagle Games, the company holding the gambling permit, is a company incorporated under Albanian Law”).

⁷¹ *Id.* ¶¶ 102-104.

⁷² *Id.*

Article 25(2)(b) of the ICSID Convention, notwithstanding that Mr. Ilir Burimi is also an Italian national.

103. Second, there is no jurisdiction under Article 25(2)(b) second clause given that the parties did not agree to treat Eagle Games as a non-Albanian national “because of foreign control.”⁷³ According to Respondent “[n]o such consent is included in the provisions of the BIT (or the FIL for the matter), whereby it is noted that the “nationality” stipulation in Article 8(2)(c) of the BIT [...] for the purposes of the first clause of Article 25(2)(b) of the ICSID, must not be confused with a specific agreement concerning host State nationals for purposes of the second clause of Article 25(2)(b) of the ICSID” Convention.⁷⁴
104. Moreover, Albania argues that even if the “foreign control” exception applied, Eagle Games still would not qualify as a non-Albanian national because its shares are held by two Albanian nationals as follows: 65 percent by Mr. Ilir Burimi and 35 percent by Ms. Alma Leka.⁷⁵
105. Furthermore, “the fact that Mr. Burimi is also an Italian national is...irrelevant.”⁷⁶ “[D]ual nationals that also hold the nationality of the State party to the dispute are categorically ineligible to qualify as ‘national of another Contracting State’, or simply as a ‘foreigner’.”⁷⁷
106. Therefore, according to Respondent, as Eagle Games is an Albanian company under Albanian control, this Tribunal lacks jurisdiction *ratione personae* pursuant to the second clause of Article 25(2)(b) of the Convention.
107. Finally, Respondent claims that there is no evidence on the record showing that Mr. Ilir Burimi’s 65 percent shareholding in Eagle Games is in fact owned by Burimi SRL. To the contrary, Claimants produced a company extract for Eagle Games from the Albanian Trade Registry,⁷⁸ in which Mr. Ilir Burimi – and *not* Burimi SRL – is listed as the company’s 65

⁷³ *Id.* ¶¶ 105-107.

⁷⁴ *Id.* ¶ 106 (*emphasis omitted*).

⁷⁵ *Id.* ¶ 112.

⁷⁶ *Id.* ¶ 113.

⁷⁷ *Id.*

⁷⁸ Exhibit C-3.

percent shareholder.⁷⁹ In addition, the sale contract by which Mr. Ilir Burimi purchased the shares from Mr. Edmond Shoto and Mr. Artan Serjani again identifies Mr. Ilir Burimi as the buyer and owner of the shares and does not indicate that he acted “on behalf of” Burimi SRL.⁸⁰

108. Therefore, Respondent concludes that the Tribunal lacks jurisdiction *ratione personae* with respect to the claims of Eagle Games.

(iii) Tribunal’s Analysis

109. To have standing under ICSID Convention Article 25(2)(b), Eagle Games must show that it is a national “of a Contracting State other than the State party to the dispute” or that it should, by way of exception, “be treated” as such for the purposes of the ICSID Convention “because of foreign control.”⁸¹

110. Eagle Games is a legal entity incorporated in Albania. As such, it does not qualify as a national “of a Contracting State other than the State party to the dispute” under the first clause of Article 25(2)(b).

111. Under the second clause of Article 25(2)(b), Eagle Games could, by way of exception, “be treated as a national of another Contracting State” if, “because of foreign control, the parties have agreed” that it would be treated as such.

112. The requirement of “foreign control” is not expressly defined in the ICSID Convention. The wording of the second clause of 25(2)(b) allows the parties “to decide under what circumstances a company could be treated as a ‘national of another Contracting State.’”⁸² Accordingly, the Tribunal must consider whether the parties to this dispute have agreed that Eagle Games is under foreign—in this case, Italian—control and thereby qualifies as a national of Italy.

⁷⁹ CM ¶ 118.

⁸⁰ *Id.* ¶¶ 118-119.

⁸¹ Article 25 of the ICSID Convention.

⁸² Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours 1972 II, Vol 136, pp. 337-410, at pp. 358-359.

113. As Eagle Games has not concluded an agreement, such as an investment contract, directly with Respondent in which there is a direct or implied (by virtue of an ICSID arbitration clause) agreement to treat Eagle Games as a foreign national, the Tribunal must look to the relevant investment treaty and foreign investment law to determine whether there is an agreement on the meaning of “foreign control” for the purposes of fulfilling the requirement established by the second clause of Article 25(2)(b).⁸³
114. Article 8(2)(c) of the Italy-Albania BIT states “[...] For the purposes of Article 25 of the Washington Convention March 18, 1965 and as of the date on which this will be applicable for both Contracting Parties, *a company having legal nationality of a Contracting Party to the dispute, but with a majority of capital owned by investors [of] the other Contracting Party or other third party, will be considered as having the nationality of the latter.*”
115. Claimants are thus correct in their assertion that, if the majority of Eagle Games’ shares were owned by an Italian national, Eagle Games would qualify as having Italian nationality under the second clause of Article 25(2)(b) of the ICSID Convention.
116. Claimants argue that 100 percent of Eagle Games’ shares are owned by Burimi SRL, an Italian entity incorporated in Italy because Ms. Alma Leka’s 35 percent shareholding is attributable to Burimi SRL via the financing agreement⁸⁴ and the pledge agreement,⁸⁵ and Mr. Ilir Burimi’s 65 percent shareholding is attributable to Burimi SRL as Mr. Ilir Burimi was acting as an agent of Burimi SRL when he purchased the shares.
117. The Tribunal finds that the financing and pledge agreement do not represent ownership by Burimi SRL of the 35 percent shareholding in Eagle Games, nor have Claimants provided sufficient evidence that Mr. Ilir Burimi was acting on behalf of Burimi SRL as the purchaser and owner of the 65 percent of shares. The Share Sale Contract⁸⁶ and the attestation by the Albanian judge of the sale of shares,⁸⁷ in addition to trade data extracts and balance sheets,⁸⁸

⁸³ Claimants brought this case under the BIT and the FIL. The Tribunal notes that unlike the BIT, the FIL does not contain an agreement on the meaning of “foreign control” for purposes of the second clause of Article 25(2)(b).

⁸⁴ Exhibit C-4.

⁸⁵ Exhibit C-5.

⁸⁶ Exhibit R-33.

⁸⁷ Exhibit C-8.

⁸⁸ Exhibits C-3, R-3, R-13.

show that the shares were purchased in the name of Mr. Ilir Burimi and contain no reference to his acting as an agent of Burimi SRL.

118. Accordingly, the Tribunal finds that Mr. Ilir Burimi, a dual national of Italy and Albania, is the majority shareholder of Eagle Games and therefore the relevant party for determining whether Eagle Games can be treated as a national of a Contracting State other than the State party to the dispute because it is under “foreign control.”
119. While Claimants did not make this argument in its written submissions, the conclusion that Mr. Ilir Burimi—a dual national of Italy and Albania—is the majority shareholder of Eagle Games raises an important question about whether a dual national may rely on his “foreign” nationality—that is, the nationality other than the nationality of the Contracting State party to the dispute—for the purposes of establishing “foreign control” over a company bringing a claim before ICSID.
120. The ICSID Convention makes it very clear that a dual national may not invoke one of his two nationalities to establish jurisdiction over a claim brought in his own name under Article 25(2)(a).⁸⁹ Indeed, it is for this very reason that Mr. Ilir Burimi was required to withdraw as a Requesting Party from the Request for Arbitration dated June 16, 2011.
121. While neither the ICSID Convention nor relevant precedents address the potential for a dual national invoking one of his two nationalities to establish jurisdiction over a claim brought in the name of a juridical person under the second clause of Article 25(2)(b), it strikes the Tribunal as anomalous that the principle against use of dual nationality in 25(2)(a) would not transfer to the potential use of dual nationality in 25(2)(b). Otherwise, any dual national who is a national of the Contracting State to a dispute could circumvent the bar on claims in Article 25(2)(a) by establishing a company in that state and asserting foreign control of that company by virtue of his second (foreign) nationality. Accordingly, the Tribunal finds that for the purposes of considering whether Eagle Games could be treated as a national of

⁸⁹ Pursuant to Article 25(2)(a) of the ICSID Convention, jurisdiction under the Convention does not extend to “any person who on either date [of consent or registration of a request for arbitration] also had the nationality of the Contracting State party to the dispute.”

another Contracting State (i.e., Italy) because of “foreign control,” Mr. Ilir Burimi cannot invoke his Italian nationality to establish “foreign control” of Eagle Games.

122. The Tribunal thus concludes that it lacks jurisdiction *ratione personae* with respect to the claims of Eagle Games.

2. Whether there is jurisdiction *ratione personae* and *ratione materiae* with respect to the claims of Burimi SRL

2.1. Jurisdiction *ratione personae*

(i) Claimants’ Position

123. Claimants allege that Burimi SRL has standing before this Tribunal because it is a company incorporated in Italy. As such, it is a “national of another Contracting State” pursuant to Article 25(2)(b) of the ICSID Convention.⁹⁰

124. Moreover, according to Claimants, Mr. Ilir Burimi acted on behalf of Burimi SRL when he purchased shares of Eagle Games, as clearly indicated in the records of the transaction.⁹¹ As a result, Claimants assert that Burimi SRL has exercised control over Eagle Games.

(ii) Respondent’s Position

125. Respondent argues that Burimi SRL lacks standing because it is owned by Mr. Ilir Burimi, who is a national of both Albania and Italy. As a consequence, Burimi SRL is an Albanian company—as opposed to an Italian company—for purposes of Article 25 of the ICSID Convention.

126. Furthermore, Respondent submits that the Republics of Italy and Albania included a specific stipulation as to the investor’s nationality in Article 8(2)(c) of the BIT. Under this provision, the nationality of a legal entity is determined by who controls it, and not by the company’s place of incorporation. To apply correctly this provision, Albania contends that one has to pierce the corporate veil of the company to identify the nationality of the person or legal entity holding the majority of the capital for purposes of the first clause of Article 25(2)(b) of

⁹⁰ Mem, unpaginated.

⁹¹ Exhibit C-26.

the ICSID Convention.⁹² In this case, 90 percent of the shares in Burimi SRL are held and owned by Mr. Ilir Burimi, who is an Albanian national.

127. Therefore, Respondent concludes that the Tribunal lacks jurisdiction *ratione personae* with respect to the claims of Burimi SRL.

(iii) Tribunal's Analysis

128. Article 8(2)(c) of the Italy-Albania BIT states that “*For the purposes of Article 25 of the Washington Convention March 18, 1965 and as of the date on which this will be applicable for both Contracting Parties, a company having legal nationality of a Contracting Party to the dispute, but with a majority of capital owned by investors [of] the other Contracting Party or other third party, will be considered as having the nationality of the latter.*” Respondent argues that this provision requires the Tribunal to pierce the corporate veil and determine the nationality of Burimi SRL based on the nationality of the majority shareholder. As Mr. Ilir Burimi is a citizen of Albania, Respondent claims that for the purposes of Article 25(2)(b), Burimi SRL is an Albanian company.
129. Respondent’s argument is based on a fundamental misunderstanding of Article 25(2)(b) of the ICSID Convention.
130. The first clause of Article 25(2)(b) defines a “national of another Contracting State” as “any juridical person which had the nationality of a Contracting State *other than the State party to the dispute* on the date on which the parties consented to submit such dispute to conciliation or arbitration.” Burimi SRL is a juridical person with nationality of a Contracting State (Italy) other than the State party to the dispute (Albania).
131. The second clause of Article 25(2)(b) defines a “national of another Contracting State” as “any juridical person *which had the nationality of the Contracting State party to the dispute* on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State”. Burimi SRL does not have the nationality of the

⁹² CM ¶ 129.

Contracting State party to the dispute (Albania). It is an Italian legal entity. Therefore, whether it is under “foreign control” is irrelevant to the determination of its nationality.

132. Respondent mistakenly argues that piercing the corporate veil—as is required by Article 8(2)(c) of the Italy-Albania BIT—is necessary to determine the nationality of a company that *already* has the nationality of a State other than the State party to the dispute. The purpose of Article 8(2)(c), however, is to determine whether companies *with* the nationality of the State party to the dispute (Albania), can be considered under foreign control and therefore should be treated as a “national of another Contracting State” for the purposes of the ICSID Convention.
133. The Tribunal thus concludes that it does have jurisdiction *ratione personae* with respect to the claims of Burimi SRL.

2.2. Jurisdiction *ratione materiae*

(i) Claimants’ Position

134. Claimants submit that Burimi SRL (an Italian company) invested in Eagle Games by virtue of the financing agreement entered into with Ms. Alma Leka to fund her purchase of shares in Eagle Games.⁹³
135. Claimants therefore argue that Burimi SRL holds an indirect investment under the terms of the ICSID Convention, the BIT, and the FIL.

(ii) Respondent’s Position

136. Respondent objects to jurisdiction *ratione materiae* on six grounds.⁹⁴ First, Albania argues that the dispute does not arise directly out of an investment but rather out of a commercial financing agreement. In Albania’s view, the financing agreement is a private *inter-partes* agreement concluded between one of the shareholders of Eagle Games (Ms. Alma Leka) and a third party (Burimi SRL).⁹⁵ Respondent further argues that “the objective of the financing

⁹³ Mem, unpaginated.

⁹⁴ CM ¶¶ 137-355.

⁹⁵ *Id.* ¶ 145.

agreement was not to invest in Eagle Games, the gambling permit holder, but to finance investments *belonging to Ms. Leka*.”⁹⁶ Albania thus concludes that Burimi SRL’s claims do not arise directly out of the gambling permit or the transactions associated therewith.⁹⁷

137. Second, Respondent argues that Burimi SRL has not made an investment within the meaning of ICSID Convention Article 25, FIL Articles 1(3) and 1(5), and BIT Articles 1(1) and 1(3). Albania further argues that this Tribunal should “irrespective of the requirements stipulated in the BIT or FIL—not accept jurisdiction *ratione materiae* if the ‘investment’ requirements of Article 25 of the ICSID Convention are not met.”⁹⁸ According to Respondent, those requirements include (i) a (substantial) contribution; (ii) a certain duration; (iii) risk; and (iv) a contribution to the host State’s development.⁹⁹
138. Third, Respondent contends that Burimi SRL has failed to prove “that it is the holder of the right it claims, i.e., the ‘investment’ in Eagle Games.”¹⁰⁰ To satisfy this burden, Albania submits that Burimi SRL must show two separate facts: first, full proof of its investment,¹⁰¹ and second, that the documents in question provide a minimally sufficient degree of confidence in their authenticity.¹⁰² Albania contends that Claimants have failed to meet “even at this advanced stage of the jurisdictional and merit proceedings, either of these two obligations.”¹⁰³
139. Fourth, Respondent argues that there is no *bona fide* investment because Mr. Ilir Burimi “single-handedly designed and construed the financing arrangements between Burimi SRL and Ms. Leka with no other objective than to create – on paper – the illusion of a foreign investment, where there was, in reality, none.”¹⁰⁴ Respondent thus contends that the financing arrangements were designed not only as an attempt to create ICSID jurisdiction

⁹⁶ *Id.* ¶ 146.

⁹⁷ *Id.* ¶ 147.

⁹⁸ *Id.* ¶¶ 211-235.

⁹⁹ *Id.* ¶ 227 citing *Salini Costruttori S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) Decision on Jurisdiction, 23 July 2001, ¶ 52.

¹⁰⁰ *Id.* ¶ 161.

¹⁰¹ *Id.* ¶ 162.

¹⁰² *Id.* ¶ 163.

¹⁰³ *Id.* ¶ 181.

¹⁰⁴ *Id.* ¶ 284.

where there was none, but that these actions further constitute a violation of the principle of good faith.¹⁰⁵

140. Fifth, Respondent alleges that Burimi SRL’s investment is illegal because it was made in violation of several domestic laws and regulations in Albania.¹⁰⁶ In light of these breaches, Albania argues that the alleged investment cannot benefit from protection under the FIL, the BIT and the ICSID Convention.¹⁰⁷
141. Sixth, Respondent contends that Burimi SRL has not established a *prima facie* expropriation of its alleged investment because it failed to indicate (i) how its property—the financing and pledge agreements—was “taken”; and (ii) how this taking is attributable to Albania.¹⁰⁸

(iii) Tribunal’s Analysis

142. Article 25(1) of the ICSID Convention states that “the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State.” Claimants argue that the legal dispute at hand arises directly out of Burimi SRL’s investment in Albania, which consists of (i) Burimi SRL’s 65 percent shareholding in Eagle Games, an Albanian company, and (ii) Burimi SRL’s financing agreement with Ms. Alma Leka as regards her 35 percent shareholding in Eagle Games.
143. With respect to Burimi SRL’s alleged ownership of the 65 percent shareholding of Eagles Games, the Tribunal has already concluded that Claimants have not provided sufficient proof that Mr. Ilir Burimi was acting on behalf of Burimi SRL as the purchaser and owner of the 65 percent of shares. The Share Sale Contract¹⁰⁹ and the attestation by the Albanian judge of the sale of shares,¹¹⁰ in addition to trade data extracts and balance sheets,¹¹¹ show that the shares were purchased in the name of Mr. Ilir Burimi and contain no reference to his acting

¹⁰⁵ *Id.* ¶¶ 284-285.

¹⁰⁶ *Id.* ¶¶ 297-330.

¹⁰⁷ *Id.* ¶ 331.

¹⁰⁸ *Id.* ¶¶ 333-355.

¹⁰⁹ Exhibit R-33.

¹¹⁰ Exhibit C-8.

¹¹¹ Exhibits C-3, R-3, R-13.

as an agent of Burimi SRL. Accordingly, the Tribunal concludes that Burimi SRL does not own the 65 percent of shares held by Mr. Ilir Burimi and those shares therefore do not represent an investment in Albania by Burimi SRL.

144. With respect to Burimi SRL's alleged ownership of the 35 percent shareholding of Eagle Games, Claimants argue that the financing agreement¹¹² and the share pledge agreement¹¹³ between Ms. Alma Leka and Burimi SRL together constitute an investment by Burimi SRL in Eagle Games. However, the financing agreement—by which Burimi SRL financed Ms. Alma Leka's share purchase in exchange for 90 percent of the profits she would receive—does not represent ownership by Burimi SRL of Eagle Games. Rather, it represents a private, contractual loan agreement between Burimi SRL and Ms. Alma Leka, a private citizen, to finance investments belonging to her. The financing agreement states: "The object of this contract is to ratify an agreement between the company Burimi Srl, which engages to finance *all the belonging investments of the shareholder Ms. Alma Leka [...]*".¹¹⁴
145. Moreover, the dispute at hand does not arise out of any government measure affecting Burimi SRL's agreement with Ms. Alma Leka. The financing and pledge agreements are free-standing contracts between Ms. Alma Leka and Burimi SRL, and exist independently of Eagle Games' gambling business. Burimi SRL's claims in this dispute arise out of its agreement with Ms. Alma Leka and do not arise out of the investment in question, namely, the enterprise of Eagle Games.
146. On these grounds alone, the Tribunal concludes that it lacks jurisdiction *ratione materiae* with respect to the claims of Burimi SRL. Therefore the Tribunal does not address Respondent's many other arguments on this jurisdictional question.

¹¹² Exhibit C-4.

¹¹³ Exhibit C-5.

¹¹⁴ Exhibit C-4 (emphasis added).

3. Whether Claimants have complied with the best efforts negotiation provisions of the BIT and FIL

(i) Claimants' Position

147. Claimants contend that they have complied with FIL Article 8(2) and BIT Article 8(2). In their view, Claimants attempted to settle this dispute prior to initiating ICSID arbitration but their notice letters were rejected by Respondent.¹¹⁵ Claimants further contend that they also informed the Italian Embassy of the dispute, the latter suggesting that legal action should be taken.¹¹⁶

(ii) Respondent's Position

148. Respondent argues that Claimants did not make an effort to engage in proper amicable settlement negotiations with Albania.¹¹⁷

149. Burimi SRL did not send any notification at all of a dispute to Albania prior to submitting the request for arbitration.¹¹⁸

150. With respect to Eagle Games, only one letter was sent on August 25, 2010. In Respondent's view, the letter was "nothing but a formal notification of Eagle Games' claims and its intention to resort to legal proceedings" if Albania failed to pay the amount in dispute in this arbitration.¹¹⁹

151. Moreover, the letter did not invite Albania to enter into amicable settlement negotiations and made no reference to ICSID, the BIT, or the FIL—instead it only mentioned the European Court of Human Rights.¹²⁰

152. Therefore, Respondent concludes that Claimants have not complied with the best efforts obligation of FIL Article 8(2) and BIT Article 8(2).

¹¹⁵ Exhibits C-14 and C-16.

¹¹⁶ Exhibit C-33; Mem, unpaginated.

¹¹⁷ CM ¶ 74 and ¶¶ 85-98.

¹¹⁸ CM ¶ 92.

¹¹⁹ CM ¶ 94.

¹²⁰ CM ¶¶ 94-95.

(iii) Tribunal's Analysis

153. Given the Tribunal's disposition of the other jurisdictional objections, it need not decide this question.

V. COSTS

A. The Parties' Statements

154. After the hearing, the Tribunal asked the Parties to submit their statements of costs.

155. On January 31, 2013, Respondent claimed costs as follows:

ICSID fees	USD 150,000
Legal representation costs	EUR 348,856

156. On February 5, 2013, Claimants submitted the following statement:

ICSID fees	USD 175,000
Legal representation costs	EUR 407,000

B. The Costs of the Proceeding

157. The costs of the proceeding include the Tribunal's fees and expenses as well as ICSID's administrative fees and expenses. They are paid out of the advances made by the Parties.¹²¹

¹²¹ The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

158. The costs of the proceeding are summarized as follows:¹²²

Description	USD
Tribunal's fees and expenses	\$122,408.17
ICSID's fees and expenses (estimated)	\$64,142.42
Total	\$186,550.59

C. The Tribunal's Decision on Costs

159. Costs are governed by Article 61 of the ICSID Convention and Arbitration Rule 47(j).

160. Article 61 of the ICSID Convention reads as follows:

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

161. Arbitration Rule 47 provides that:

(1) The award shall be in writing and shall contain:

[...]

(j) any decision of the Tribunal regarding the costs of the proceeding.

162. It is clear from the above-mentioned provisions that the Tribunal has broad powers to rule on the costs incurred by the Parties and ICSID in connection with this proceeding.

163. Respondent prevailed on its jurisdictional arguments. Indeed, some of the grounds for jurisdiction asserted by Claimants did not withstand even moderate scrutiny. Moreover, Respondent's task (as well as the Tribunal's) was rendered difficult by the often incoherent presentation by Claimants.

¹²² The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final.

164. In the circumstances, the Tribunal exercises its discretion pursuant to Article 61 of the Convention and awards all costs in favor of Respondent. Therefore, Claimants shall pay to Respondent:
1. USD 93,225.30¹²³ for Respondent's costs of these proceedings; and
 2. EUR 348,856 for Respondent's legal costs and expenses in this arbitration.
165. Interest on the amount awarded to Respondent shall run from the date of this Award and be set at the Euro Interbank Offered Rate (Euribor) three-month rate in effect on the date of this Award, plus two percent (2%) compounded semi-annually from the date of this Award.

¹²³ The Tribunal awards Respondent 100 percent of its arbitration costs. After ICSID refunds Albania with its share of the remaining balance in the case account, Albania will have incurred USD 93,275.30 in arbitration costs. This amount is calculated by subtracting USD 56,997.93 (the amount to be refunded to Albania) from USD 150,000 (the total amount paid into the case account by Albania.) For a detailed breakdown of the arbitration costs, please refer to the financial statement to be provided with the refund letters.

VI. AWARD

For the reasons and on the grounds set out above, the Tribunal unanimously decides that:

1. The Tribunal lacks jurisdiction *ratione personae* with respect to the claims of Eagle Games S.H.A.;
2. The Tribunal lacks jurisdiction *ratione materiae* with respect to the claims of Burimi SRL;
3. Claimants shall pay to Respondent USD 93,225.30 for Respondent's costs of these proceedings;
4. Claimants shall pay to Respondent EUR 348,856 for Respondent's legal costs and expenses in this arbitration;
5. Interest on the amounts awarded to Respondent shall run from the date of this Award and be set at the Euro Interbank Offered Rate (Euribor) three-month rate in effect on the date of this Award, plus two percent (2%) compounded semi-annually from the date of this Award;
6. All other claims and requests by the Parties are dismissed.

[signed]

Professor Ibrahim Fadlallah
Arbitrator
Date: 20 May 2013

[signed]

Professor Bernardo M. Cremades
Arbitrator
Date: 23 May 2013

[signed]

Mr. Daniel M. Price
President
Date: 28 May 2013