PCA Case No. 2017-07

IN THE MATTER OF AN ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES (1976) AND THE AGREEMENT BETWEEN THE GOVERNMENT OF THE RUSSIAN FEDERATION AND THE FEDERAL GOVERNMENT OF THE REPUBLIC OF YUGOSLAVIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS (11 OCTOBER 1995)

between

OLEG VLADIMIROVICH DERIPASKA

The Claimant

and

THE STATE OF MONTENEGRO

The Respondent

FINAL AWARD

The Arbitral Tribunal
Ms. Jean E. Kalicki (Presiding Arbitrator)
Prof. Zachary Douglas QC
Prof. Brigitte Stern

Registry
The Permanent Court of Arbitration

15 October 2019

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GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

Abuse of Process Objection	Respondent's seventh objection to jurisdiction
Agency	Agency of Montenegro for Restructuring of the Economy and Foreign Investments
BIT Validity Objection	Respondent's first objection to jurisdiction
Boies, Schiller & Flexner	Boies, Schiller & Flexner (UK) LLP
CEAC	CEAC Holdings Limited, a limited company organized under the laws of the Republic of Cyprus
CEAC Notice of Dispute	Notice of dispute from CEAC dated 23 August 2013, sent prior to initiating the Third Arbitration
Claimant	Mr. Oleg Vladimirovich Deripaska
Contract Claims Objection	Respondent's eighth objection to jurisdiction
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 5 June 2018
Cyprus-Montenegro BIT	Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, entered into force on 23 December 2005
Decision on Independence	Decision on the Proclamation of Independence of the Republic of Montenegro, adopted by Montenegrin Parliament on 3 June 2006
Declaration of Independence	Declaration of the Independence of the Republic of Montenegro, adopted by Montenegrin Parliament on 3 June 2006
Deutsche Bank	Deutsche Bank A.G., London Branch and Deutsche Bank Luxembourg SA
En+	En+ Group Limited, a holding company incorporated under the laws of Jersey
Energy Supply Agreement	Framework Agreement between KAP, EPCG and Montenegro on KAP Energy Supply from 1 January 2009 until 31 December 2012, dated 23 February 2010
EPAM	Egorov Puginsky Afanasiev & Partners
EPCG	Elektroprivreda Crne Gore A.D. Nikšić, Montenegro's state-owned electricity supplier
Failure to Negotiate Objection	Respondent's second objection to jurisdiction
First Arbitration	An arbitration initiated on 27 November 2007 by CEAC against Montenegro and the Funds under the UNCITRAL Rules
First Hollis Report	Expert Report of Professor Duncan B. Hollis dated 10 March 2018 on succession to the FRY-Russia BIT (**RER-1**)
First Tams Report	Expert Report of Professor Christian J. Tams dated 5 June 2018 on succession to the FRY-Russia BIT (**CER-2**)
FRY	Federal Republic of Yugoslavia
FRY-Russia BIT or **Treaty**	Agreement between the Government of the Russian Federation and the Federal Government of the Republic of Yugoslavia for the

	Promotion and Mutual Protection of Investments, dated 11 October 1995
Funds	The Fund for Development of the Republic of Montenegro, the Republic Fund for Pension and Disability Insurance, and the Bureau for Employment of the Republic of Montenegro
Hårdeman and Permyakova Report	Expert Report of Mr. Ulf Hårdeman and Ms. Polina Permyakova dated 5 June 2018 on Swedish arbitration law (**CER-3**)
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ILC Guiding Principles	International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, A/61/10 (2006)
Investment Objection	Respondent's fourth objection to jurisdiction
Investor Status Objection	Respondent's third objection to jurisdiction
KAP	Kombinat Aluminijuma Podgorica A.D., an aluminium smelting plant
KAP SHA	KAP Shareholders' Agreement between CEAC and Montenegro dated 26 October 2010
KAP SPA	Agreement for the Sale and Purchase of Shares in KAP dated 27 July 2005
Madsen Report	Expert Report of Finn Madsen dated 3 August 2018 on Swedish law (**RER-3**)
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated 12 March 2018
MFA	Ministry of Foreign Affairs
Montenegrin Note of 4 June 2006	Diplomatic note from the Montenegrin Ministry of Foreign Affairs to the Ministry of Foreign Affairs of the Russian Federation dated 4 June 2006
Montenegrin Note of 4 August 2006	Diplomatic note from the Montenegrin Ministry of Foreign Affairs to the Ministry of Foreign Affairs of the Russian Federation dated 4 August 2006
Montenegro or **Respondent**	The State of Montenegro
Notice of Arbitration	Notice of Arbitration dated 5 December 2016
Objections	The Respondent's nine objections to jurisdiction and admissibility, presented in these proceedings
OFAC	Office of Foreign Assets Control, United States Department of the Treasury
Parties	The Claimant and the Respondent
Pljevlja Power Station	Termoelektrana Pljevlja, a coal-fired thermal power station
Pljevlja Tender	The public tender for the acquisition of the Pljevlja Power Station and the Rudnik uglja A.D. Pljevlja mine, published by Agency of Montenegro for Restructuring of the Economy and Foreign Investments on 30 May 2005

Privatization Council	Privatization Council of the Government of Montenegro
RBN	Rudnici Boksita A.D. Nikšić, a bauxite mine
RBN SPA	Agreement for the Sale and Purchase of RBN dated 17 October 2005
Rejoinder on Jurisdiction	Claimant's Rejoinder on Jurisdiction dated 5 October 2018
Reply on Jurisdiction	Respondent's Reply on Jurisdiction dated 3 August 2018
Request for Bifurcation	Respondent's Request for Bifurcation dated 31 October 2017
Respondent or **Montenegro**	The State of Montenegro
RUP	Rudnik uglja A.D. Pljevlja, a mine supplying coal to the Pljevlja Power Station
Rusal	United Company RUSAL Plc, a limited liability company incorporated under the laws of Jersey
Russian Note of 26 June 2006	Diplomatic note from the Ministry of Foreign Affairs of the Russian Federation to the Montenegrin Ministry of Foreign Affairs dated 26 June 2006
Russian Note of 16 August 2006	Diplomatic note from the Ministry of Foreign Affairs of the Russian Federation to the Montenegrin Ministry of Foreign Affairs dated 16 August 2006
SAA	Swedish Arbitration Act
Second Arbitration	An arbitration initiated on 12 November 2013 by CEAC and En+ against Montenegro, the Funds, KAP and RBN under the 2010 UNCITRAL Rules
Second Hollis Report	Expert Report of Professor Duncan B. Hollis dated 3 August 2018 (**RER-2**)
Second Tams Report	Expert Report of Professor Christian J. Tams dated 5 October 2018 (**CER-4**)
Settlement Agreement	Settlement agreement between Montenegro, the Funds, CEAC, En+, KAP, and RBN dated 16 November 2009
Security Application	Application for Security for Costs dated 22 September 2018
Security Reply	Reply to Application for Security for Costs dated 19 October 2018
SFRY	Socialist Federal Republic of Yugoslavia
Shareholder Claims Objection	Respondent's fifth objection to jurisdiction
Standing Objection	Respondent's sixth objection to jurisdiction
State Union	State Union of Serbia and Montenegro
Statement of Claim	Statement of Claim dated 15 July 2017
Statement of Defence	Statement of Defence dated 31 October 2017
Third Arbitration	An arbitration initiated on 20 March 2014 by CEAC against Montenegro under the ICSID Convention
Time Bar Objection	Respondent's ninth objection to jurisdiction
Treaty or **FRY-Russia BIT**	Agreement between the Government of the Russian Federation and the Federal Government of the Republic of Yugoslavia for the

	Promotion and Mutual Protection of Investments, dated 11 October 1995
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law 1976
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties dated 23 May 1969
VCSST	Vienna Convention on Succession of States in respect of Treaties dated 23 August 1978
Vektra	Vektra Montenegro Limited Podgorica, a company supplying carbon anodes to Kombinat Aluminijuma Podgorica A.D.

I. PARTIES AND THEIR REPRESENTATIVES

1. The Claimant is Mr. Oleg Vladimirovich Deripaska, a national of the Russian Federation (the "**Claimant**"), residing at 30 Rochdelskaya Street, Moscow 123022, Russian Federation. The Claimant is represented by: Mr. Dmitry Dyakin, Mr. Dmitry Kaysin, Mr. Vsevolod Taraskin, Ms. Maria Demina and Mr. Rukhlan Mamedov of Egorov Puginsky Afanasiev & Partners ("**EPAM**"), 40/5 Bol. Ordynka Street, Moscow 119017, Russian Federation; Professor Guglielmo Verdirame and Dr. Kate Parlett of 20 Essex Street Chambers, London WC2R 3AL, United Kingdom (as from August 2018);[1] and Mr. Denis Kolpakov and Ms. Anastasia Gorbatova of Hecate Legal Advisory LLC, 1st Spasonalivkovsky Lane 6, Moscow 119049, Russian Federation.

2. The Respondent is the State of Montenegro, a sovereign State ("**Montenegro**" or "**Respondent**," and together with the Claimant, the "**Parties**"). The Respondent is represented by Mr. Slaven Moravčević, Ms. Jelena Bezarević Pajić, Ms. Vanja Tica and Ms. Tanja Šumar of Moravčević Vojnović & Partners in cooperation with Schönherr Rechtsanwaelte GmbH, Dobračina 15, Beograd 11000, Serbia; and Mr. David Pawlak of David A. Pawlak LLC, c/o Soltysinski Kawecki & Szlezak, ul. Jasna 26, Warsaw, Poland.

II. PROCEDURAL HISTORY

3. On 5 December 2016, the Claimant submitted a **Notice of Arbitration**, invoking the Agreement between the Federal Government of the Federal Republic of Yugoslavia ("**FRY**") and the Government of the Russian Federation for the Promotion and Protection of Investment signed on 11 October 1995 and entering into force on 19 July 1996 (the "**Treaty**" or "**FRY-Russia BIT**")[2] and the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the "**UNCITRAL Rules**").

4. In its Notice of Arbitration, the Claimant appointed Professor Zachary Douglas QC as first arbitrator. By letter dated 4 January 2017, the Respondent appointed Professor Brigitte Stern as second arbitrator. On 10 February 2017, in accordance with Article 7(1) of the UNCITRAL Rules, the co-arbitrators appointed Ms. Jean E. Kalicki as Presiding Arbitrator.

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[1] Until August 2018, the Claimant also was represented by Boies, Schiller & Flexner (UK) LLP ("**Boies, Schiller & Flexner**"), 25 Old Broad Street, London EC2N 1 HQ, United Kingdom. As discussed herein, Boies, Schiller & Flexner provided notice in April 2018 of its suspension of work and formally withdrew from the case in August 2018.

[2] **C-1**; **RLA-20**. The Parties rely on different English translations of the Treaty.

5. On 20 March 2017, the Parties and the Members of the Tribunal signed the Terms of Appointment.

6. On 3 May 2017, the Tribunal issued Procedural Order No. 1 containing, *inter alia*, (i) a timeframe for the Respondent to request bifurcation of these proceedings, and (ii) the applicable procedural timetable if bifurcation was agreed or granted.

7. On 7 June 2017, having sought the Parties' comments on the procedural timetable and scheduling of hearing dates, the Tribunal issued Procedural Order No. 2, which set forth a revised procedural timetable in accordance with the Parties' proposed adjustments.

8. On 15 July 2017, pursuant to the agreed timetable, Claimant submitted its **Statement of Claim**, which included: (i) Witness Statements of Mr. Oleg Deripaska, dated 15 July 2017; Messrs. Dmitry Potrubach and Alexey Kuznetsov, dated 13 July 2017; Mr. Yakov Yuryevich Itskov, dated 10 July 2017; and Mr. Vyacheclav Gennadyevich Krylov, dated 14 July 2017; (ii) the Expert Report of Professors Vladimir Pavić and Miloš Živković, dated 15 July 2017, with appendices; (iii) Exhibits C-1 to C-297; and (iv) Legal Authorities CLA-1 to CLA-53.

9. On 31 October 2017, the Respondent submitted its **Statement of Defence** and **Request for Bifurcation**, which included: (i) Witness Statements of Messrs. Branko Vujović and Dragan Kujović dated 30 October 2017; (ii) Exhibits R-1 to R-106; and (iii) Legal Authorities RLA-1 to RLA-217. The Request for Bifurcation set forth nine objections to jurisdiction and admissibility (together, the "**Objections**") and sought bifurcation so that each of the Objections could be addressed in a preliminary phase, prior to any examination of the merits.

10. By letter dated 14 November 2017, the Claimant informed the Tribunal that it did not oppose the Respondent's Request for Bifurcation and proposed a revised procedural timetable for the jurisdictional phase of the proceedings. By letter dated 20 November 2017, the Respondent objected to the proposed amended timetable. On 27 November 2017, the Tribunal issued Procedural Order No. 3, maintaining in place the procedural timetable set forth in Procedural Order No. 2.

11. On 12 March 2018, the Respondent submitted its **Memorial on Jurisdiction**, along with: (i) the Expert Report of Professor Duncan B. Hollis dated 10 March 2018 on succession to the FRY-Russia BIT (the "**First Hollis Report**"), with appendices; (ii) Exhibits R-107 to R-121; and (iii) Legal Authorities RLA-218 to RLA-274.

12. By letter dated 13 April 2018, the Claimant's then-counsel, Boies, Schiller & Flexner, wrote to the Tribunal to advise that, in light of the decision of the Office of Foreign Assets Control

("**OFAC**") of the United States Department of the Treasury of 6 April 2018 to add the Claimant to its Specially Designated Nationals list, it was currently considering whether it could continue to act as counsel in this arbitration. It advised that it would revert to the Tribunal once its analysis of the matter was complete.

13. On 23 April 2018, the PCA advised the Parties that it had consulted the US Government regarding the continuing service of the Presiding Arbitrator in view of the addition of the Claimant to OFAC's Specially Designated Nationals list. It advised that the US Government had recommended that the Presiding Arbitrator apply for a specific license that would authorize her to continue to act in the arbitration, and sought the Parties' preferences as to the making of such application. On 26 April 2018, the Parties separately confirmed their preference that the Presiding Arbitrator seek such a license.

14. Also on 26 April 2018, the Claimant, through its counsel EPAM, proposed changes to the procedural timetable as a result of the suspension of legal services by co-counsel Boies, Schiller & Flexner. On 28 April 2018, the Respondent opposed the Claimant's proposed changes to the procedural timetable. The Claimant provided further unsolicited comments on its application for changes to the procedural timetable on 30 April 2018.

15. On 30 April 2018, the Tribunal decided to adjust the procedural timetable largely in accordance with that sought by the Claimant. In particular, it provided and determined that the **Hearing on Jurisdiction** would be held for 2-3 days between 15 and 20 November 2018.

16. On 5 June 2018, the Claimant filed its **Counter-Memorial on Jurisdiction**, along with: (i) the Witness Statement of Mr. Artem Volynets, dated 4 June 2018; (ii) the Expert Reports of Professor Christian J. Tams dated 5 June 2018 on succession to the FRY-Russia BIT (the "**First Tams Report**") and of Mr. Ulf Hårdeman and Ms. Polina Permyakova dated 5 June 2018 on Swedish arbitration law (the "**Hårdeman and Permyakova Report**"); (iii) Updated Exhibits C-1 and C-19; (iv) Exhibits C-298 to C-363; and (v) Legal Authorities CLA-54 to CLA-164.

17. On 27 June 2018, the PCA advised the Parties that OFAC had approved the Presiding Arbitrator's application for a specific license, and that the resulting license would be valid until June 2020.

18. On 3 August 2018, the Respondent filed its **Reply on Jurisdiction**, along with: (i) the Second Expert Report of Professor Duncan B. Hollis dated 3 August 2018 on succession to the FRY-Russia BIT, with appendices (the "**Second Hollis Report**"); (ii) the Expert Report of Mr. Finn Madsen dated 3 August 2018 on Swedish law (the "**Madsen Report**"); and (iii) the updated list of the Respondent's exhibits and legal authorities.

19. On 27 August 2018, the Claimant notified the Tribunal that Boies, Schiller & Flexner had stepped down as counsel of record in these proceedings, and advised that Professor Guglielmo Verdirame and Dr. Kate Parlett, of 20 Essex Street Chambers, had been added to the Claimant's counsel team. He requested that these changes be reflected in the Claimant's counsel list. On 29 August 2018, the PCA wrote to the Parties under the instructions of the Presiding Arbitrator, seeking an indication from the Respondent as to whether it contended that anything in the notification of addition of counsel would implicate Article 4.7 of Procedural Order No. 1. Following further correspondence between the Parties between 31 August 2018 and 5 September 2018, including a confirmation from the Respondent that it did not object to the proposed counsel team additions, the Tribunal confirmed the addition of Professor Verdirame and Dr. Parlett to the Claimant's list of counsel on 5 September 2018.

20. On 7 September 2018, the Respondent requested that Mr. Nemanja Galić of Schönherr Rechtsanwälte GmbH be added to its list of counsel. The Tribunal confirmed this addition on 10 September 2018.

21. Meanwhile, on 30 August 2018, the Claimant had submitted a Motion to Produce Documents related to the Respondent's objections to jurisdiction, with an annex of requested documents. The Respondent submitted its reply to the Motion on 7 September 2018, and voluntarily produced certain documents on 12 September 2018. The Respondent also requested that certain documents uncovered during the document production process be admitted to the case file as Exhibits R-220 to R-225. The Parties then made further submissions on 19 and 21 September 2018, in which the Claimant recorded his non-objection to adding Exhibits R-220 to R-225 to the case file.

22. On 22 September 2018, the Respondent filed an Application for Security for Costs (the "**Security Application**") pursuant to Articles 15(1) and 26 of the UNCITRAL Rules, accompanied by Exhibits R-220 to R-237 (later re-submitted as Exhibits R-226 to R-243) and Legal Authorities RLA-463 to RLA-483. At the same time, the Respondent proposed a timetable for dealing with the Security Application, which involved *inter alia* the presentation of oral arguments during the Hearing on Jurisdiction already scheduled for November 2018.

23. On 25 September 2018, the Tribunal issued Procedural Order No. 4, in which it dealt with the Claimant's document production motion of 30 August 2018 and granted the request to admit Exhibits R-220 to R 225 into the case file by consent. It also requested that the Respondent re-submit the factual exhibits accompanying the Security Application in order that they bear exhibit numbers following on from those admitted by consent. By letter of the same date, the Tribunal acknowledged receipt of the Security Application and requested that the Claimant comment by 28 September 2018 on the Respondent's proposed timetable for addressing that Application.

24. On 26 September 2018, after hearing from the Parties, the Tribunal scheduled a pre-hearing telephone conference for 25 October 2018. By e-mail of the same date, the Respondent re-submitted the factual exhibits accompanying the Security Application as Exhibits R-226 to R-243.

25. Between 28 and 29 September 2018, the Claimant and the Respondent provided comments on the Security Application and related timetable. On 1 October 2018, the PCA wrote to the Parties on behalf of the Presiding Arbitrator to confirm the Parties' agreed timetable for written submissions on the Security Application and that it would hear short oral arguments on the Application during the Hearing on Jurisdiction as the Respondent had proposed.

26. On 5 October 2018, the Claimant filed its **Rejoinder on Jurisdiction**, along with: (i) the Witness Statement of Mr. Justin Fenwick dated 2 October 2018; (ii) the Witness Statement of Mr. Stalbek Mishakov dated 27 September 2018; (iii) a further Expert Report of Professor Christian J. Tams dated 5 October 2018 (the "**Second Tams Report**"); and (iv) the updated list of the Claimant's exhibits and legal authorities.

27. On 12 October 2018, the Parties simultaneously notified the PCA of the witnesses and experts to be examined at the Hearing on Jurisdiction. The Claimant advised that it intended to cross-examine Professor Duncan Hollis, Dr. Finn Madsen and Mr. Branko Vujović at the Hearing on Jurisdiction, and the Respondent advised that it intended to cross-examine Professor Christian J. Tams at such Hearing. On the same date, the PCA circulated these notifications to the full distribution list.

28. On 18 October 2018, the Parties simultaneously provided their lists of issues to the PCA, which the PCA then circulated to the full distribution list. On the same date, the Respondent provided the Parties' agreed chronology of events and agreed list of *dramatis personae* to the Tribunal.

29. Also on 18 October 2018, the Respondent (i) requested leave to submit into the record Exhibits R-244 to R-266, which the Respondent previously had produced to the Claimant in response to its request but which the Claimant had elected not to reference in its Rejoinder on Jurisdiction; and (ii) requested that the Claimant provide the original versions of Exhibits C-382 and C-383.

30. On 19 October 2018, the Claimant: (i) filed his Reply to the Security Application (the "**Security Reply**"), accompanied by Exhibits C-428 to C-435 and Legal Authorities CLA-337 to CLA-349; (ii) advised that the Respondent could inspect the original of Exhibit C-382 in EPAM's offices at any time prior to the Hearing on Jurisdiction or at any time during such Hearing; (iii) advised

that the Claimant was not in possession of the original of C-383; and (iv) withdrew its call for cross-examination of Dr. Finn Madsen and Mr. Branko Vujović at the Hearing on Jurisdiction.

31. On 23 October 2018, the Claimant requested that the Tribunal dismiss the Respondent's request to admit Exhibits R-244 to R-266 into the record.

32. Also on 23 October 2018, the Respondent conveyed to the Tribunal the Parties' agreed proposals regarding, *inter alia*, the hearing schedule and sequence, hearing and witness bundles, closing submissions, post-hearing briefs and transcript corrections. In light of this agreement, and in consultation with the Parties, the Tribunal cancelled the pre-hearing telephone conference scheduled for 25 October 2018.

33. On 24 October 2018, the Tribunal granted the Respondent's request for leave to admit Exhibits R-244 to R-266 into the record.

34. On 25 October 2018, the Tribunal issued its Procedural Order No. 5, in which it set the date for the Hearing on Jurisdiction for 19 and 20 November 2018, and confirmed the Parties' agreements as to, *inter alia*, the hearing schedule (including for oral submissions on the Respondent's Objections and its Security Application), the allocation of time to the Parties at the Hearing on Jurisdiction, and provisions as to the correction of transcripts.

35. On 31 October 2018, the Claimant notified the Tribunal that it had added Mr. Denis Kolpakov and Ms. Anastasia Gorbatova of Hecate Legal Advisory LLC to its counsel team for the Hearing on Jurisdiction. The Tribunal noted these additions by e-mail dated 2 November 2018.

36. On 9 November 2018, the Respondent sought leave to submit into the record three documents responsive to the Claimant's Security Reply, being proposed Exhibits R-267 to R-269.

37. On 13 November 2018, the Claimant opposed the Respondent's application for leave to submit new documents into the record, and applied for the Tribunal's leave to submit a further legal authority into the record, being proposed Legal Authority CLA-350.

38. By letter dated 14 November 2018, the Tribunal: (i) declined the Respondent's application to admit further proposed Exhibits R-267 to R-269; (ii) admitted the Claimant's proposed Legal Authority into the record as CLA-350; and (iii) made a minor adjustment to the hearing schedule.

39. The Hearing on Jurisdiction was held between 19 and 20 November 2018 at the Peace Palace in The Hague, the Netherlands. The following individuals attended:

Arbitral Tribunal
Ms. Jean E. Kalicki (Presiding Arbitrator)
Professor Zachary Douglas, QC
Professor Brigitte Stern

Claimant
Mr. Radovan Grbovic
(Claimant's Representative)

Mr. Guglielmo Verdirame
Ms. Kate Parlett
(20 Essex Street Chambers)

Mr. Dmitry Dyakin
Mr. Dmitry Kaysin
Ms. Maria Demina
Mr. Rukhlan Mamedov
(Egorov Puginsky Afanasiev & Partners)

Mr. Denis Kolpakov
Ms. Anastasia Gorbatova
(Hecate Legal Advisory, LLC)

Professor Christian J. Tams
(Expert Witness)

Respondent
Mr. David A. Pawlak
(David A. Pawlak LLC)

Mr. Slaven Moravčević
Ms. Jelena Bezarević Pajić
Ms. Tanja Šumar
Ms. Vanja Tica
(Moravčević, Vojnović & Partners, in co-operation with Schönherr)

Professor Duncan B. Hollis
(Expert Witness)

PCA
Ms. Helen Brown
Ms. Camilla Pondel
Ms. Marihú Contreras
Ms. Juana Martínez Quintero

Court Reporter
Ms. Diana Burden

40. At the Hearing on Jurisdiction, the Parties made oral submissions on Respondent's Objections and examined in person the expert witnesses called for that purpose. The Parties also made oral submissions on the Security Application. At the close of the Hearing on Jurisdiction, the Tribunal made directions as to transcript corrections, post-hearing briefs and costs submissions.

41. On 22 November 2018, the Claimant distributed to the Tribunal and the Respondent an electronic copy of its opening presentation used during the Hearing on Jurisdiction. On 26 November 2018, the Respondent distributed to the Tribunal and the Claimant electronic copies of its materials used during the Hearing on Jurisdiction.

42. On 26 November 2018, the Tribunal issued its Procedural Order No. 6, in which it confirmed the directions made at the close of the Hearing as to transcript corrections, post-hearing briefs and costs submissions.

43. On 5 December 2018, the Parties presented their agreed transcript corrections. On 7 December 2018, the Court Reporter circulated the revised versions of the Hearing Transcript, including the Parties' agreed corrections.

44. On 15 January 2019, the Parties separately submitted their **Post-Hearing Briefs** to the PCA, which circulated these materials to the full distribution list on 16 January 2019.

45. On 31 January 2019, the Parties separately submitted their **Costs Submissions** to the PCA, which circulated these materials to the full distribution list on 1 February 2019.

46. On 10 February 2019, the Respondent e-mailed the PCA only, to request leave to comment on the reasonableness of the Claimant's costs. At the PCA's request, the Respondent forwarded its communication to the full distribution list on 11 February 2019. Having heard the Claimant on the Respondent's request for leave, the Tribunal allowed both Parties to submit comments on the other Party's costs submissions by 18 February 2019.

47. On 18 February 2019, the Respondent submitted its comments on the Claimant's costs submissions separately to the PCA. On the same date, the Claimant advised the PCA that it would not submit comments on the Respondent's costs submission. The PCA circulated the Respondent's comments to the full distribution list on the same date.

48. On 22 August 2019, the Respondent applied to the Tribunal to reopen the record in this arbitration to admit an award in a separate investment arbitration matter also involving Montenegro as respondent. The Claimant opposed this request on 27 August 2019. On the same date, the Tribunal denied the Respondent's application to reopen the record.

III. NATURE OF THE DISPUTE

49. The Claimant is the President and owner of En+ Group Limited ("**En+**"), a holding company incorporated under the laws of Jersey, which in turn holds a controlling interest in United

Company RUSAL Plc ("**Rusal**"), a limited liability company incorporated under the laws of Jersey.[3] En+ also holds 100 percent of the shares in CEAC Holdings Limited ("**CEAC**"), a limited company organized under the laws of the Republic of Cyprus.[4]

50. This dispute concerns measures allegedly taken by the Respondent that deprived the Claimant of the value of his investment in the aluminium smelting plant Kombinat Aluminijuma Podgorica A.D. ("**KAP**") and the Rudnici Boksita A.D. Nikšić ("**RBN**") bauxite mine.[5] The Claimant defines his investment as including, *inter alia*: (i) his indirect shareholding in KAP and RBN through En+ and CEAC; (ii) his debt interest in KAP and RBN; and (iii) his contribution of funds for the purchase, funding and restructuring of KAP.[6]

51. The Claimant seeks declaratory and compensatory relief for the Respondent's alleged breach of its obligations, under Articles 3(1) and 4 of the Treaty, to provide fair and equitable treatment to his investment and to pay compensation for expropriation.[7] According to the Claimant, the Respondent took a series of measures that created a hostile operating environment for KAP and RBN after their privatization in 2005, and ultimately expropriated KAP by forcing it into bankruptcy and conducting insolvency proceedings in a way that denied him "an opportunity to protect his investment."[8] The Claimant further contends that the Respondent harassed one of his representatives in Montenegro, Mr. Dmitry Potrubach, by launching a criminal investigation against him.[9]

52. The issue at present before the Tribunal relates only to the Respondent's Objections to jurisdiction and admissibility.

IV. RESPONDENT'S OBJECTIONS AND THE PARTIES' REQUESTS FOR RELIEF

53. The Respondent raises nine Objections. Its principal objection, which it submits would dispose of the entire case, is that the FRY-Russia BIT is not valid and binding on Montenegro (the "**BIT Validity Objection**").[10]

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3 Statement of Claim, ¶ 1.20, citing Witness Statement of Oleg Vladimirovich Deripaska, 15 July 2017, ¶¶ 1-2 (**CWS-1**). For ease of reference, the Tribunal uses the term "**En+**" to refer to the entity known as Eagle Capital Group Limited and later renamed En+ Group Limited. Statement of Claim, ¶ 3.26.

4 Statement of Claim, ¶ 1.20, citing **CWS-1**, ¶¶ 1-2. For ease of reference, the Tribunal uses the term "**CEAC**" to refer to the entity known as Salamon Enterprises Limited and renamed CEAC Holdings Limited. **C-34**.

5 Statement of Claim, ¶ 1.2.

6 Statement of Claim, ¶ 2.9.

7 Statement of Claim, ¶ 1.17.

8 Statement of Claim, ¶¶ 1.10, 1.14.

9 Statement of Claim, ¶¶ 1.15, 5.85.

10 Statement of Defence, ¶ 219.

54. The Respondent's second to ninth objections are dependent on the Claimant's status in relation to CEAC and En+. First, if the Claimant is deemed a person separate from CEAC and En+, the Respondent's second to fifth objections argue that: (ii) the Claimant failed to comply with preconditions to arbitration under Article 8 of the FRY-Russia BIT (the "**Failure to Negotiate Objection**"); (iii) the Claimant failed to prove he is an "investor" for the purposes of Article 1 of the FRY-Russia BIT (the "**Investor Status Objection**"); (iv) the Claimant failed to prove he holds a protected "investment" under the FRY-Russia BIT (the "**Investment Objection**"); and (v) the Claimant's claims are all inadmissible shareholder claims (the "**Shareholder Claims Objection**").[11] Alternatively, if the Claimant is deemed identical to CEAC and En+, the Respondent's sixth to eighth objections contend that the Claimant: (vi) lacks standing (the "**Standing Objection**"); (vii) committed an abuse of process that renders his claims inadmissible (the "**Abuse of Process Objection**"); and (viii) is not entitled to pursue CEAC's or En+'s contract claims in this arbitration (the "**Contract Claims Objection**").[12] Finally, regardless of the Claimant's status, the Respondent's ninth objection submits that some of the Claimant's claims are time-barred and are therefore inadmissible (the "**Time Bar Objection**").[13]

55. Based on these Objections, the Respondent seeks from the Tribunal an Award:

(a) dismissing all of the Claimant's claims for lack of jurisdiction and/or inadmissibility in their entirety and with prejudice; and

(b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules, ordering that Claimant bear all of the costs of this arbitration, in particular, all of Respondent's costs for legal representation and assistance, including costs incurred by Respondent's departments dealing with this arbitration, and interest thereon.[14]

56. In response, the Claimant advances separate arguments with respect to the Respondent's first to fourth objections, which he views as jurisdictional objections, and the remaining objections, which he views as admissibility objections.[15] He contends that the jurisdictional objections should be dismissed in full at this stage of the proceedings,[16] but the admissibility objections should be reserved for the merits, or alternatively should likewise be dismissed in full.[17]

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11 Statement of Defence, ¶ 221.
12 Statement of Defence, ¶ 222.
13 Statement of Defence, ¶ 223.
14 Memorial on Jurisdiction, ¶ 93; Reply on Jurisdiction, ¶ 776.
15 Counter-Memorial on Jurisdiction, ¶ 3.
16 Counter-Memorial on Jurisdiction, ¶ 4; Rejoinder on Jurisdiction, ¶ 2(a).
17 Counter-Memorial on Jurisdiction, ¶ 4; Rejoinder on Jurisdiction, ¶ 2(b)-(c).

57. In his Rejoinder on Jurisdiction, the Claimant requests that the Tribunal:

(a) Declare that this dispute is within the Tribunal's jurisdiction;

(b) Dismiss all the Respondent's objections on jurisdiction in their entirety;

(c) Reserve all of the Respondent's objections on admissibility for the merits;

(d) Alternatively, dismiss all the Respondent's objections on admissibility in their entirety at this stage; and

(e) Order the Respondent to bear all of the costs of these proceedings, including the fees and expenses of counsel and experts, together with appropriate interest.[18]

V. SUMMARY OF PLEADED FACTS

58. The following is a short summary of the background facts as pleaded by the Parties, without prejudice to any legal conclusions by the Tribunal which will be addressed in later sections.

A. THE PRIVATIZATION PROGRAM

59. In the aftermath of the dissolution of the former Yugoslavia, Montenegro considered resorting to privatization to resolve issues faced by its largest state-owned enterprise, the KAP aluminium smelting plant.[19]

60. To that end, on 21 January 2003, the Privatization Council of the Government of Montenegro (the "**Privatization Council**") decided to privatize KAP.[20] In late March 2004, Mr. Deripaska discussed with the Montenegrin Prime Minister, Mr. Milo Đukanović, the opportunity to invest in KAP as well as in the nearby RBN mine that supplied KAP with bauxite and in the coal-fired thermal power station Termoelektrana Pljevlja (the "**Pljevlja Power Station**"), that supplied KAP with electricity.[21]

61. On 9 August 2004, the Agency of Montenegro for Restructuring of the Economy and Foreign Investments (the "**Agency**") published a public invitation to tender for shares in KAP owned by the Fund for Development of the Republic of Montenegro, the Republic Fund for Pension and Disability Insurance, and the Bureau for Employment of the Republic of Montenegro

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[18] Rejoinder on Jurisdiction, ¶ 405.
[19] **C-35**; Statement of Defence, ¶¶ 88-90.
[20] *See* **C-3**, Recital A.
[21] Statement of Claim, ¶¶ 3.10-3.17, citing **CWS-1**, ¶¶ 8-10, 22.

(collectively, the "**Funds**").[22] Rusal expressed its interest to participate on 13 September 2004 and was recognized as a qualified participant on 12 October 2004.[23]

62. On 22 December 2004, the Privatization Council decided to also privatize RBN.[24] The Respondent asserts that, for convenience purposes, Montenegro intended to sell RBN "as a part of the same package" with KAP.[25]

63. In 2005, CEAC won tenders for the Funds' shares in both KAP and RBN. Two separate contracts were concluded: (i) an Agreement for the Sale and Purchase of the Funds' Shares in KAP, by Public Tender dated 27 July 2005 (the "**KAP SPA**"), by which CEAC acquired, for consideration of €48,500,000 (plus other investment commitments), a 65.4394 percent stake in KAP;[26] and (ii) an Agreement for the Sale and Purchase of RBN, by Public Tender dated 17 October 2005 (the "**RBN SPA**"), by which CEAC acquired, for consideration of €6,000,000, a 32.0455 percent stake in RBN.[27] En+ (as a corporate guarantor) and the Government of Montenegro were also parties to the KAP SPA and the RBN SPA.[28]

64. The Claimant contends that, on 24 December 2004, Elektroprivreda Crne Gore A.D. Nikšić ("**EPCG**"), Montenegro's state-owned electricity supplier, decided to sell the Pljevlja Power Station by tender.[29]

65. On 30 May 2005, the Agency published a public invitation to tender for the acquisition of the Pljevlja Power Station and a 31.1117 percent stake in the Rudnik uglja A.D. Pljevlja ("**RUP**") mine, which supplied coal to the Pljevlja Power Station (the "**Pljevlja Tender**").[30]

66. On 16 December 2005, having received only unsatisfactory offers, the tender commission in charge of the Pljevlja Tender issued a revised Pljevlja Tender.[31] En+ submitted a bid for the Pljevlja Tender on 31 May 2006 and was declared the winning bidder on 16 June 2006.[32] With the Privatization Council's endorsement,[33] Mr. Deripaska negotiated with Montenegro, between

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22 **C-3**, Recital B.
23 **C-3**, Recital B.
24 *See* **C-4**, Recital A; Statement of Claim, ¶ 3.21, citing Witness Statement of Yakov Yuryevich Itskov, 10 July 2017, ¶ 13 (**CWS-4**).
25 Statement of Defence, ¶ 93.
26 **C-3**, Recital H, Clause 2.
27 **C-4**, Recital H, Clause 2.
28 *See* **C-3**; **C-4**.
29 Statement of Claim, ¶ 3.22; Statement of Defence, ¶ 99.
30 Statement of Claim, ¶ 3.39, citing **CWS-4**, ¶ 24; Statement of Defence, ¶¶ 99-100.
31 Statement of Claim, ¶ 3.40, citing **CWS-4**, ¶ 29; Statement of Defence, ¶¶ 101-102.
32 **C-31**; **C-45**, Recital D.
33 **C-45**, Recital D.

2006 and early 2007, the terms and conditions of a sale and purchase agreement for the Pljevlja Power Station.[34]

67. On 3 July 2007, the Privatization Council annulled the Pljevlja Tender.[35] Mr. Deripaska contends that soon afterwards, he met Mr. Đukanović in person to seek an explanation, and Mr. Đukanović reaffirmed Montenegro's commitment to meet KAP's electricity needs and to give him another opportunity to buy the Pljevlja Power Station.[36]

68. Two years later, on 3 September 2009, after a tendering process in which Mr. Deripaska had chosen not to participate,[37] Montenegro sold its 22 percent stake in EPCG to A2A S.p.A.[38]

B. THE INITIAL DISPUTE

69. The Claimant asserts that, after assuming control of KAP in November 2005,[39] he discovered significant undisclosed liabilities of KAP to Vektra Montenegro Limited Podgorica ("**Vektra**"), a company whose plant – located on KAP's site – supplied KAP with carbon anodes needed for aluminium smelting.[40] Mr. Deripaska's new management team also commissioned reports valuing KAP's assets and assessing its environmental impact and financial situation.[41] According to the Claimant, these reports showed that Montenegro had misrepresented KAP's operational and financial situation.[42] The Claimant also contends that, between 2005 and 2006, Montenegro interfered with KAP's affairs and failed to help KAP resolve labor disputes and reduce production costs.[43]

70. For these reasons, on 24 May 2006, CEAC served on Montenegro and the Funds a notice of breach of the KAP SPA and the RBN SPA.[44]

71. On 29 December 2006, KAP and Vektra agreed to terminate their contractual relationship and transfer control over the anode plant and its employees to KAP.[45] To that end, KAP agreed to

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34 *See, e.g.*, **C-45**.
35 **C-33**.
36 Statement of Claim, ¶ 3.47, citing **CWS-1**, ¶ 38.
37 Statement of Claim, ¶ 3.84.
38 Statement of Claim, ¶ 3.86. *See* **C-68**.
39 Statement of Claim, ¶ 3.48, citing **CWS-4**, ¶ 39.
40 Statement of Claim, ¶¶ 3.50-3.51. *See* **C-53**, p. 55.
41 Statement of Claim, ¶ 3.54, citing **CWS-4**, ¶¶ 40-41. *See, e.g.*, **C-40**.
42 Statement of Claim, ¶ 3.55.
43 Statement of Claim, ¶ 3.55, citing **CWS-4**, ¶¶ 42-44.
44 Statement of Claim, ¶¶ 3.56-3.57. *See* **C-51**.
45 **C-43**.

pay significant liabilities to Vektra, pursuant to an agreement whose enforcement later became the subject of litigation.[46]

72. On 5 October 2007, after unsuccessful negotiations, CEAC served on Montenegro and the Funds a notice of dispute.[47] On 27 November 2007, CEAC initiated arbitration proceedings under the UNCITRAL Rules against Montenegro and the Funds in accordance with the arbitration clauses set out in the KAP SPA and the RBN SPA (the "**First Arbitration**").[48] Montenegro and the Funds filed a counterclaim on 23 March 2009, seeking reparation for CEAC's own breaches of the KAP SPA.[49]

C. THE SETTLEMENT AGREEMENT

73. In December 2008, representatives from CEAC and Montenegro began negotiations to resolve KAP's difficulties and settle the First Arbitration.[50]

74. A Memorandum of Understanding dated 2 June 2009 was signed by Montenegro's Deputy Prime Minister, Dr. Igor Lukšić, and by Mr. V. Soloviev, CEO of En+. The Memorandum of Understanding called for amendment of the KAP SPA and RBN SPA by 30 June 2009 in accordance with new negotiated terms, including that CEAC sell and transfer 50 percent of its shares in KAP and RBN to Montenegro in return for additional State support.[51] Further negotiations took place in July, August and September 2009 for conclusion of a settlement agreement.[52] On 6 November 2009, KAP provided Montenegro with a detailed restructuring model.[53] On 16 November 2009, Montenegro, the Funds, CEAC, En+, KAP, and RBN concluded a **Settlement Agreement**, terminating the KAP SPA and RBN SPA and settling the First Arbitration.[54]

75. Under the terms of the Settlement Agreement, CEAC and En+ waived all claims against KAP and RBN predating 2 June 2009.[55] Montenegro also agreed, *inter alia*, to issue State guarantees amounting up to €135,000,000 as security for KAP's loans,[56] as well as to waive certain claims against KAP and RBN while deferring some of their liabilities to the Montenegrin Government.[57]

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46 *See* **C-263**. *See also* **C-53**, p. 55.
47 *See* **C-51**.
48 **C-51**.
49 **R-14**, ¶ 4.
50 *See, e.g.*, **C-57**; **C-58**; **C-59**; **C-61**; **C-62**.
51 **C-65**, Clauses 1, 6(d).
52 Statement of Claim, ¶ 3.65. *See* **C-67**.
53 **C-71**; **C-72**.
54 **C-5**, Clauses 17, 27.
55 **C-5**, Clause 13.3.
56 **C-5**, Recital J, Clauses 4-8.
57 **C-5**, Clauses 12.1, 12.2, 13.1, 13.4, 13.6, 13.7.

Montenegro agreed to grant up to €60,000,000 in electricity subsidies to KAP from 2009 to 2012 if actual prices charged by EPCG exceeded prices derived from the agreed electricity price formula.[58] Further, the Settlement Agreement also provided that CEAC, En+, KAP and RBN would have "no claim of whatsoever kind against [Montenegro]" if a "failure of restructuring" were to occur after the Settlement Agreement was concluded.[59] The events that would qualify as a "failure of restructuring" are listed in Clause 28.1 of the Settlement Agreement, and include specific situations "in which it is clear that KAP is on the brink of bankruptcy and can no longer meet its most basic obligations."[60]

76. Between November 2009 and August 2010, KAP raised funds by entering into several loan agreements with three main creditors, including Deutsche Bank A.G., London Branch and Deutsche Bank Luxembourg SA (together, "**Deutsche Bank**").[61] Montenegro issued State guarantees as security for these loans.[62]

77. On 23 February 2010, KAP, EPCG and Montenegro concluded a Framework Agreement on KAP Energy Supply from 1 January 2009 until 31 December 2012 (the "**Energy Supply Agreement**"), setting out the quantity of guaranteed electricity supply and a new price formula.[63]

78. On 26 October 2010, CEAC and Montenegro signed the KAP Shareholders' Agreement (the "**KAP SHA**") transferring 50 percent of CEAC's shares in KAP and RBN to Montenegro for a nominal charge of €1.00, while granting CEAC the option to repurchase them.[64] Clause 5 of the KAP SHA granted Montenegro's appointee to the KAP board of directors the right to veto certain company decisions relating, *inter alia*, to restructuring, production targets, financing through loans, and the approval of transactions valued at €5,000,000 or more.[65]

79. On 26 October 2010, the Settlement Agreement came into force.[66]

D. THE EVENTS AFTER SETTLEMENT

80. The Claimant alleges that, soon after concluding the Settlement Agreement, Montenegro committed a series of "unfair, inequitable and ultimately expropriatory acts" which created a

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58 **C-5**, Clause 11.3.
59 **C-5**, Clause 28.5.
60 **C-5**, Clause 28.1; Statement of Defence, n.568.
61 **C-48**; **C-73**; **C-80**; **R-24**; **R-25**; **R-26**.
62 **C-79**; **C-83**; **R-16**; **R-17**; **R-18**.
63 **C-76**, Clauses 2-4.
64 **C-6**, Annex 3, Clause 2.
65 **C-6**, Annex 3, Clause 5.
66 **C-84**, Annex 10.

"hostile operating environment" for his business.[67] In particular, the Claimant asserts that Montenegro abused its powers as a shareholder to obstruct KAP's governance and prevent KAP from improving its liquidity. The Claimant further recounts that "due to the decisions adopted by Montenegro's representatives, KAP was forced into ever less sustainable positions, most notably in respect of electricity use and operations."[68]

81. In addition, during the first half of 2011, due to its serious liquidity issues, KAP incurred several defaults under its loan agreements.[69] Following the expiration of numerous payment deadlines,[70] on 2 April 2012, Deutsche Bank turned to Montenegro to seek repayment of its loan under the State guarantee.[71] Montenegro paid back the loan in full on 5 April 2012.[72]

82. Also in 2012, EPCG informed KAP that its unpaid electricity bill amounted to €40,717,823.86 as at the end of April 2012 and that the "only solution" with respect to this situation was to "gradually but drastically reduce electricity supply to KAP."[73] Later, by letter dated 5 September 2012, EPCG requested that KAP settle its complete debt for consumed energy by 15 September 2012.[74] Having received no payment by the specified date, EPCG notified KAP on 17 September 2012 of its intention to terminate KAP's electricity supply and the Energy Supply Agreement as of 1 October 2012.[75]

83. On 14 June 2013, Montenegro's Ministry of Finance filed a bankruptcy petition against KAP on the basis of its inability to pay off its debt to Montenegro for settling the Deutsche Bank loan.[76] These bankruptcy proceedings, which were formally instituted on 8 July 2013,[77] are pending.[78]

84. On 19 November 2013, according to the Claimant, the Montenegrin bank Crnogorska Komercijalna Banka a.d. Podgorica filed a petition against RBN.[79] These bankruptcy proceedings are also pending.[80]

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67 Statement of Claim, ¶ 1.10.
68 Statement of Claim, ¶ 3.131.
69 **R-36**; **R-33**.
70 **R-30**; **R-31**; **R-32**.
71 **R-46**.
72 **R-47**.
73 **C-127**.
74 *See* **C-135**.
75 **C-135**.
76 **C-149**.
77 **C-160**.
78 Statement of Defence, ¶¶ 192-198.
79 Statement of Claim, ¶ 3.178.
80 Statement of Claim, ¶ 3.179.

E. THE SUBSEQUENT DISPUTES

85. On 20 August 2013, CEAC sent a notice of dispute to Montenegro (the "**CEAC Notice of Dispute**").[81] It advised of a dispute arising under the Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, entered into force on 23 December 2005 (the "**Cyprus-Montenegro BIT**"), and invited Montenegro to attempt to amicably resolve the dispute.

86. On 12 November 2013, in a separate matter, CEAC and En+ initiated arbitration proceedings against Montenegro, the Funds, KAP and RBN under the UNCITRAL Rules 2010, invoking the arbitration clauses in the Settlement Agreement and the KAP SHA (the "**Second Arbitration**").[82] In addition to alleging a breach of the Settlement Agreement,[83] CEAC and En+ claimed that: (i) Montenegro had obstructed KAP's restructuring plans; (ii) Montenegro had unlawfully caused the acceleration of KAP's loan with Deutsche Bank; (iii) Montenegro did not pay off the electricity subsidies agreed in the Settlement Agreement; (iv) Montenegro failed to secure an affordable, long-term electricity supply for KAP; (v) Montenegro breached its contractual and statutory duties by filing a bankruptcy petition against KAP; and (vi) Montenegro repeatedly violated the law during KAP's bankruptcy proceedings.[84]

87. On 20 March 2014, CEAC instituted arbitration proceedings against Montenegro under the Cyprus-Montenegro BIT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") (the "**Third Arbitration**").[85] The Claimant describes the Third Arbitration as "related to the same wrongful acts and omissions of Montenegro in respect of KAP"[86] as at issue in the present proceedings.

88. On 26 July 2016, the arbitral tribunal in the Third Arbitration issued its award, finding that it lacked jurisdiction *ratione personae* to hear the case because CEAC had failed to establish that it had its "seat" in Cyprus to qualify as an "investor" under the Cyprus-Montenegro BIT.[87] CEAC

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81 **C-20**.
82 *See* **R-27**.
83 *See* **R-27**, ¶¶ 28, 511*ff*. In its counterclaim, Montenegro alleged that CEAC and En+ had breached the Settlement Agreement. Statement of Defence, ¶ 203.
84 *See* **R-27**, ¶¶ 28, 511*ff*.
85 *CEAC Holdings Ltd. v. Montenegro*, ICSID Case No. ARB/14/08, Award, 26 July 2016, ¶ 4 (**C-254**).
86 Notice of Arbitration, ¶ 3.3.
87 **C-254**, ¶ 226.

commenced annulment proceedings under the ICSID Convention on 22 November 2016,[88] but an *ad hoc* Committee later declined to annul the award.[89]

89. The Respondent contends that also in November 2016, "CEAC initiated a litigation before the District Court in Nicosia for compensation in relation to its investment in KAP."[90]

90. On 5 December 2016, the Claimant filed his Notice of Arbitration in these proceedings, noting that he "repeatedly has attempted to resolve this dispute amicably with Montenegro, but [that] these efforts have proven to be futile."[91]

91. On 12 January 2017, the arbitral tribunal in the Second Arbitration issued an award in favor of Montenegro on the merits.[92]

VI. RELEVANT LEGAL PROVISIONS

A. THE FRY-RUSSIA BIT

92. The key provisions of the FRY-Russia BIT for the purposes of the Respondent's nine bifurcated jurisdictional objections are Articles 1 and 8. Article 1 provides:

> For the purposes of this Agreement:
>
> (1) "Investor" means:
>
> a) any natural person who is a national of a Contracting Party;
>
> b) any legal entity constituted under the laws of a Contracting Party and having its seat in its territory.
>
> (2) "Investment" means every kind of asset invested by the investors of a Contracting Party in the territory of the other Contracting Party in accordance with the law of that Contracting Party, and in particular, though not exclusively, includes:
>
> – movable and immovable property and any other rights in rem, including also pledges;
>
> – pecuniary assets, stocks, shares and other forms of participation;
>
> – the rights of claim on financial assets invested to create an economic value or on services having economic value;
>
> – copyrights, patents, industrial samples, trade and service marks, trade names, including technology and know-how;
>
> – business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

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88 Notice of Arbitration, ¶ 3.5.
89 *CEAC Holdings Ltd. v. Montenegro*, ICSID Case No. ARB/14/08, Decision on Annulment, 1 May 2018 (**CLA-141**).
90 Statement of Defence, ¶ 213.
91 Notice of Arbitration, ¶ 1.6.
92 *See* **R-27**, ¶¶ 907*ff*.

(3) "Returns" means the amounts yielded by an investment under paragraph (2) of this Article, and in particular includes profit (or a part thereof), dividends, interest, royalties and fees.

(4) "Territory" means the territory, exclusive economic zone and the coastal region of the Contracting Party.

93. Article 8 provides:

> Disputes between a Contracting Party and the investors of the other Contracting Party regarding the investment, including disputes concerning the amount, conditions or method of payment of compensation should, if possible, be settled by negotiations.
>
> If a dispute is not settled in such way within six months from the date it arose, it may be referred to:
>
> (a) the competent court or an arbitral tribunal of the Contracting Party in the territory of which the investments have been made; or
>
> (b) an ad hoc arbitration tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The decision of the arbitral tribunal shall be final and binding on both parties. Each Contracting Party shall enforce such arbitral award in accordance with its laws.

B. THE VIENNA CONVENTION ON THE LAW OF TREATIES

94. Article 31 of the Vienna Convention on the Law of Treaties, dated 23 May 1969 ("**VCLT**") provides the following general rules of treaty interpretation:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> c. any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

VII. PARTIES' POSITIONS ON THE RESPONDENT'S OBJECTIONS

A. THE BIT VALIDITY OBJECTION

95. The Respondent's first objection is that the FRY-Russia BIT is not valid and binding on Montenegro. The following background is relevant to the Parties' respective positions.

1. The Relevant Background

96. The FRY was a two-member federation formed in 1992 between Serbia and Montenegro, the two remaining Republics of the former Socialist Federal Republic of Yugoslavia ("**SFRY**") after four other Republics seceded from the SFRY and became the independent States of Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina.[93] The FRY underwent a further restructuring in 2003 following the enactment of the Constitutional Charter of Serbia and Montenegro, resulting in a new name for its territory, the State Union of Serbia and Montenegro (the "**State Union**").[94] The Constitutional Charter authorized either Serbia or Montenegro to dissolve the State Union through a referendum on independence.[95]

97. Following such a referendum in favor of independence, Montenegro seceded from the State Union on 3 June 2006, when its Parliament adopted the Declaration of the Independent Republic of Montenegro (the "**Declaration of Independence**"),[96] pursuant to a Decision on the Proclamation of Independence of the Republic of Montenegro (the "**Decision on Independence**") which was adopted at the same session.[97]

98. The Decision on Independence stated:

> 1. The Republic of Montenegro is an independent state with full international legal personality in its existing state borders.
>
> 2. The Republic of Montenegro, by renewing its independence, assumes all powers that, on the adoption of the Constitutional Charter of the State Union of Serbia and Montenegro, it had delegated to the competence of the institutions of the State Union.
>
> 3. *The Republic of Montenegro shall apply and take over international treaties and agreements concluded by and acceded to by the State Union of Serbia and Montenegro which relate to Montenegro and which are in conformity with its legal order.*
>
> 4. The laws and regulations which, on the day of entry into force of this Decision, applied as the laws and regulations of the State Union of Serbia and Montenegro shall continue to apply accordingly as the laws and regulations of the Republic of Montenegro pending

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93 Statement of Defence, ¶ 36.
94 Statement of Defence, ¶ 37.
95 Statement of Defence, ¶ 38.
96 Declaration of the Independent Republic of Montenegro, Official Gazette of RMNE, No. 36/2006 (**C-365**); *see also* **RLA-329**.
97 Decision on the Proclamation of Independence of the Republic of Montenegro, Official Gazette of RMNE, No. 36/2006 (**RLA-25**).

> enactment of corresponding laws and regulations of the Republic of Montenegro, insofar as they are not contrary to the legal order and interests of the Republic of Montenegro.
>
> 5. The Republic of Montenegro shall regulate the manner of taking over the tasks that have been conducted by the institutions of the State Union Serbia and Montenegro, and by special acts of the Parliament and the Government of the Republic of Montenegro, it shall determine and publish the principles on which internal and external politics will be developed and managed.
>
> 6. This Decision shall enter into force on the day of its adoption and shall be published in the "Official Gazette of the Republic of Montenegro".
>
> SU-SK Number 01-394/2
>
> Podgorica, 3 June 2006
>
> Parliament of the Republic of Montenegro,
>
> President,
>
> Ranko Krivokapić[98]

99. The Declaration of Independence, which was adopted pursuant to the Decision on Independence, provided in paragraph 3 as follows:

> The Republic of Montenegro *shall, based on the principles of international law, establish and develop bilateral relations with other countries, accepting the rights and obligations which arise from the existing arrangements,* and shall continue with its active policy of good neighbourly relations and regional cooperation.[99]

100. On 4 June 2006, the Montenegrin Ministry of Foreign Affairs ("**MFA**") addressed a diplomatic note to the Russian Minister of Foreign Affairs (the "**Montenegrin Note of 4 June 2006**"), in which it stated:

> The Republic of Montenegro shall observe all principles of international law and all treaties and provisions of international agreements signed by the state union of Serbia and Montenegro. …
>
> The sovereign and independent Republic of Montenegro, as state with full international legal personality, is committed to the best traditions of humanism and civilization, European history, and a prosperous future for all citizens of the Republic of Montenegro and looks forward to develop broad cooperation and friendly relations with the Russian Federation.
>
> We would highly appreciate if the Russian Federation would recognize the Republic of Montenegro as a sovereign and independent state and we stand ready to initiate the process of establishing diplomatic relations between our two States as soon as possible.[100]

101. On 26 June 2006, the Russian MFA replied in a diplomatic note addressed to the Montenegrin MFA (the "**Russian Note of 26 June 2006**"), in which it stated:

> Ministry of Foreign Affairs of the Russian Federation presents its complements (sic) to the Ministry of Foreign Affairs of the Republic of Montenegro and, guided by the desire to develop bilateral cooperation between the Russian Federation and the Republic of

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98 Decision on Independence, **RLA-25** (emphasis added).
99 **RLA-329** (emphasis added); *see also* **C-365**.
100 **R-74**.

> Montenegro, has the honour to inform of the readiness of the Russian Federation to establish diplomatic relations with the Republic of Montenegro at the embassy level.
>
> In case the Montenegrin side agrees, this note and the note of the Ministry of Foreign Affairs of the Republic of Montenegro will form an agreement on the establishment of diplomatic relations, which will become applicable from the date of the exchange of notes.[101]

102. On 4 August 2006, the Montenegrin MFA addressed a diplomatic note to the Russian MFA (the "**Montenegrin Note of 4 August 2006**"), in which it stated:

> Ministry of Foreign Affairs of the Republic of Montenegro presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to inform that in accordance with item 3 of the Decision of Assembly of the Republic of Montenegro on declaration of the independence of the Republic of Montenegro dated June 8, 2006, the Republic of Montenegro is a state-successor to the State Union of Serbia and Montenegro with regard to international treaties and agreements which were concluded by the State Union of Serbia and Montenegro and to which it acceded and in this regard, the Republic of Montenegro confirms its readiness to observe all treaties and agreements that have been effective between the Russian Federation and the State Union of Serbia and Montenegro.[102]

103. On 16 August 2006, the Russian MFA replied in a diplomatic note in the following terms (the "**Russian Note of 16 August 2006**"):

> Ministry of Foreign Affairs of the Russian Federation presents its complements (sic) to the Ministry of Foreign Affairs of the Republic of Montenegro and in connection with the note of the Ministry No 03/04-1414 of 4 August 2006 respectfully informs that the Russian side takes into consideration the readiness of the Republic of Montenegro as a successor of the State Union of Serbia and Montenegro to exercise powers and discharge obligations arising out of all international treaties that were effective between the Russian Federation and the State Union of the Serbia and Montenegro.[103]

104. An issue regarding the translation of the Russian Note has been raised. The Claimant submits that the phrase "принимает к сведению" is translated as "takes note of" or, alternatively, "acknowledges."[104] The Respondent "does not see a *major* material difference between the two translations." It submits that "'takes into consideration' is more accurate, while the expression 'takes note of' is also a viable translation."[105]

2. The Parties' Positions

105. There is no dispute between the Parties that the State Union succeeded to the FRY-Russia BIT after the dissolution of the former Republic of Yugoslavia in 1991. The dispute concerns whether

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[101] **R-75**.
[102] **C-18**.
[103] **C-19**.
[104] Claimant's Post-Hearing Brief, ¶ 5.
[105] Respondent's Post-Hearing Brief, ¶ 106.

Montenegro thereafter succeeded to the FRY-Russia BIT following its declaration of independence and secession from the State Union in 2006.

106. The Respondent submits that Montenegro did not automatically succeed to the FRY-Russia BIT after its independence in June 2006, and that the diplomatic notes that it later exchanged with the Russian Federation did not constitute a succession agreement.[106]

107. The Claimant rejects the Respondent's assertion that Montenegro has not succeeded to the FRY-Russia BIT. He submits that three key facts, taken severally or jointly, prove the opposite: (i) Montenegro's Decision on Independence in June 2006; (ii) the exchange of diplomatic notes on succession between Montenegro and the Russian Federation in August 2006; and (iii) Montenegro's post-independence conduct in respect of pre-independence USSR/Russia treaties.[107]

108. The Parties' positions are summarized below with respect to the three embedded issues in the objection, namely: (i) whether Montenegro automatically succeeded to the FRY-Russia BIT as a matter of customary international law; (ii) whether Montenegro's Decision on Independence produced succession to the FRY-Russia BIT; and (iii) whether Montenegro reached a succession agreement with the Russian Federation through an exchange of notes.

(a) Whether Montenegro automatically succeeded to the FRY-Russia BIT as a matter of customary international law

The Respondent's Position

109. The Respondent argues that the Vienna Convention on Succession of States in respect of Treaties ("**VCSST**") is inapplicable in this arbitration because, while the State Union was party to that treaty prior to Montenegro's independence, the Russian Federation was not.[108] The Respondent also submits that there is no basis for contending that the VCSST forms part of customary international law.[109] The Respondent contends that State practice, especially in the case of seceding States,[110] shows that there is a long-established customary rule of non-succession to bilateral treaties.[111] While recognizing that there may be exceptions to this non-succession

[106] Memorial on Jurisdiction, ¶ 6; Statement of Defence, ¶¶ 224-226; Reply on Jurisdiction, ¶ 29.
[107] Counter-Memorial on Jurisdiction, ¶¶ 6, 45.
[108] Statement of Defence, ¶¶ 233-235. Article 34 of the VCSST provides that in case of separation of parts of a State, "any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed." **CLA-166**.
[109] Statement of Defence, ¶ 235; Respondent's Post-Hearing Brief, ¶¶ 21-22; Hearing Transcript, 31:5-8.
[110] Memorial on Jurisdiction, ¶ 13.
[111] Statement of Defence, ¶ 246; Memorial on Jurisdiction, ¶¶ 9-13; Reply on Jurisdiction, ¶ 58, referring to I. Brownlie, *Principles of Public International Law* (5th ed., Oxford UP, 1998), p. 663 (**RLA-30**); J. Crawford,

rule,[112] such as the exception for boundary treaties,[113] the Respondent submits that no such exception exists for BITs.[114] In particular, it argues that State practice of concluding succession agreements with respect to BITs would preclude finding a customary rule of automatic succession.[115] With reference to the Claimant's argument that BITs enshrining enforceable rights of investors are subject to a rule of automatic succession, the Respondent contends that the Claimant "fails to provide any support for overturning a well-established rule of customary international law."[116]

110. In relation to the analogy drawn by the Claimant between human rights treaties and BITs, the Respondent first contends that there is no customary international law rule of automatic succession to human rights treaties.[117] Second, the Respondent submits that the analogy with human rights treaties is inapposite because: (i) human rights treaties apply *erga omnes*, whereas BITs provide reciprocal protection for only a certain group of persons from a specific State;[118] (ii) human rights treaties are humanitarian in nature, whereas BITs serve investors' commercial

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Brownlie's Principles of Public International Law (8th ed., Oxford UP, 2012), p. 438 (**RLA-218**); A. Aust, *Handbook of International Law* (2nd ed., Cambridge UP, 2010), pp. 365-366 (**RLA-219**); M. Shaw, *International Law* (6th ed., Cambridge UP, 2008), p. 974 (**RLA-220**); H. Bokor-Szego, "Questions of State Continuity and State Succession in Eastern and Central Europe," in M. Mrak (ed.), *Succession of States* (Martinus Nijhoff, 1999), pp. 105-106 (**RLA-221**); International Law Association, *Aspects of the Law on State Succession*, Resolution No. 3/2008, Annex, Section VI.2, ¶ 8 (**RLA-222**); B. Stern, *La succession d'Etats*, Collected courses of the Hague Academy of International Law, vol. 262 (Martinus Nijhoff, 2000), p. 314 (**RLA-223**). *See also* Respondent's Post-Hearing Brief, ¶¶ 5, 7; Hearing Transcript, 35:7-15.

[112] Reply on Jurisdiction, ¶¶ 61-65, citing Second Hollis Report, ¶ 3 (**RER-2**), referring to Aust, pp. 365-366 (**RLA-219**); R. Pereira Fleury, "State Succession and BITs' Challenges for Investment Arbitration," *American Review of International Arbitration*, Vol. 27, No. 4 (2016), p. 456 (**RLA-279**); A. Genest, "Sudan Bilateral Investment Treaties and South Sudan: Musings on State Succession to Bilateral Treaties in the Wake of Yugoslavia's Breakup," TDM Journal (April 2014), p. 22 (**RLA-280**).

[113] Reply on Jurisdiction, ¶ 61, referring to Aust, pp. 365, 366 (**RLA-219**); Respondent's Post-Hearing Brief, ¶¶ 6, 19.

[114] Reply on Jurisdiction, ¶¶ 61-64, referring to Aust, pp. 365, 366 (**RLA-219**); Second Hollis Report, Section III, (**RER-2**); P. Dumberry, "An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs concluded by Predecessor States before Independence," Journal of International Dispute Settlement, Vol. 6 (2015), p. 76 (**RLA-278**); Pereira Fleury, p. 456 (**RLA-279**); Genest, p. 22 (**RLA-280**). *See also* Respondent's Post-Hearing Brief, ¶¶ 5, 7; Hearing Transcript, 38:9.

[115] Reply on Jurisdiction, ¶¶ 85-86, referring to M. Shaw, *International Law* (8th ed., Cambridge UP, 2017), p. 58 (**RLA-282**); Statute of the International Court of Justice, Article 38(1)(b) (**RLA-276**); Respondent's Post-Hearing Brief, ¶¶ 20, 40-43.

[116] Reply on Jurisdiction, ¶¶ 59-60; Respondent's Post-Hearing Brief, ¶ 26. *See also* Hearing Transcript, 33:15-20.

[117] Reply on Jurisdiction, ¶¶ 66-68, citing Aust, p. 366 (**RLA-219**); M. Shaw, *International Law* (8th ed., Cambridge UP, 2017), p. 745 (**RLA-282**); J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford UP, 2012), p. 440 (**RLA-218**); Respondent's Post-Hearing Brief, ¶¶ 6, 24, 27-29.

[118] Reply on Jurisdiction, ¶ 75, referring to U. Kriebaum, C. Schreuer, *The Concept of Property in Human Rights Law and International Investment Law* (2007), p. 13 (**RLA-285**); C. Reiner, C. Schreuer, "Human Rights and International Investment Arbitration," in *Human Rights in International Investment Law and Arbitration*, P-M Dupuy et al. (eds) (Oxford UP, 2009), p. 95 (**RLA-286**); J. Paulsson, "Indirect expropriation: is the right to regulate at risk?," *Making the most of international investment agreements: a common agenda, Symposium co-organised by ICSID, OECD, and UNCTAD* (2005), p. 4 (**RLA-287**); M. Shaw, *International Law* (8th ed., Cambridge UP, 2017), p. 743 (**RLA-282**). *See also* Hearing Transcript, 39:23-40:12.

interests;[119] (iii) human rights treaties often provide little in the way of protection mechanisms, whereas BITs create "significantly greater exposure" for States to potential claims;[120] (iv) human rights treaties continue to have effect regardless of breach, whereas BITs "are not subject to such an exception";[121] (v) human rights treaties are multilateral, whereas investment treaties are generally bilateral;[122] (vi) the protection of non-parties is not exclusive to human rights treaties and investment treaties,[123] nor is third-party enforcement available in all human rights treaties;[124] and (vii) sunset clauses in investment treaties do not provide the same stability for investor rights as human rights law does with respect to vested rights.[125] The Respondent points to Professor Tams' published work of 2016, which it submits contradicts the human rights treaty analogy advanced by the Claimant.[126] According to the Respondent, it follows that "the absence of a rule of automatic succession for [human rights treaties] must mean that there is no succession without an agreement among the parties."[127]

111. The Respondent asserts that economic and political relations between Montenegro and the Russian Federation do not suggest the existence of a presumption of succession, and "cannot substitute for the lack of consent needed for succession to occur."[128] In particular, the Respondent contends that succession to a BIT cannot be presumed, especially in light of the significant burden a BIT might impose on the State (such as exposure to arbitration).[129] It submits that this is the case regardless of the significance of a particular trade partner.[130]

112. Rather, it is the Respondent's position that international law requires an explicit agreement between States for succession to bilateral treaties.[131] Where this agreement is achieved through an exchange of diplomatic notes, the Respondent contends that such notes must be specific as to the parties' intention to be bound.[132] The Respondent submits that Montenegro has developed a

[119] Reply on Jurisdiction, ¶ 76.
[120] Reply on Jurisdiction, ¶ 77, citing Reiner and Schreuer, pp. 94-96 (**RLA-286**). *See also* Respondent's Post-Hearing Brief, ¶¶ 30-39.
[121] Reply on Jurisdiction, ¶ 78, referring to Second Hollis Report, ¶ 70 (**RER-2**).
[122] Reply on Jurisdiction, ¶ 79.
[123] Reply on Jurisdiction, ¶ 80.
[124] Hearing Transcript, 41:14-42:4.
[125] Reply on Jurisdiction, ¶¶ 81-83, referring to *Certain German Interests in Polish Upper Silesia*, P.C.I.J. (Ser. A), No. 7, Judgment, 25 August 1925, p. 42 (**RLA-288**); Hearing Transcript, 42:6-15.
[126] Hearing Transcript, 39:2-7, referring to C. J. Tams, "Ways out of the Marshland: Investment Lawyers and the Law of State Succession," in *Investment Arbitration as a Motor of General International Law* (Hofmann, Schill, and Tams, eds., forthcoming) (**RLA-277**).
[127] Respondent's Post-Hearing Brief, ¶ 25.
[128] Reply on Jurisdiction, ¶¶ 46(i), 48.
[129] Reply on Jurisdiction, ¶ 53.
[130] Reply on Jurisdiction, ¶ 53.
[131] Statement of Defence, ¶ 247; Memorial on Jurisdiction, ¶¶ 9, 14-24; Respondent's Post-Hearing Brief, ¶¶ 8-9.
[132] Statement of Defence, ¶ 248; Memorial on Jurisdiction, ¶¶ 20-24.

uniform succession practice of concluding specific agreements, either through an exchange of notes or by signing a succession document.[133] It argues that any final notes constituting an agreement on succession "contained explicit and clear confirmation of the intentions of the offer and acceptance, *i.e.* intentions to be bound by specific agreements of the predecessor State"[134] and "a specific list of treaties that served the interests of both States."[135]

113. The Respondent also submits that if a customary international law rule of automatic succession does exist, which it disputes,[136] Montenegro would not be bound by it.[137] The Respondent argues that Montenegro can be considered a "persistent objector" to any such rule, and refers to its post-independence practice with respect to BITs to demonstrate its case-by-case approach to such treaties.[138] It submits that the examples relied on by the Claimant to demonstrate inconsistencies are not in fact inconsistent with its State practice. Instead, the Respondent explains that each example demonstrates its case-by-case approach in which it requires a comprehensive or individual succession agreement.[139] In this regard, the Respondent claims that its "'inventory' procedures have a constitutive, not declaratory, effect,"[140] as do those of the Russian Federation.[141]

The Claimant's Position

114. The Claimant agrees with the Respondent that the automatic succession rule in Article 34 of the VCSST does not apply on the basis that the Russian Federation is not party to the VCSST and the rule itself has not yet become customary international law. However, the Claimant submits that "it does not follow that customary international law is defined by the opposite rule, i.e. one of automatic 'discontinuity.'"[142] It contends that Montenegro assumed all of the State Union's treaty obligations (including under the FRY-Russia BIT) upon secession,[143] and argues that the

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[133] Statement of Defence, ¶¶ 250-253; Reply on Jurisdiction, ¶¶ 100-102. *See also* Respondent's Post-Hearing Brief, ¶¶ 45-46.
[134] Statement of Defence, ¶ 254. *See also id.*, ¶¶ 255-259, *referring to* Decision to Publish the Agreement on Succession of Bilateral Agreements between Montenegro and the United States of America, No. 77/08, 16 October 2014 (**RLA-33**); Decision to Publish the Agreement between Montenegro and the State of Israel regulating Bilateral Contractual Relations, Official Gazette of Montenegro, No. 13/2011, 13 October 2011 (**RLA-37**). *See* Statement of Defence, ¶ 249. *See also* Respondent's Post-Hearing Brief, ¶¶ 10-11, 44(iii).
[135] Respondent's Post-Hearing Brief, ¶ 44(ii).
[136] Reply on Jurisdiction, ¶¶ 85-86.
[137] Reply on Jurisdiction, ¶ 87.
[138] Reply on Jurisdiction, ¶¶ 88-99, referring to **R-66**; **R-147**. *See also* Respondent's Post-Hearing Brief, ¶ 44(i).
[139] Respondent's Post-Hearing Brief, ¶ 47-65; Hearing Transcript, 59:11-21.
[140] Respondent's Post-Hearing Brief, ¶ 44(iv); Hearing Transcript, 57:24-58:9.
[141] Respondent's Post-Hearing Brief, ¶¶ 67-68; Hearing Transcript, 61:1-62:20.
[142] Rejoinder on Jurisdiction, ¶ 34. *See* Counter-Memorial on Jurisdiction, ¶¶ 128-129; Hearing Transcript, 152:12-21, 154:19-23, 155:4-10.
[143] Statement of Claim, ¶ 2.2(d).

content of the Montenegrin Note of 4 August 2006 is consistent with the automatic succession rule "which applies to certain categories of treaties, including some bilateral treaties."[144]

115. The Claimant submits that Montenegro can be regarded as an "automatic successor State," drawing an analogy in this respect between human rights treaties and BITs.[145] The Claimant contends that automatic succession to human rights treaties – informed by succession in the context of acquired rights – is widely accepted,[146] and anchors his analogy on economic rights such as the right to property,[147] arguing that "[s]ince BITs aim at protection of property rights, by analogy, succession to BITs may be considered automatic."[148] In support of this proposition, the Claimant relies on the First Tams Report, which argues for BITs to be treated in the same way as human rights treaties for the purposes of State succession.[149] This is because both types of treaties "protect rights of beneficiaries (individuals, investors) that are not themselves party to the treaty in question" and "vest the beneficiaries with a right to seek redress against breaches."[150] In this respect, Professor Tams clarifies that:

> In making this argument, I am not advocating a particular view of the general relationship between investor rights and individual rights. Nor do I suggest that international investment agreements were a particular form of human rights protection. My point is a narrow one: investment treaties share one special feature of human rights treaties: both protect rights of beneficiaries that are not themselves party to the treaty. To the extent that (as shown in the preceding section) this special feature is held to justify a rule of automatic succession to human rights treaties, it should matter when assessing the regime of succession applicable to investment agreements.[151]

116. Accordingly, the Claimant submits that Montenegro should be treated as an automatic successor to the FRY-Russia BIT.[152] Contrary to the Respondent's position, the Claimant posits that: (i) the distinction between secession and dissolution of States is not indicative, let alone determinative, of automatic succession to treaties protecting foreign investors;[153] (ii) the Treaty is not prevented

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[144] Claimant's Post-Hearing Brief, ¶ 11; Statement of Claim, ¶ 2.2(d), referring to **C-18**. *See also* Claimant's Post-Hearing Brief, ¶¶ 13, 20, 37; Hearing Transcript, 154:4-8.

[145] Counter-Memorial on Jurisdiction, ¶ 129. *See also* Rejoinder on Jurisdiction, ¶ 60, referring to First Tams Report, ¶ 32 (**CER-2**); Second Tams Report, ¶ 53 (**CER-4**); Claimant's Post-Hearing Brief, ¶ 17, citing Hearing Transcript, 397:12-21, 399:4-14.

[146] Rejoinder on Jurisdiction, ¶ 38, citing First Tams Report, ¶ 30 (**CER-2**); Second Tams Report, ¶¶ 22, 25 (**CER-4**). *See also* Rejoinder on Jurisdiction, ¶ 60; First Tams Report, ¶ 32 (**CER-2**).

[147] Counter-Memorial on Jurisdiction, ¶ 130, citing UN Universal Declaration of Human Rights, Art. 17 (**CLA-82**). *See also* Hearing Transcript, 156:4-14.

[148] Counter-Memorial on Jurisdiction, ¶ 130. *See* Rejoinder on Jurisdiction, ¶ 41, referring to First Tams Report, ¶¶ 37-41 (**CER-2**).

[149] First Tams Report, ¶¶ 37-41 (**CER-2**); Rejoinder on Jurisdiction, ¶ 41.

[150] First Tams Report, ¶ 37 (**CER-2**). *See also* Rejoinder on Jurisdiction, ¶¶ 54-56, 76, citing Tams Second Report, ¶¶ 64-65. *See also* Claimant's Post-Hearing Brief, ¶ 37.

[151] First Tams Report, ¶ 39 (**CER-2**).

[152] Counter-Memorial on Jurisdiction, ¶ 133; Rejoinder on Jurisdiction, ¶ 76.

[153] Rejoinder on Jurisdiction, ¶ 44, referring to Second Tams Report, ¶ 32 (**CER-4**). *See also* Hearing Transcript, 157:10-24.

from being subject to automatic succession by virtue only of its bilateral nature;[154] (iii) the salient feature which justifies automatic succession in human rights treaties, being conferral of benefits on non-parties, is evident in investment treaties;[155] and (iv) any alleged differences between human rights treaties and investment treaties are "either immaterial or mischaracterized," and the focus of the analysis should rather be on the shared features of such treaties.[156]

117. The Claimant pays particular attention to "sunset clauses" in investment treaties, arguing that their regular inclusion supports his proposed analogy with human rights treaties, as it "underlines that rights accorded to investors, once granted, cannot easily be taken away."[157] In this regard, the Claimant argues that the inclusion of sunset clauses "must decisively move the sovereignty/stability pendulum towards the latter,"[158] and the fact that they are commonly included "demonstrates that investment treaty protection is better immunized against changes than human rights treaty protection."[159]

118. The Claimant rejects the Respondent's view that succession to bilateral treaties requires the conclusion of an explicit agreement, and contends that there is "no rigid requirement of form" in this area.[160] In this regard, the Claimant refers to the statement of the International Court of Justice ("**ICJ**") in the *Croatian Genocide* Case that, in the case of succession, "the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any documents issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form."[161]

119. As to the practice of State succession, the Claimant submits that this varies significantly,[162] and points to unilateral statements and confirmations by subsequent behavior as means of effecting succession other than explicit agreement.[163] In particular, the Claimant argues that succession

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[154] Rejoinder on Jurisdiction, ¶¶ 47-48, citing Second Tams Report, ¶ 43-45 (**CER-4**).
[155] Rejoinder on Jurisdiction, ¶ 51, referring to Second Tams Report, ¶ 49, n.90 (**CER-4**).
[156] Rejoinder on Jurisdiction, ¶¶ 54-60, referring to Second Tams Report, ¶ 53 (**CER-4**).
[157] Rejoinder on Jurisdiction, ¶ 61, citing First Tams Report, ¶ 42 (**CER-2**). *See also* Hearing Transcript, 156:15-157:9.
[158] Rejoinder on Jurisdiction, ¶ 66, referring to First Tams Report, ¶ 42 (**CER-2**); Second Tams Report, n.94 (**CER-4**).
[159] Rejoinder on Jurisdiction, ¶ 67, referring to **C-374**, A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (6th ed., Oxford UP, 2015), ¶ 8.16 (**CLA-238**); L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration*, (Kluwer Law International, 2010), p. 105 (**CLA-239**). *See also* Claimant's Post-Hearing Briefs, ¶ 19.
[160] Counter-Memorial on Jurisdiction, ¶¶ 53-54.
[161] Counter-Memorial on Jurisdiction, ¶ 59, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, ICJ Reports 2008, p. 412, ¶ 109 (**CLA-67**) (the "***Croatian Genocide* Case**").
[162] Counter-Memorial on Jurisdiction, ¶ 56.
[163] Counter-Memorial on Jurisdiction, ¶ 55.

may also be inferred from conduct,[164] and points out in this regard that the Respondent's expert, Professor Hollis, has recognized that other FRY-Russia bilateral agreements "have, **as a matter of practice**, continued to apply," arguing that this demonstrates acceptance that Montenegro and the Russian Federation have agreed to apply similar treaties "through mere conduct."[165]

120. As regards the Respondent's claim that it is a persistent objector to any customary international law rule of automatic succession, the Claimant submits that the Respondent's practice in this regard has not been consistent and does not indicate its status as a persistent objector.[166] He contends that Montenegro has not persistently and openly dissented to a rule of automatic succession applicable to investment treaties through any express or implied statements,[167] and points out that Montenegro is a party to the VCSST and has therefore recognized its rule of automatic succession in Article 34.[168]

(b) Whether Montenegro's Decision on Independence establishes its succession to the FRY-Russia BIT

The Respondent's Position

121. The Respondent disputes that the Decision on Independence may, in and of itself, establish that Montenegro succeeded to the FRY-Russia BIT as a unilateral act, and contends that succession cannot occur by unilateral statements, nor by unilateral conduct.[169] It submits that the Decision on Independence is, at most, a political statement of Montenegro's intention to establish and develop bilateral relations.[170] In support of this contention, the Respondent contends that Montenegro's Parliament "under international law lacks the capacity to undertake unilateral acts binding Montenegro internationally,"[171] and submits that the content and context of the Decision on Independence show that it can be considered to be "no more than a general statement of policy."[172] It argues that this conclusion is supported because: (i) Montenegro followed the general practice of a notification of succession by sending a list of multilateral treaties to which Montenegro wished to succeed to the UN Secretary-General; and (ii) Montenegro subsequently

[164] Counter-Memorial on Jurisdiction, ¶ 61.
[165] Counter-Memorial on Jurisdiction, ¶ 56 (emphasis in original), citing First Hollis Report, ¶¶ 11, 14 (**RER-1**).
[166] Rejoinder on Jurisdiction, ¶¶ 71-72, citing Reply on Jurisdiction, ¶ 97. *See* **C-375**; **C-376**; Reply on Jurisdiction, ¶ 106.
[167] Rejoinder on Jurisdiction, ¶ 73.
[168] Rejoinder on Jurisdiction, ¶¶ 74-75. *See also* Hearing Transcript, 153:16-154:8.
[169] Respondent's Post-Hearing Brief, ¶¶ 13-14, 74. *See also* Hearing Transcript, 91:10-94:8.
[170] Statement of Defence, ¶¶ 238-241. *See also* Respondent's Post-Hearing Brief, ¶¶ 80-82.
[171] Statement of Defence, ¶ 239, referring to International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, A/61/10 (2006) ("**ILC Guiding Principles**"), pp. 372-374 (**RLA-26**).
[172] Statement of Defence, ¶ 240, referring to E. Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (Brill Nijhoff, 2015), pp. 197-198 (**RLA-27**).

developed a practice of succeeding into "specifically identified treaties based on diplomatic notes."[173]

122. The Respondent asserts that the alleged unilateral act should be "examined in the context of succession to a bilateral treaty,"[174] and argues that relevant ICJ jurisprudence significantly narrows the doctrine of unilateral acts and excludes its application in this case.[175] The Respondent further contends that the unilateral act doctrine applies only when there is no other applicable law,[176] and argues that since there is a specifically developed area of international law in relation to State succession to treaties, "there is no room to apply the doctrine of binding unilateral acts in the present case."[177] Alternatively, the Respondent advances four arguments based on its analysis of the Decision on Independence and Declaration of Independence to support its contention that these instruments do not produce the binding obligations claimed by the Claimant.

123. First, the Respondent contends that the context of the Decision on Independence and Declaration of Independence implies that Montenegro did not intend to be unilaterally bound by them.[178] It argues that the statements were made in the context of Montenegro "striving to establish an independent identity," and that they were not made with any particular audience – *i.e.* the Russian Federation – in mind.[179]

124. Second, the Respondent submits that the "general political language" of both instruments leads to the same conclusion. It argues that the phrase "take over international treaties" in the Decision on Independence indicates that there is an applicable procedure for a treaty to "become Montenegrin,"[180] and therefore the Decision on Independence should be seen as an instruction to take the required steps in that regard.[181] As to the Declaration of Independence, the Respondent

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[173] Statement of Defence, ¶¶ 242-244, referring to Letter from Ministry of Foreign Affairs of Montenegro to the Secretary-General of the United Nations, 10 October 2006 (**RLA-29**); Respondent's Post-Hearing Brief, ¶¶ 76-77.
[174] Reply on Jurisdiction, ¶¶ 227-230, citing ILC Guiding Principles, Guiding Principle 7 (**RLA-26**).
[175] Reply on Jurisdiction, ¶ 230, referring to Counter-Memorial on Jurisdiction, ¶ 65. *See also* Reply on Jurisdiction, ¶¶ 234-244, citing *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, pp. 89, 132-133 (**RLA-300**); *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, ICJ Reports 1986, p. 554, ¶¶ 36, 39-40 (**RLA-50**); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6, ¶¶ 19-20, 25, 33, 40-41, 48, 50, 52-53 (**RLA-55**).
[176] Reply on Jurisdiction, ¶¶ 247-248, citing Second Hollis Report, ¶ 134 (**RER-2**). *See also* Respondent's Post-Hearing Brief, ¶¶ 13-14.
[177] Reply on Jurisdiction, ¶ 248.
[178] Reply on Jurisdiction, ¶ 257.
[179] Reply on Jurisdiction, ¶¶ 258-260.
[180] Reply on Jurisdiction, ¶ 266; Decision on Independence (**RLA-25**).
[181] Reply on Jurisdiction, ¶¶ 265-267.

submits that the language of that instrument at best amounts to a political pledge to establish and develop bilateral relations.[182] It argues that, since the Declaration of Independence requires that any action be taken "based on the principles of international law," such action would therefore need to comply with the principles concerning succession to treaties.[183]

125. Third, the Respondent submits that the Montenegrin Parliament lacks the capacity to undertake unilateral acts to bind Montenegro. While the Claimant invokes the 1992 Constitution of the Republic of Montenegro to show that Parliament was authorized to ratify international agreements, the Respondent argues that such authorization was limited according to the competence of the Republic of Montenegro under the FRY Constitution and the Constitutional Charter of the State Union.[184] It further contends that ILC Guiding Principle 4 as it relates to unilateral acts does not list parliaments as suitably authorized to bind a State to a treaty through a mere unilateral declaration.[185]

126. Fourth, the Respondent submits that, while the Montenegrin MFA and other organs have referred to these instruments, such references were made only in a preambular sense.[186] It refers to Montenegro's subsequent practice of succeeding to BITs through exchanges of notes,[187] and argues that there would be no need for such exchanges if the Decision on Independence and Declaration of Independence were sufficient for that purpose.[188]

127. Separately, the Respondent submits that databases such as UNCTAD and ICSID are instructive, because they are maintained by highly trained staff and are based on input from contracting parties themselves.[189] It submits that the FRY-Russia BIT is not found in Montenegro's reports to UNCTAD in 2014, 2015 or 2016,[190] and that the Treaty's appearance on UNCTAD's list in

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[182] Reply on Jurisdiction, ¶¶ 269-272; **C-365**.
[183] Reply on Jurisdiction, ¶ 273.
[184] Reply on Jurisdiction, ¶¶ 275-276, citing Constitution of the Federal Republic of Yugoslavia (Official Gazette of FRY, No. 1/92), Article 7 (**RLA-330**); Constitutional Charter of the State Union of Serbia and Montenegro (Official Gazette of Serbia and Montenegro, No. 1/2003. Amendments I and II – OG SUSM, 26/2005-1), 4 February 2003, Article 15 (**RLA-23**).
[185] Reply on Jurisdiction, ¶¶ 277-280, citing ILC Guiding Principles, pp. 372-373 (**RLA-26**).
[186] Reply on Jurisdiction, ¶¶ 281-283, referring to Protocol between the Government of Montenegro and the Government of Romania on Succession of Montenegro in respect of Bilateral Treaties (**RLA-39**).
[187] Reply on Jurisdiction, ¶ 285, referring to Decision on Publishing the Agreement on Succession of Bilateral Agreements between Montenegro and the Republic of Estonia, Official Gazette of Montenegro, No. 4-2015, 4 May 2015 (**RLA-34**); Decision to Publish the Agreement on Succession of Bilateral Agreements between Montenegro and the Republic of Lithuania, Official Gazette of Montenegro, No. 4-2015, 4 May 2015 (**RLA-35**); Decision to Publish the Agreement between Montenegro and the State of Israel regulating Bilateral Contractual Relations, Official Gazette of Montenegro, No. 13/2011, 13 October 2011 (**RLA-37**); Protocol between the Government of Montenegro and the Government of Romania on Succession of Montenegro in respect of Bilateral Treaties (**RLA-39**).
[188] Reply on Jurisdiction, ¶¶ 284-287, citing **R-66**.
[189] Reply on Jurisdiction, ¶¶ 288-291.
[190] Reply on Jurisdiction, ¶ 292, referring to **R-195**; **R-120**; **R-148**.

2017 was an error that Montenegro requested be rectified.[191] The Respondent also contends that national databases can be "informative," and refers to the fact that the FRY-Russia BIT is not listed as being in force for Montenegro in any Russian database.[192]

128. The Respondent rejects as "futile" the Claimant's comparison between the Decision on Independence and Declaration of Independence, on the one hand, and the Alma Ata Declaration and the Kosovo Declaration on the other. According to the Respondent, the Claimant's position is based on a mischaracterization of the latter instruments.[193]

The Claimant's Position

129. For the Claimant, rather than "a mere piece of paper,"[194] the Decision on Independence is "the best evidence of consent to succession"[195] and is sufficient to prove that Montenegro succeeded to the FRY-Russia Treaty.[196] The Claimant submits that the Decision on Independence was a manifestation of Montenegro's "free will to be bound by international treaties" entered into by the State Union.[197] He argues that unilateral acts of States may create binding legal obligations without the need for any reaction from other States,[198] contending that bilateral treaties can be "considered in force as between a new State and the other State by reason of a unilateral declaration by the former and conduct amounting to acquiescence by the latter."[199]

130. The Claimant posits that, while succession cannot occur merely by a unilateral statement of the successor State, "a unilateral statement on succession can constitute the clearest evidence of a State's consent to succeed."[200] Paragraph 3 of the Declaration of Independence, according to the Claimant, "is clearly a statement of legal continuity for treaties,"[201] and language elsewhere in the Declaration supports this position.[202] Similarly, the Claimant submits that the language in the Decision on Independence also supports such a position.[203] The Claimant gives examples of

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[191] Reply on Jurisdiction, ¶¶ 293-295, referring to **R-200**.
[192] Statement of Defence, ¶ 296; Reply on Jurisdiction, ¶ 297.
[193] Respondent's Post-Hearing Brief, ¶¶ 83-95, citing Memorandum of Understanding on the issue of succession in respect of treaties of the former USSR of mutual interest (**RLA-416**), E. Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law*, Brill Nijhoff (2015) (**RLA-27**).
[194] Counter-Memorial on Jurisdiction, ¶ 63. *See also* Hearing Transcript, 167:7-25.
[195] Rejoinder on Jurisdiction, ¶ 92.
[196] Counter-Memorial on Jurisdiction, ¶ 74; Claimant's Post-Hearing Brief, ¶¶ 11, 40-41.
[197] Counter-Memorial on Jurisdiction, ¶ 67.
[198] Counter-Memorial on Jurisdiction, ¶¶ 64-65, citing *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, p. 457, ¶¶ 46-49 (**RLA-47**).
[199] Rejoinder on Jurisdiction, ¶¶ 94-95, citing N. Marquez Antures, "Acquiescence," *Max Planck Encyclopedia of Public International Law* (2006), ¶ 21 (**CLA-241**). *See also* Claimant's Post-Hearing Brief, ¶ 11.
[200] Claimant's Post-Hearing Brief, ¶ 11. *See also* Claimant's Post-Hearing Brief, ¶ 29; Hearing Transcript, 168:1-13.
[201] Hearing Transcript, 169:3-4.
[202] Hearing Transcript, 169:3-173:1, 177:15-178:18.
[203] Hearing Transcript, 173:2-174:2.

the Alma-Ata Declaration and the Kosovo Declaration of Independence to demonstrate State practice of treaty succession supportive to his position.[204] He further elaborates that subsequent State practice is not necessary to demonstrate provisional application and succession.[205]

131. The Claimant also argues that, since the Montenegrin Parliament is empowered to ratify international treaties,[206] it must also have the "final word" on the matter of Montenegro's succession to such treaties.[207] He contends that Parliament's "wide scope of powers," as confirmed by the Constitutional Court of Montenegro, demonstrates that it was "fully authorized to make a statement indicating … that Montenegro intended to be bound by pre-independence bilateral treaties" in the Decision on Independence.[208]

132. In support of its argument that the Decision on Independence is the "key official document underpinning Montenegro's succession," the Claimant refers to the subsequent conduct of the Montenegrin MFA and other authorized bodies recognizing it as such.[209] First, the Claimant points to several occasions on which the Montenegrin MFA referred to the Decision on Independence as the basis for its succession to various instruments, including in the Montenegrin Note of 4 August 2006.[210] It also notes that the Montenegrin Ministry of Finance only required the Decision on Independence to conclude that other agreements between the Russian Federation and the FRY continued to apply.[211] The Claimant also points to a similar statement made by Montenegro's Ministry of Economy in 2009 to the European Commission.[212]

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[204] Hearing Transcript, 174:3-176:5.
[205] Hearing Transcript, 176:19-177:14.
[206] Counter-Memorial on Jurisdiction, ¶ 68, citing Decision on Proclamation of the Constitution of the Republic of Montenegro, adopted on 12 October 1992, Article 81(5) (**CLA-68**).
[207] Counter-Memorial on Jurisdiction, ¶ 69; Claimant's Post-Hearing Brief, ¶ 43.
[208] Rejoinder on Jurisdiction, ¶¶ 98-99, citing Decision of the Constitutional Court of Montenegro No. V 74/06, 6 December 2006 (**CLA-242**).
[209] Counter-Memorial on Jurisdiction, ¶ 71.
[210] Counter-Memorial on Jurisdiction, ¶ 71, citing **R-66**; Decision on Publishing the Agreement on Succession of Bilateral Agreements between Montenegro and the Republic of Estonia, Official Gazette of Montenegro, No. 4-2015, 4 May 2015 (**RLA-34**); Decision to Publish the Agreement on Succession of Bilateral Agreements between Montenegro and the Republic of Lithuania, Official Gazette of Montenegro, No. 4-2015, 4 May 2015 (**RLA-35**); Decision to Publish the Agreement between Montenegro and the State of Israel regulating Bilateral Contractual Relations, Official Gazette of Montenegro, No. 13/2011, 13 October 2011 (**RLA-37**); Protocol between the Government of Montenegro and the Government of Romania on Succession of Montenegro in respect of Bilateral Treaties (**RLA-39**).
[211] Counter-Memorial on Jurisdiction, ¶ 71, citing **R-66**; **C-302**; **C-303**; Convention between the Government of the Russian Federation and the Union Government of the Federal Republic of Yugoslavia for the Avoidance of Double Taxation with respect to Taxes on Income and Property, 12 October 1995 (**CLA-70**); Agreement between the Government of the Russian Federation and the Federal Republic of Yugoslavia on Cooperation and Mutual Assistance of Customs Services, 6 November 1996 (**CLA-71**). *See also* Rejoinder on Jurisdiction, ¶¶ 100-102, citing **R-74**; **R-75**.
[212] Rejoinder on Jurisdiction, ¶¶ 106-107, citing **R-66**, ¶ 21.

133. However, even if the Montenegrin Parliament was not authorized to make a legally binding statement regarding Montenegro's succession to bilateral treaties, the Claimant submits that the Montenegrin MFA is competent in this regard.[213] The Claimant therefore contends that, through its subsequent conduct, the Montenegrin MFA approved the Decision on Independence for succession purposes.[214]

134. Finally, the Claimant submits that the context of the Decision and the Declaration shows that Montenegro intended to create legal obligations for itself on which other States could rely. According to the Claimant, the relevant context is Montenegro's move towards independence, and its attempts to secure international recognition at the time the Decision and the Declaration were adopted.[215] In this light, the Claimant contends that the Decision and the Declaration "should be given very considerable weight … for the purposes of treaty succession."[216]

(c) Whether Montenegro concluded a succession agreement with the Russian Federation

The Respondent's Position

135. The Respondent submits that succession to bilateral treaties may occur by explicit agreement,[217] implicitly through conduct,[218] general agreement "preceded by negotiations and employ[ing] very clear language of agreement and specification of the treaties being succeeded into,"[219] and on a "case-by-case basis."[220] For the Respondent, Montenegro never succeeded to the FRY-Russia BIT, either expressly through the exchange of diplomatic notes[221] or implicitly.[222] The Respondent contends that the notes exchanged between Montenegro and the Russian Federation are incapable of constituting a succession agreement because they do not conform to the Respondent's succession practice and lack the very clear and unambiguous wording used by

[213] Counter-Memorial on Jurisdiction, ¶ 70, citing ILC Guiding Principles (**RLA-26**); Regulation on Organization and Method of Operation of State Administration, 23 January 2012, Article 10 (**CLA-69**).
[214] Counter-Memorial on Jurisdiction, ¶ 72.
[215] Counter-Memorial on Jurisdiction, ¶ 73, citing First Tams Report, ¶ 90 (**CER-2**).
[216] Rejoinder on Jurisdiction, ¶¶ 108-112, citing Second Tams Report, ¶¶ 77-82 (**CER-4**). *See also* Claimant's Post-Hearing Brief, ¶ 40.
[217] Respondent's Post-Hearing Brief, ¶ 9.
[218] Respondent's Post-Hearing Brief, ¶ 10.
[219] Respondent's Post-Hearing Brief, ¶ 11. *See also* Respondent's Post-Hearing Brief, ¶¶ 107-108.
[220] Respondent's Post-Hearing Brief, ¶ 12. *See also* Hearing Transcript, 63:22-64:1.
[221] Memorial on Jurisdiction, ¶ 25; Reply on Jurisdiction, ¶ 100, referring to First Hollis Report (**RER-1**); Hearing Transcript, 46:23-47:1.
[222] Reply on Jurisdiction, Part 1.4. *See also* Respondent's Post-Hearing Brief, ¶¶ 70-73; Hearing Transcript, 64:6-69:22*ff*.

Montenegro and the Russian Federation in their respective succession agreements with other States.[223]

136. The Respondent describes the succession practice of Montenegro, evidenced by public statements and succession agreements with several countries,[224] as requiring a succession agreement and consolidation process to have occurred.[225] It also points to communications with the United Kingdom to demonstrate that where this succession practice is not followed, no BIT is recognized.[226] The Respondent observes that succession agreements concluded post-independence by way of an exchange of notes or the signature of a new agreement contain "explicit and clear confirmation of the intentions of the offer and acceptance, i.e. intentions to be bound by specific agreements of the predecessor State,"[227] as well as a list of the relevant pre-independence agreements to which it intends to succeed in that instance.[228] It contends that, until a succession agreement is concluded and enters into force, a "legal vacuum" exists with regard to obligations under treaties concluded by its predecessor State with third States. The FRY-Russia BIT is one such treaty.[229] In such circumstances, "the default rule is that [the FRY-Russia BIT] is not binding."[230]

137. In relation to the "twilight period" between a State's independence and the conclusion of a subsequent succession agreement, the Respondent contends that the status of pre-existing treaties will differ for successor and continuator States. It contends that "all the predecessor treaties continue vis-à-vis the continuator State, so that any treaty between the new State and the third State must be newly agreed"[231] and "depend[s] on the position of Montenegro and Russia."[232] The Respondent argues that "neither State considers bilateral treaties to be legally binding" until a succession agreement is reached, as is demonstrated by State practice.[233] It follows, according

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[223] Respondent's Post-Hearing Brief, ¶¶ 96-98.
[224] Reply on Jurisdiction, ¶¶ 104, 106, referring to **R-66**; **R-150**; **R-151**; **R-152**; **R-153**; **R-154**; **R-155**; **R-156**; **R-157**; **R-158**; **R-159**; **R-160**; **R-161**; **R-162**; **R-163**; **R-164**; **R-165**; **R-167**; **R-168**; Agreement between the Government of Montenegro and the Government of the Czech Republic on Amendments to the Agreement between the Federal Government of the Republic of Yugoslavia and the Government of the Czech Republic on Mutual Encouragement and Protection of Investments, 4 June 2010 (**RLA-299**).
[225] Reply on Jurisdiction, ¶ 104.
[226] Reply on Jurisdiction, ¶¶ 107-109, referring to **R-169**; **R-170**; **R-171**.
[227] Statement of Defence, ¶ 254. *See* Reply on Jurisdiction, ¶ 110.
[228] Statement of Defence, ¶¶ 260-262, referring to **R-67**; **R-68**; **R-69**; **R-70**; **R-71**; **R-72**; **R-73**; Protocol between the Government of Montenegro and the Government of Romania on Succession of Montenegro in respect of Bilateral Treaties (**RLA-39**).
[229] Statement of Defence, ¶¶ 263-629. *See* Reply on Jurisdiction, ¶ 267. *See also* Respondent's Post-Hearing Brief, ¶ 16.
[230] Respondent's Post-Hearing Brief, ¶ 15.
[231] Respondent's Post-Hearing Brief, ¶ 165.
[232] Respondent's Post Hearing Brief, ¶ 171.
[233] Respondent's Post Hearing Brief, ¶ 170.

to the Respondent, that the States "do not consider the FRY-Russia BIT applicable" in the interim period.[234]

138. The Respondent makes a fourfold argument for why no agreement for succession to the FRY-Russia BIT exists between Montenegro and the Russian Federation. First, it submits that the diplomatic notes exchanged between both States contain "non-binding wording" and do not express a clear offer and acceptance to be bound towards each other.[235] On the one hand, the Respondent contends that the Montenegrin Note of 4 August 2006, in which Montenegro merely expressed its "readiness to observe" all treaties in force between the State Union and the Russian Federation, may not be considered an offer of succession to the FRY-Russia BIT because "[i]t does not include a list of agreements and does not contain the standard language of a succession offer."[236] On the other hand, assuming that the Montenegrin Note of 4 August 2006 was a succession offer, the Respondent contends that Russian Note may not be considered an acceptance leading to an agreement.[237] That Note states that "the Russian side takes into consideration" or "takes note of"[238] Montenegro's readiness to "exercise powers and discharge obligations" arising out of all treaties in force between the State Union and Russia.[239] For the Respondent, "[t]his is not an affirmative answer."[240] The Respondent points to language of other comprehensive succession agreements completed by Montenegro, noting that the language in those agreements is "manifestly different" from that in the exchange of notes.[241]

139. Second, the Respondent rejects the Claimant's reliance on the exchange of diplomatic notes in June 2006 as demonstrating perfection of consent to a succession agreement.[242] The Respondent submits that neither the Claimant's expert, nor the Russian MFA, hold the same view of the June 2006 exchange as the Claimant.[243]

140. Third, the Respondent argues that the notes do not capture the FRY-Russia BIT, as they refer to treaties concluded between the Russian Federation and the State Union, rather than the Federal Republic of Yugoslavia.[244]

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[234] Respondent's Post Hearing Brief, ¶ 171.
[235] Reply on Jurisdiction, ¶ 114, referring to Reply from Ministry of Foreign Affairs of the Russian Federation, 27 April 2018, ¶ 4 (**C-301**).
[236] Statement of Defence, ¶ 274. *See also id.*, ¶¶ 275-279.
[237] Statement of Defence, ¶¶ 280-290.
[238] Hearing Transcript, 49:17-21.
[239] **C-19**.
[240] Statement of Defence, ¶ 289. *See also* Hearing Transcript, 49:21-50:1.
[241] Hearing Transcript, 51:22-52:21, 54:11-18.
[242] Respondent's Post-Hearing Brief, ¶ 97, referring to Hearing Transcript, 210:11-13.
[243] Respondent's Post-Hearing Brief, ¶ 97, referring to Hearing Transcript, 210:11-13.
[244] Statement of Defence, ¶¶ 291-293.

141. Fourth, the Respondent submits that the practices of Montenegro and the Russian Federation, and of "several key international organisations," demonstrate that Montenegro did not succeed into the FRY-Russia BIT. According to the Respondent, the Treaty is not listed in either State's public records as being in force between Montenegro and the Russian Federation, nor in the United Nations Treaty Series ("**UNTS**"), the databases of ICSID, the United Nations Conference on Trade and Development ("**UNCTAD**"), Kluwer Arbitration, or the Global Arbitration Review.[245] It was also not listed as an applicable BIT in the 2009 European Commission Questionnaire.[246] In support of its position, the Respondent relies on the First Hollis Report, which concludes:

> (i) that the 2006 Exchange of Notes between Montenegro and the Russian Federation did not constitute an agreement in any sense, and as such, cannot form the basis for treating the FRY-Russia as currently in force.
>
> (ii) If there was an agreement reached in those 2006 Exchange of Notes, it is my opinion that it was a political commitment as there is neither any manifest intention or other objective evidence to treat it as an international agreement governed by international law;
>
> (iii) If there was an international agreement governed by international law involved in the 2006 Exchange of Notes, neither Montenegro nor Russia have evidenced the requisite consent to be bound by it; and
>
> (iv) Even assuming the 2006 Exchange of Notes somehow comprised a legally binding treaty in force for both Montenegro and the Russian Federation, its contents would not require either State to treat the FRY-Russia BIT as in force.[247]

142. Responding to the Claimant's argument that the Russian MFA website shows the FRY-Russia BIT as in force, the Respondent states that this "is entirely accurate given that Serbia, as the continuator State, remained bound by" it. For the Respondent, this is insufficient to show that the FRY-Russia BIT is in force vis-à-vis Montenegro.[248]

143. The Respondent also argues that there is no "context" in which the diplomatic notes have legal effect, arguing that: (i) the Claimant has misinterpreted statements made by Montenegrin Prime Ministers;[249] (ii) the notes concerned Montenegro's recognition, not its treaty succession;[250] and (iii) the consultation schedule of the Russian and Montenegrin MFAs show that the inventory and consolidation processes, which the Respondent submits were part of Montenegro's

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[245] Statement of Defence, ¶¶ 294-299; Memorial on Jurisdiction, ¶ 35; Respondent's Post-Hearing Brief, ¶¶ 112, 147, 149, 154; Hearing Transcript, 79:13-19, 82:4-85:13.
[246] Hearing Transcript, 79:13-81:7.
[247] First Hollis Report, ¶ 70 (**RER-1**). *See* Memorial on Jurisdiction, ¶¶ 27-32. *See also* Hearing Transcript, 51:19-21.
[248] Respondent's Post-Hearing Brief, ¶ 153. *See also* Hearing Transcript, 46:4-12.
[249] Reply on Jurisdiction, ¶¶ 117, 119-120, referring to **C-298**, **C-305**.
[250] Reply on Jurisdiction, ¶ 118.

succession State practice,[251] were to be subject of further discussion.[252] The Respondent accordingly concludes that "the only possible, *i.e.*, legally grounded outcome, is that the FRY-Russia BIT is not applicable as regards the Russian Federation and Montenegro because no agreement exists to that effect."[253]

144. The Respondent also submits that there was no implicit succession agreement. It contends that "implied consent is accepted only when it is specific and unequivocal," and that it therefore should not be presumed lightly.[254] It refers to the conclusions reached in the First Tams Report, and submits that: (i) national court practice rather demonstrates that consent by silence is not easily established;[255] (ii) the Claimant has not presented any analogous case in which an arbitral tribunal found there to be implicit succession;[256] (iii) an "agreement by conduct" requires conduct specific to the particular treaty, which Professor Tams has not cited;[257] (iv) the *Croatian Genocide* Case is irrelevant as it involved a multilateral treaty reflecting a principle already considered a *jus cogens* norm.[258] The absence of a "tacit manifestation of the will of the interested parties" required for a potential argument of treaty continuity, according to the Respondent, "did not extend to all bilateral treaties" or indicate the existence of a comprehensive succession agreement.[259]

145. In this regard, the Respondent contends that the factual background does not meet the necessary standard for the existence of an implicit succession agreement. First, the Respondent argues that there was no general rule of succession which could give rise to implied succession of the FRY-

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[251] Hearing Transcript, 55:19-56:20.
[252] Reply on Jurisdiction, ¶ 121, referring to **R-172**.
[253] Memorial on Jurisdiction, ¶ 33.
[254] Reply on Jurisdiction, ¶¶ 123-124, citing *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, p. 3, ¶ 28 (**RLA-68**).
[255] Reply on Jurisdiction, ¶¶ 127-139, citing First Tams Report, ¶¶ 49-50, 65; *M v. Federal Dept. of Justice and Police*, Switzerland, Federal Tribunal, 73 ILR 107-111, 21 September 1979 (**CLA-192**); *Decision on Case No. 2Ob69/92*, Austria, Supreme Court, 16 December 1992 (**CLA-193**); Oberlandsgericht Dusseldorf, 4 Ausl (A) 325/93-132/93 III, Judgment, 9 December 1993 (**CLA-202**/**RLA-302**).
[256] Reply on Jurisdiction, ¶¶ 140-149, citing First Tams Report, ¶¶ 51-52, 61-62; **C-364**; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004 (**CLA-195**); Succession Agreement between the Czech Republic and the Netherlands, 8 December 1993, p. 3 (**RLA-303**); Trade Agreement between the Government of Canada and the Government of the Republic of Kazakhstan, 29 March 1995 (**RLA-304**); *EURAM v. Slovakia*, Jurisdiction, ¶¶ 22-23 (**CLA-198**/**RLA-224**); Exchange of Notes between the Republic of Austria and the Slovak Republic regarding the further application of certain international treaties between Austria and Czechoslovakia, 22 December 1993 (**CLA-199**); *Achmea BV v. Slovakia*, UNCITRAL, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 152 (**RLA-305**); *Achmea v. Slovakia*, Jurisdiction and Admissibility, n.1 (**CLA-55**); *Austrian Airlines v. Slovakia*, UNCITRAL, Final Award, 9 October 2009, ¶ 8 (**RLA-306**); *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, Award, 3 May 2018, n.2 (**RLA-307**).
[257] Reply on Jurisdiction, ¶¶ 150-152, citing First Tams Report, ¶¶ 53-54. *See also* Hearing Transcript, 66:20-67:1.
[258] Reply on Jurisdiction, ¶¶ 153-164, citing Second Hollis Report, ¶ 107 (**RER-2**).
[259] Respondent's Post-Hearing Brief, ¶ 138.

Russia BIT.[260] It argues that there is evidence of specific succession agreements for all of the bilateral treaties referred to by the Claimant as allegedly in force pursuant to a general succession agreement,[261] and goes on to provide examples of other treaties to which Montenegro did not succeed in that same time frame, including the "Diplomas Agreement."[262] The Respondent also

[260] Reply on Jurisdiction, ¶¶ 196-217, referring to Agreement between the Government of the Union of Soviet Socialist Republics and the Union Executive Assembly of the Assembly of the Socialist Federal Republic of Yugoslavia on the mutual recognition of documents on education and academic degrees, 15 March 1988 (**RLA-312**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Field of Construction, 16 May 1997 (**RLA-314**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in Culture, Education, Science and Sport, 19 July 1995 (**RLA-315**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Field of the Agro-Industrial Complex, 31 October 1996 (**RLA-316**); Scientific and Technical Cooperation Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation, 5 December 1996 (**RLA-317**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Veterinary Field, 31 October 1996 (**RLA-318**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Field of Quarantine and Plant Protection, 31 October 1996 (**RLA-319**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Military-Technical Cooperation, 3 December 1997 (**RLA-320**); Cooperation Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation in Preventing Industrial Accidents, Natural Disasters and Eliminating the Consequences thereof, 23 July 1996 (**RLA-321**); Respondent's Post-Hearing Brief, ¶¶ 109-112, 115.

[261] Reply on Jurisdiction, ¶¶ 168-195, referring to Second Hollis Report, ¶ 127 (**RER-2**); **C-316**; Convention between the Government of the Russian Federation and the Union Government of the Federal Republic of Yugoslavia for the Avoidance of Double Taxation with respect to Taxes on Income and Property, 12 October 1995 (**CLA-70**); Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on Trade and Economic Cooperation, 24 August 1994 (**CLA-75**); Agreement between the Government of the Union of Soviet Socialist Republics and the Union Executive Council of the National Assembly of the Socialist Federal Republic of Yugoslavia on Mutual Travel of Citizens, 31 October 1989 (**CLA-78**); Agreement between the Government of the Russian Federation and the Government of Montenegro on Conditions of Mutual Travel of Citizens of the Russian Federation and Citizens of Montenegro, 24 September 2008 (**CLA-79**); Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on the Establishment of the Yugoslav-Russian Intergovernmental Committee for Trade, Economic and Scientific-Technical Cooperation, 24 August 1994 (**CLA-80**); Consular Convention between the Russian Federation and Serbia and Montenegro, 7 November 2005 (**CLA-81**); Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on Free Trade between the Russian Federation and the Federal Republic of Yugoslavia, 28 August 2000 (**CLA-206**); Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on Cooperation and Mutual Assistance of Customs Services (**RLA-311**). *See also* Hearing Transcript, 70:13-74:14, 85:24-86:13.

[262] Reply on Jurisdiction, ¶¶ 196-217, referring to Agreement between the Government of the Union of Soviet Socialist Republics and the Union Executive Assembly of the Assembly of the Socialist Federal Republic of Yugoslavia on the mutual recognition of documents on education and academic degrees, 15 March 1988 (**RLA-312**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Field of Construction, 16 May 1997 (**RLA-314**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in Culture, Education, Science and Sport, 19 July 1995 (**RLA-315**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Field of the Agro-Industrial Complex, 31 October 1996 (**RLA-316**); Scientific and Technical Cooperation Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation, 5 December 1996 (**RLA-317**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Cooperation in the Veterinary Field, 31 October 1996 (**RLA-318**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian

refers to what it calls the "vacillating view" of the Russian MFA in September-October 2017, and argues that its change in official position (from denying the existence of any agreement on mutual encouragement of investments between the Russian Federation and Montenegro, to contending that the FRY-Russia BIT is in force by virtue of the Russian Note) supports its argument that the FRY-Russia BIT was never in force between the Parties.[263] The Respondent points to the Russian MFA's subsequent letter dated 19 September 2018, submitting that such letter evidences the requirement of implementation of the FRY-Russia BIT to "confirm … the state's recognition of the effectiveness of the treaty."[264] For the Respondent, this confirms that "Montenegro succeeded to individual treaties on a case-by-case basis, based on mutual confirmation."[265]

The Claimant's Position

146. The Claimant submits that succession can occur in a number of ways: (a) by means of a general agreement, (b) by means of specific explicit agreement,[266] and (c) "by implicit (or tacit) agreement."[267] According to the Claimant, "succession to bilateral treaties can [also] happen by reason of conduct," with "no requirement of form for such conduct."[268] That conduct "may also include what States fail to do (i.e. omissions), as well as silence."[269] In the case of bilateral treaties, the Claimant submits that the context, including "a fundamental premise of the presumption of continuity" should be considered.[270]

147. The Claimant submits that the 2006 exchange of diplomatic notes confirmed Montenegro's succession to international treaties in effect between the State Union and the Russian Federation,

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Federation on Cooperation in the Field of Quarantine and Plant Protection, 31 October 1996 (**RLA-319**); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation on Military-Technical Cooperation, 3 December 1997 (**RLA-320**); Cooperation Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Russian Federation in Preventing Industrial Accidents, Natural Disasters and Eliminating the Consequences thereof, 23 July 1996 (**RLA-321**). *See also* Respondent's Post-Hearing Brief, ¶¶ 109-110, 113-114, 116-128, referring to **CLA-75**, **CLA-80**, **CLA-81**, **CLA-76**, **CLA-78**, **CLA70**, **CLA-71**, **RLA-312**, **RLA-314**, **RLA-216**, **RLA-316**, **RLA-318**, **RLA317**, **RLA-320**, **RLA-321**, **CLA-207;** Hearing Transcript, 68:16-21, 69:3-12, 74:15-75:16, *referring to* **RLA-312**.

263 Reply on Jurisdiction, ¶¶ 218-224, citing **R-191**; **R-192**; **R-193**; Second Hollis Report, ¶ 99 (**RER-2**). Regarding further correspondence with Russian authorities, *see* Respondent's Post-Hearing Brief, ¶¶ 142-143, 148-149; Hearing Transcript, 76:17-77:8, 86:14-90:9.

264 Respondent's Post-Hearing Brief, ¶ 139, citing **C-389**.

265 Respondent's Post-Hearing Brief, ¶¶ 140-141.

266 Claimant's Post-Hearing Brief, ¶ 11.

267 Claimant's Post-Hearing Brief, ¶ 23, emphasis omitted. *See* Claimant's Post-Hearing Brief, ¶¶ 11, 53-54.

268 Claimant's Post-Hearing Brief, ¶ 11. *See also* Hearing Transcript, 160:12-161:24, 186:19-25, 187:1-19, 195:15-196:3.

269 Claimant's Post-Hearing Brief, ¶ 24, emphasis omitted.

270 Hearing Transcript, 163:10-11, *citing* **RLA-408, CLA-172**. *See* Hearing Transcript, 163:7-164:5.

including the FRY-Russia BIT.[271] This includes by drawing an inference from Montenegro's "inaction" in response to the Russian Note, that "[h]ad Montenegro considered that the Russian response was contrary to its decision on succession, it would have responded immediately."[272] The Claimant refers to the Russian MFA's opinion on this topic, which is that the Montenegrin Note of 4 August 2006 should be read as an expression of will – together with subsequent behavior – sufficient to amount to a declaration of succession to treaties concluded by the State Union, not "as an invitation to additional negotiations."[273]

148. Referring to the language of the Montenegrin Note of 4 August 2006, the Claimant rejects the Respondent's argument that the word "readiness" indicated mere preparedness, arguing that this language should be read in light of the language already used in the Note and in that of 4 June 2006. In particular, it asserts that the earlier use of phrases such as "shall observe" and "shall apply and take over international treaties and agreements" demonstrates that Montenegro had already reached a decision to this effect.[274]

149. Commenting on the expression "takes into consideration" – or the alternative translations proposed by the Claimant, being "takes note of" or "acknowledges"[275] – in the Russian Note of 16 August 2006, the Russian MFA states that it is established practice to use such wording in diplomatic notes. It states that, while more explicit language is required when concluding an international treaty (such as "confirms", "agrees", "expresses its agreement"), such language is unnecessary where one State expresses its will to continue the rights and obligations, and another State recognizes or takes note of that fact.[276] On this basis, the Claimant argues, by reference to the Second Tams Report, that the Respondent's conduct "could also be regarded as giving rise to an estoppel," and preclude Montenegro from denying the applicability of the FRY-Russia BIT by reason of past conduct and declarations.[277]

150. The Claimant also relies on the First and Second Tams Reports to argue that the 2006 exchange of notes "reflects the desire of both States for treaty continuity."[278] The Claimant observes that Montenegro neither proposed to make an inventory of applicable pre-independence treaties with

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[271] Counter-Memorial on Jurisdiction, ¶ 78, citing **C-304**; **C-301**, ¶ 4. *See also* Rejoinder on Jurisdiction, ¶ 116, citing Second Tams Report, ¶ 103 (**CER-4**). *See also* Claimant's Post-Hearing Brief, ¶ 49.
[272] Claimant's Post-Hearing Brief, ¶ 51.
[273] Counter-Memorial on Jurisdiction, ¶ 78, citing **C-304**; **C-301**, ¶ 4. *See also* Rejoinder on Jurisdiction, ¶ 116, citing Second Tams Report, ¶ 103 (**CER-4**). *See also* Claimant's Post-Hearing Brief, ¶ 49.
[274] Claimant's Post-Hearing Brief, ¶ 48, citing Hearing Transcript, 46:17-22.
[275] Claimant's Post-Hearing Brief, ¶ 5.
[276] **C-301**, p. 6. *See also* Claimant's Post-Hearing Brief, ¶ 50.
[277] Rejoinder on Jurisdiction, ¶ 117, citing Second Tams Report, ¶ 104 (**CER-4**). *See also* Claimant's Post-Hearing Brief, ¶¶ 11, 33.
[278] Counter-Memorial on Jurisdiction, ¶ 79, citing First Tams Report, ¶ 104 (**CER-2**); Rejoinder on Jurisdiction, ¶ 116, citing Second Tams Report, ¶¶ 95, 103 (**CER-4**).

the Russian Federation, nor ever publicly claimed that it did not consider itself bound by those treaties.[279] On the contrary, the Claimant notes that, at a meeting with the chairman of the lower house of the Russian Parliament on 19 July 2007, the then Prime Minister of Montenegro, Mr. Zeljko Sturanovic, stated that "[t]he contractual and legal basis for cooperation [with the Russian Federation] has been preserved through Montenegro's succession to treaties signed by the former Yugoslavia."[280]

151. The Claimant points to the absence of "any indication in [the Notes], express or implicit, of a 'subject to inventory' qualification" which would require further action constituting an agreement.[281] He rejects the Respondent's argument that "both Russia and Montenegro understood that succession to the bilateral treaties with Russia has not taken effect as a result of the [Notes]," on the basis that the Respondent's argument relies on a "mere Plan of Consultations between the foreign ministers of the two countries."[282] The Claimant notes that, in any event, the document omits reference to the Declaration on Independence and Decision of Independence, inferring that "the critical question of continuity in force of the bilateral treaties was no longer a live one."[283]

152. The Claimant rejects the Respondent's view that the diplomatic notes do not capture the FRY-Russia BIT. He submits that, when speaking of treaties "concluded by the State Union of Serbia and Montenegro and to which it acceded," the word "it" in the Montenegrin Note evidently refers to the State Union, and not Montenegro.[284] In turn, the Russian Note refers to treaties that were "effective" between the State Union and the Russian Federation.[285] Accordingly, the Claimant contends that the diplomatic notes capture all "international agreements concluded between the USSR and/or the Russian Federation, on one side, and the Federal Republic of Yugoslavia and/or the [State Union], on the other."[286] In this regard, he also asserts that it is not relevant whether the diplomatic notes were published in the Official Gazette of Montenegro, and refers to several other countries whose exchanges of diplomatic notes have never been published.[287]

153. The Claimant also rejects the Respondent's assertion that Montenegro had developed a "uniform practice" of concluding succession agreements with individual third States.[288] For the Claimant,

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[279] Counter-Memorial on Jurisdiction, ¶¶ 80-81.
[280] Counter-Memorial on Jurisdiction, ¶ 81, citing **C-305**. *See also* Claimant's Post-Hearing Brief, ¶¶ 55-57.
[281] Claimant's Post-Hearing Brief, ¶ 57.
[282] Claimant's Post-Hearing Brief, ¶¶ 58-59.
[283] Claimant's Post-Hearing Brief, ¶ 60.
[284] Counter-Memorial on Jurisdiction, ¶ 83(a), citing **C-18**.
[285] Counter-Memorial on Jurisdiction, ¶ 83(b), citing **C-18**.
[286] Counter-Memorial on Jurisdiction, ¶ 84. *See also* Claimant's Post-Hearing Brief, ¶ 38.
[287] Rejoinder on Jurisdiction, ¶ 147.
[288] Rejoinder on Jurisdiction, ¶ 136.

this "uniform practice" rather concerned the inventory process of bilateral relations, which does not necessarily run in parallel with State succession.[289] He also points out that, while such inventories constitute a new agreement under Russian law and therefore must be published in the official bulletin, ordinary succession notes do not constitute a separate international agreement and therefore Russian law does not require their publication.[290] Moreover, the Claimant submits that the Respondent "did succeed to many international treaties by tacit agreements,"[291] and quotes the Second Tams Report which suggests that treaties between the Respondent and the Russian Federation "proceed from a general rule of continuity," not discontinuity as the Respondent proposes.[292]

154. In relation to the Respondent's argument that a "legal vacuum" exists until a succession agreement is reached and the consolidation process is completed, the Claimant submits that this cannot be correct.[293] In particular, he argues that the language used in inventory agreements (*e.g.*, "remain in force," "shall continue to apply," "are no longer in force") implies that the relevant pre-independence treaties did not cease to apply upon Montenegro's secession from the State Union.[294] Moreover, the Claimant submits that the very purpose of the inventories was to define the existing bilateral legal framework and avoid "the *emergence* of a legal vacuum."[295] With specific reference to the Russian Federation, the Claimant notes that since the consolidation process "has not yet started," it would be unsustainable to contend that all pre-independence bilateral treaties are not currently in force.[296] Finally, the Claimant submits that "the inventory practice of Montenegro is not dispositive of the case since it does not overturn a well-established practice of states' succession to international treaties by exchange of ordinary diplomatic notes."[297]

155. Relatedly, the Claimant submits that "the rules on provisional application dispose of the argument that the absence of further specific communications since Montenegro's succession was acknowledged by Russia should mean that the FRY-Russia Treaty 'fell away' at some point..."[298]

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[289] Counter-Memorial on Jurisdiction, ¶ 86, citing Statement of Defence, ¶ 250; **C-301**, ¶ 1. *See* Counter-Memorial on Jurisdiction, ¶¶ 123-124, citing **C-301**; **C-334**; **C-335**.
[290] Counter-Memorial on Jurisdiction, ¶¶ 126-127.
[291] Rejoinder on Jurisdiction, ¶ 120.
[292] Rejoinder on Jurisdiction, ¶ 122, citing Second Tams Report, ¶ 120 (**CER-4**). *See also* Claimant's Post-Hearing Brief, ¶ 26, Hearing Transcript, 189:1-23, 196:4-18.
[293] Counter-Memorial on Jurisdiction, ¶¶ 87-89.
[294] Counter-Memorial on Jurisdiction, ¶ 92.
[295] Counter-Memorial on Jurisdiction, ¶ 92, citing **R-70**.
[296] Rejoinder on Jurisdiction, ¶ 148.
[297] Counter-Memorial on Jurisdiction, ¶ 96.
[298] Claimant's Post-Hearing Brief, ¶ 35. *See also* Hearing Transcript, 161:18-162:13.

The Claimant contends that, "absent the indication of a specific date for the termination of [a] provisional period, the rule is that the treaty remains in force."[299]

156. The Claimant observes that after 3 June 2006, Montenegro and the Russian Federation continued to apply several pre-independence treaties, including, *inter alia*, the Treaty on Legal Assistance in Civil, Family and Criminal Cases of 24 February 1962, without the need for any subsequent confirmatory act.[300] This behavior, in the Claimant's view, can only be due to the continuity of pre-independence treaty rights and obligations[301] following the perfection of consent to the continuation of treaty obligations as supported by the exchange of notes between the Montenegrin and Russian MFAs in June 2006.[302]

157. Drawing on examples of the succession of pre-independence treaties between the Russian Federation and the Respondent,[303] the Claimant submits that: (i) the Respondent's position is not always supported by Professor Hollis' expert evidence;[304] (ii) the succession to some agreements considered to be in force by the Respondent "does not meet the Respondent's test regarding tacit agreement";[305] (iii) the Russian MFA, as the only competent authority regarding the Russian Federation's position as to succession,[306] "applied all pre-independence agreements with Montenegro consistently and with no exceptions," and clarified the Respondent's succession to the FRY-Russia BIT and other pre-independence treaties "in reliance on the Montenegrin and Russian Notes";[307] and (iv) the Respondent's inferences of invalidity and inapplicability of

[299] Claimant's Post-Hearing Brief, ¶ 35.

[300] Counter-Memorial on Jurisdiction, ¶¶ 97-113, referring to, *inter alia*, Convention between the Government of the Russian Federation and the Union Government of the Federal Republic of Yugoslavia for the Avoidance of Double Taxation with respect to Taxes on Income and Property, 12 October 1995 (**CLA-70**);Treaty between the Union of Soviet Socialist Republics and Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil, Family and Criminal Matters, 24 February 1962 (**CLA-72**); Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on Trade and Economic Cooperation, 24 August 1994 (**CLA-75**); Agreement between the Government of the Russian Federation that the Federal Government of the Federal Republic of Yugoslavia on International Road Transport, 4 November 1998 (**CLA-76**); Agreement between the Government of the Union of Soviet Socialist Republics and the Union Executive Council of the National Assembly of the Socialist Federal Republic of Yugoslavia on Mutual Travel of Citizens, 31 October 1989 (**CLA-78**); Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on the Establishment of the Yugoslav-Russian Intergovernmental Committee for Trade, Economic and Scientific-Technical Cooperation, 24 August 1994 (**CLA-80**); Consular Convention between the Russian Federation and Serbia and Montenegro, 7 November 2005 (**CLA-81**). *See also* Rejoinder on Jurisdiction, ¶ 123, referring to **C-381**.

[301] Counter-Memorial on Jurisdiction, ¶ 114.

[302] Hearing Transcript, 210:6-20.

[303] Rejoinder on Jurisdiction, ¶ 123, referring to **C-381**.

[304] Rejoinder on Jurisdiction, ¶ 125.

[305] Rejoinder on Jurisdiction, ¶ 126.

[306] Rejoinder on Jurisdiction, ¶ 129, referring to Decree of the President of the Russian Federation No. 865, Questions of the Ministry of Foreign Affairs of the Russian Federation, 11 July 2004 (**CLA-243**); Federal Law on International Treaties of the Russian Federation, No. 101-FZ, 15 July 1995 (**CLA-244**).

[307] Rejoinder on Jurisdiction, ¶¶ 127-128, citing Second Tams Report, ¶ 113 (**CER-4**).

several pre-independence international agreements are based on its misinterpretation of the position of certain Russian State bodies.[308] The Claimant also presents examples of other international bilateral agreements to which Montenegro is a party to illustrate inconsistency in its succession practice[309] and the Respondent's note addressed to the UN Secretary General which, he says, "inform[ed] members of the international community of the decision to succeed to treaties which it had unambiguously taken at the time of its succession."[310]

158. The Claimant submits that the presence of the FRY-Russia BIT in national or international databases is not determinative of the Treaty's validity, because – while those databases are important – they are not authoritative and should not have any evidentiary weight in this arbitration.[311] He also submits that, contrary to the Respondent's contention, the FRY-Russia BIT is published on the official website of the Russian MFA,[312] and points out that it used to appear in the UNCTAD database but had disappeared by the time the Respondent filed its Statement of Defence.[313] The Claimant argues that the Tribunal should draw an adverse inference from the Respondent's "non-production of documents submitted by the Respondent to the UNCTAD in connection with the 2014 UNCTAD report."[314] The Claimant also submits that the 2009 European Commission Questionnaire does not support the Respondent's claim, pointing to the significance of the language of the Questionnaire and other aspects of Montenegro's response, including which States' treaties were and were not listed.[315]

B. THE FAILURE TO NEGOTIATE OBJECTION

159. The Respondent's second objection is that the Tribunal lacks jurisdiction because the Claimant failed to satisfy a mandatory notice and negotiations requirement under Article 8 of the FRY-Russia BIT.[316]

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[308] Rejoinder on Jurisdiction, ¶¶ 130-131, citing **C-389**.
[309] Rejoinder on Jurisdiction, ¶¶ 136-142, referring to **C-377**; **C-390**; **C-391**; **C-392**; **C-393**; **C-394**; **C-395**; **C-396**; **R-66**; **R-148**; **R-120**; **R-148**; Decision on Publishing the Agreement on Succession of Bilateral Agreements between Montenegro and the Republic of Estonia, Official Gazette of Montenegro, No. 4/2015, 4 May 2015 (**RLA-34**); Decision to Publish the Agreement on Succession of Bilateral Agreements between Montenegro and the Republic of Lithuania, Official Gazette of Montenegro, No. 4-2015, 4 May 2015 (**RLA-35**).
[310] Rejoinder on Jurisdiction, ¶¶ 118-119, citing Letter from the Ministry of Foreign Affairs of Montenegro to the Secretary-General of the United Nations, 10 October 2006 (**RLA-29**); referring to Second Tams Report, ¶ 87 (**CER-4**); Hearing Transcript, 178:19-179:4.
[311] Counter-Memorial on Jurisdiction, ¶¶ 119-120; Rejoinder on Jurisdiction, ¶¶ 143, 145, referring to **C-397**.
[312] Counter-Memorial on Jurisdiction, ¶ 117, referring to **C-331**.
[313] Counter-Memorial on Jurisdiction, ¶ 118, referring to **C-332**. *See also* Rejoinder on Jurisdiction, ¶¶ 144, 146.
[314] Rejoinder on Jurisdiction, ¶ 146.
[315] Hearing Transcript, 202:5-204:2.
[316] Memorial on Jurisdiction, ¶ 38; Statement of Defence, ¶ 302.

160. By contrast, the Claimant asserts that he has complied with Article 8 of the FRY-Russia BIT. He argues that Article 8 does not reflect a mandatory requirement and that any obligations have been fully discharged through CEAC's proceedings against Montenegro under the Cyprus-Montenegro BIT (*i.e.*, the Third Arbitration).[317] The Claimant adds that, in any event, further negotiations between the Parties would have been futile.[318]

161. The Parties' positions are summarized below with respect to the two embedded issues, namely: (i) whether Article 8 of the FRY-Russia BIT imposes a mandatory notice and negotiations requirement; and (ii) whether the Claimant has complied with Article 8 of the FRY-Russia BIT, if considered mandatory.

1. Whether Article 8 of the FRY-Russia BIT imposes mandatory requirements

The Respondent's Position

162. The Respondent contends that Article 8 of the FRY-Russia BIT imposes two "straightforward and cumulative" preconditions to arbitration: "(i) the investor must allow for a six-month period for amicable settlement; and (ii) the investor must make a genuine effort to engage in good faith negotiations during the six-month period before resorting to arbitration."[319] The Respondent relies on its translation of Article 8(1), being that the dispute "shall, as far as possible, be settled through negotiations," to support its argument that the "pursuit of negotiations is mandatory."[320] According to the Respondent, the Claimant's "flagrant non-compliance"[321] with these requirements results in the Tribunal's lack of jurisdiction, for two reasons.

163. First, citing ICJ jurisprudence, the Respondent submits that compliance with the requirements of compromissory clauses is a fundamental jurisdictional requirement,[322] and adds that this principle applies with equal force with respect to compromissory clauses in BITs.[323] The

[317] Counter-Memorial on Jurisdiction, ¶ 136.
[318] Counter-Memorial on Jurisdiction, ¶ 136.
[319] Statement of Defence, ¶¶ 304-307. *See also* Reply on Jurisdiction, ¶¶ 305-306, 309; Respondent's Post-Hearing Brief, ¶ 209.
[320] Respondent's Post-Hearing Brief, ¶ 209.
[321] Statement of Defence, ¶ 308.
[322] Statement of Defence, ¶¶ 310-316, citing *Armed Activities* case, ¶¶ 88, 100, 128 (**RLA-55**); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, ¶ 131 (**RLA-57**). *See also* Reply on Jurisdiction, ¶ 313.
[323] Statement of Defence, ¶¶ 317-323, citing *Enron v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 88 (**RLA-58**); *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶¶ 114, 156 (**RLA-61**); *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, ¶¶ 316-318, 342 (**RLA-59**); *Murphy Exploration and Production Co. International v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶ 157 (**RLA-60**); *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶¶ 71-72 (**RLA-62**).

Respondent rejects the Claimant's argument that any negotiation requirement is procedural rather than jurisdictional in nature, distinguishing the Claimant's authorities on the facts and contending that they do not support its case.[324] The Respondent also contends that the lack of a formal notice requirement in the Treaty "is of no consequence for the mandatory nature of the negotiations requirement,"[325] because the negotiations requirement "is a self-standing obligation and is not dependent on whether or not such negotiations are to be initiated by a formal notice."[326]

164. Second, the Respondent submits that the *effet utile* principle requires the notice and negotiations requirement of Article 8 to be treated as a jurisdictional requirement and not merely a procedural issue.[327] In its view, non-compliance with such explicit conditions to consent to jurisdiction should "entail legal consequences for the defaulting party."[328]

The Claimant's Position

165. For the Claimant, Article 8's use of the phrase "as far as possible" when referring to negotiations demonstrates that such negotiations are non-mandatory, and therefore are not required for arbitration proceedings to be commenced.[329] He submits that there is no formal written notice requirement, and notes that the six-month period begins to run from the time that the dispute arose, not from the date it is notified to the other party.[330] He adds that a plain reading of Article 8 permits the parties to negotiate "for an unspecified period of time in an attempt to resolve the dispute."[331]

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[324] Reply on Jurisdiction, ¶ 314, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 101-102 (**CLA-95**); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 260 (**RLA-196**); *Bahloul v. Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶¶ 155-156 (**CLA-96**); *Kazakhstan v. Ascom Group S.A. et al.*, Judgment of SVEA Court of Appeal, Case No. T 2675-14, 9 December 2016, p. 50 (**CLA-98**); G. Born and M. Šćekić, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'," in D. Caron et al. (eds), *Practising Virtue: Inside International Arbitration* (Oxford UP, 2015), p. 232 (**CLA-83**).

[325] Reply on Jurisdiction, ¶ 305.

[326] Reply on Jurisdiction, ¶¶ 305-306.

[327] Statement of Defence, ¶¶ 324-332, citing *Georgia v. Russia*, ¶ 131 (**RLA-57**); *Murphy v. Ecuador*, ¶¶ 141-142 (**RLA-60**); *Eureko B.V. v. Poland*, ad hoc, Partial Award, 19 August 2005, ¶ 127 (**RLA-63**); *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, 1929 P.C.I.J. (ser. A) No. 22, Order, 19 August 1929 (**RLA-64**); *The Corfu Channel Case (United Kingdom v. Albania)*, Merits, Judgment, ICJ Reports 1949, p. 4, p. 24 (**RLA-65**); *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, ICJ Reports 1994, p. 6, ¶ 50 (**RLA-66**). *See also* Reply on Jurisdiction, ¶¶ 301-310.

[328] Statement of Defence, ¶¶ 327-331, citing *Murphy v. Ecuador*, ¶ 151 (**RLA-60**); Reply on Jurisdiction, ¶¶ 311-315.

[329] Counter-Memorial on Jurisdiction, ¶ 137. *See also* Rejoinder on Jurisdiction, ¶¶ 163-164; Hearing Transcript, 213:2-214:21.

[330] Counter-Memorial on Jurisdiction, ¶ 137(a); Rejoinder on Jurisdiction, ¶ 166.

[331] Counter-Memorial on Jurisdiction, ¶ 137(b).

166. The Claimant contends that the Russian language text of the FRY-Russia BIT is authoritative in this case,[332] and uses "less-strict language" than the relevant provisions in the treaties at issue in other cases on which the Respondent relies.[333] He argues that the term "shall" in the Russian text does not amount to a mandatory requirement,[334] and explains that:

> The Russian version employs the simple future tense in the relevant phrase "*Споры […][…]**будут** разрешаться по возможности путем переговоров*". The English version currently operates the word "shall" ("*Disputes […] **shall**, as far as possible, be settled through negotiations*"). According to the Oxford Dictionary, "shall" may be used instead of "will" when referring to the future. Therefore, given the initial Russian version of the FRY-Russia Treaty, the verb "shall" should not be interpreted as an indication of an obligation.[335]
>
> If this were a mandatory provision, the Russian version would use the short form adjectives "*должен*" (must) or "*обязан*" (should). The wording would then be "***должны разрешаться***" or "***обязаны разрешаться***", which would be imperative.[336]

167. The Claimant submits that the relevant part of Article 8(1) has two possible translations into English: (i) "literally as '[the disputes] will, if possible, be settled by negotiations'," or (ii) "[the disputes] should, if possible, be settled by negotiations."[337]

2. Whether the Claimant has complied with Article 8 of the FRY-Russia BIT

The Respondent's Position

168. The Respondent contends that the Claimant failed to comply with Article 8 by initiating this arbitration without notice that he would do so under the FRY-Russia BIT and without conducting any negotiations.[338] It submits that the FRY-Russia BIT requires an investor to advise Montenegro of its dispute specifically in connection with assets invested in Montenegro.[339] It argues that the authorities the Claimant cites for a contrary position are "inapposite or, in fact, support Respondent's case."[340]

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[332] Rejoinder on Jurisdiction, ¶ 161, referring to **C-1**.
[333] Counter-Memorial on Jurisdiction, ¶¶ 138-140, referring to *Wintershall v. Argentina*, ¶¶ 119 (**RLA-61**); *Tulip Real Estate v. Turkey*, ¶ 42 (**RLA-62**). *See also* Hearing Transcript, 214:22-215:7.
[334] Counter-Memorial on Jurisdiction, ¶ 140, referring to **C-1**. *See also* Rejoinder on Jurisdiction, ¶¶ 161-162, referring to O. Krapivkina, *Ambiguous Shall as a Problem of Interpretation and Translation of Legal Documents* (2015), p. 119 (**CLA-246**); M. S. Medvedeva, "[Usage and Translation of Modal Verbs in Legal Texts]," *Gumanitarnye i sotsial'nye nauki* (2014), No. 3, pp. 164-172 (**CLA-247**).
[335] Counter-Memorial on Jurisdiction, ¶ 140, emphasis in original. *See also* Rejoinder on Jurisdiction, ¶ 161.
[336] Rejoinder on Jurisdiction, ¶ 161, emphasis in original, referring to J. F. Jones, *Russian 200 Hour Familiarization Course* (2009), p. 251 (**CLA-248**); D. Offord, *Using Russian: A Guide to Contemporary Usage* (1996), p. 113 (**CLA-249**).
[337] Claimant's Post-Hearing Brief, ¶ 6, emphasis omitted.
[338] Statement of Defence, ¶ 301.
[339] Reply on Jurisdiction, ¶¶ 319-321.
[340] Reply on Jurisdiction, ¶ 323.

169. In relation to the notice requirement, the Respondent contends that until his commencement of this case, the Claimant had not raised any issue relating to Montenegro's performance of obligations owed to him personally under the FRY-Russia BIT,[341] and "the Request for Arbitration is too late a time to apprise Respondent of a dispute."[342] It also submits that CEAC's prior Notice of Dispute cannot qualify as notice in the present case, as it related specifically to Montenegro's obligations to CEAC under the Cyprus-Montenegro BIT and thus "could not apprise Respondent of an unlimited number of investment disputes to be initiated under various other legal instruments and by the various entities and persons somehow affiliated with, or in the case of Mr. Deripaska controlling, CEAC, including the present one."[343] On the Respondent's view, by failing to give notice of his claims arising under the FRY-Russia BIT, the Claimant "effectively denied Respondent a full opportunity to persuade Claimant to desist or explain that the State would oppose the duplicative claim as abusive or to explain that the BIT in question was not valid and in force as between the Russian Federation and Montenegro."[344]

170. As for the negotiations requirement, the Respondent contends that the Claimant's failure to provide notice of his claims arising under the FRY-Russia BIT shows that he made no genuine attempt to negotiate.[345] The Respondent further contends that the Claimant's assertions of attempted negotiations are insufficiently supported by evidence and should be disregarded.[346] It further submits that: (i) the 2009-2010 Settlement Agreement negotiations cannot qualify as negotiations under Article 8 of the FRY-Russia BIT as they were aimed exclusively at settling the First Arbitration, not this one;[347] (ii) the July 2015 and February 2016 negotiations "remain unsupported by reliable evidence"; and (iii) "the March/April 2016 negotiations concerned the contractual CEAC UNCITRAL Arbitration."[348]

171. The Respondent also rejects the Claimant's argument that it waived the negotiation requirement under the BIT by indicating that negotiations were futile. To the contrary, the Respondent argues that: (i) its mere opposition to a claim does not mean that negotiations are futile;[349] (ii) its Statement of Defence cannot be demonstrative of futility because it was submitted after

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[341] Statement of Defence, ¶¶ 348-350.
[342] Statement of Defence, ¶ 349, citing *Burlington v. Ecuador*, ¶ 312 (**RLA-59**).
[343] Statement of Defence, ¶ 342. *See also id.*, ¶¶ 340-341.
[344] Statement of Defence, ¶ 337. *See also id.*, ¶¶ 334-339; Reply on Jurisdiction, ¶ 324.
[345] Statement of Defence, ¶¶ 343-347, citing *North Sea Continental Shelf Cases*, ¶ 85(a) (**RLA-68**); Reply on Jurisdiction, ¶¶ 325, 327.
[346] Reply on Jurisdiction, ¶¶ 325-329.
[347] Statement of Defence, ¶¶ 352-355; Reply on Jurisdiction, ¶ 323, referring to *Teinver S.A. et al. v. Argentina*, ICSID Case No. ARB/09/01, Decision on Jurisdiction, 21 December 2012, ¶ 125 (**CLA-88**); *Amto v. Ukraine*, SCC Case No. 080/2005, Award, 26 March 2008, ¶ 50 (**RLA-180**); *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶ 14.1-14.5 (**CLA-90**).
[348] Respondent's Post-Hearing Brief, ¶ 210.
[349] Reply on Jurisdiction, ¶ 332.

commencement of the arbitration;[350] (iii) its alleged attempts to dissuade the Claimant from proceeding to arbitration are a "common feature" of pre-arbitral negotiations;[351] and (iv) its position with respect to CEAC in the Third Arbitration does not necessarily dictate its position with respect to the Claimant in this separate case.[352] As such, the Respondent submits that the Claimant has not discharged his burden to demonstrate futility.[353]

The Claimant's Position

172. The Claimant submits that he fully discharged any notice requirement via the Third Arbitration, and that Montenegro was informed of the dispute before 11 March 2014, the date of the Notice of Arbitration in those proceedings.[354] He states that the Respondent has acknowledged that this dispute and the one at issue in the Third Arbitration "are effectively the same dispute,"[355] and argues that it "cannot, on the one hand, complain that this dispute is effectively the same as the one brought by CEAC … and insist, on the other hand, that it was never notified of the current dispute."[356] In this regard, the Claimant argues that it is not necessary to advise that negotiations pertained to a particular treaty unless the text of the treaty expressly requires it,[357] and that international arbitral tribunals have not attached great weight to the fact that negotiations may have been conducted by a subsidiary or did not personally involve the eventual claimant, so long as the dispute itself was raised.[358] He also contends that any doubt as to whether claims discussed in pre-arbitration negotiations are the same as those later raised in arbitral proceedings should be resolved in favor of the party seeking relief on a "presumptively valid claim."[359]

173. The Claimant also contends that Montenegro clearly indicated it did not intend to settle the dispute and would not participate in further negotiations, and therefore any negotiations would have been futile.[360] He contends that in such circumstances, a State may be considered to have

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[350] Reply on Jurisdiction, ¶ 333. *See also id.*, ¶ 334.
[351] Reply on Jurisdiction, ¶¶ 335-339.
[352] Reply on Jurisdiction, ¶ 340.
[353] Reply on Jurisdiction, ¶ 341.
[354] Counter-Memorial on Jurisdiction, ¶ 142; Rejoinder on Jurisdiction, ¶ 166; Hearing Transcript, 215:8-22.
[355] Counter-Memorial on Jurisdiction, ¶ 141, referring to Statement of Defence, ¶¶445, 491.
[356] Counter-Memorial on Jurisdiction, ¶¶ 151-154. *See also* Rejoinder on Jurisdiction, ¶ 166, referring to **C-20**; **C-207**.
[357] Rejoinder on Jurisdiction, ¶ 168. *See also* Counter-Memorial on Jurisdiction, ¶¶ 151-154, referring to *Teinver v. Argentina* (**CLA-88**); *Consorzio Groupement L.E.S.I.-DIPENTA v. Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, ¶ 32(iii) (**CLA-89**); *Amto v. Ukraine* (**RLA-180**); *Generation Ukraine v. Ukraine*, ¶¶ 14.1-14.5 (**CLA-90**). *See also* Counter-Memorial on Jurisdiction, ¶¶ 151-156.
[358] Rejoinder on Jurisdiction, ¶ 169, referring to *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶¶ 103-104, 145 (**CLA-91**); *Teinver v. Argentina*, ¶¶ 112-116, 120 (**CLA-88**); *Amto v. Ukraine*, ¶ 50 (**RLA-180**).
[359] Counter-Memorial on Jurisdiction, ¶ 143, citing Born and Šćekić, pp. 254-255 (**CLA-83**).
[360] Counter-Memorial on Jurisdiction, ¶¶ 162-164, citing Statement of Defence, ¶ 337; **C337**, ¶ 58. *See also* Rejoinder on Jurisdiction, ¶¶ 170-175; Hearing Transcript, 218:11-15, 219:3-220:6.

waived its right to rely on negotiation requirements such as those in Article 8.[361] Relatedly, the Claimant argues that since Article 8 requires only six months of negotiations, there is no expectation under the FRY-Russia BIT that investors will pursue negotiations indefinitely.[362]

174. Further, and in any event, the Claimant submits that Montenegro was notified of the dispute following high-level meetings in 2015 and 2016.[363] Mr. Deripaska contends that he personally attempted to negotiate with Mr. Đukanović during two meetings,[364] and points out that while the Respondent queries the sufficiency of evidence submitted in this respect, it does not deny that these meetings took place.[365]

175. Alternatively, if the Tribunal decides that the Claimant failed to comply with the requirements of Article 8, the Claimant argues that this is at most a "procedural impropriety" and should not preclude the Tribunal from exercising jurisdiction.[366] He submits that it is "unduly formalistic" to dismiss an arbitration due to the failure of one party to complete a contractual negotiation period,[367] and points out that the Respondent has had ample time since the Notice of Arbitration to engage in negotiations if it was willing to do so.[368]

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[361] Counter-Memorial on Jurisdiction, ¶¶ 157-161, citing *Biwater Gauff v. Tanzania*, ¶ 343 (**RLA-196**); Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2012), p. 160 (**CLA-92**); R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., Oxford UP, 2012), p. 270 (**CLA-93**); Hearing Transcript, 218:15-219:2.

[362] Rejoinder on Jurisdiction, ¶ 175.

[363] Rejoinder on Jurisdiction, ¶¶ 166-167, 172, referring to **CWS-1**, ¶ 62; **CWS-4**, ¶ 18; Witness Statement of Stalbek Mishakov, 27 September 2018, ¶¶ 8-16 (**CWS-8**); **C-400**; Hearing Transcript, 215:22-218:10.

[364] Rejoinder on Jurisdiction, ¶ 172, referring to **C-400**; citing **CWS-4**, ¶ 18; **CWS-8**, ¶¶ 6-8.

[365] Counter-Memorial on Jurisdiction, ¶ 166. *See* Reply on Jurisdiction, ¶¶ 325-329; Hearing Transcript, 146:5-147:7.

[366] Counter-Memorial on Jurisdiction, ¶¶ 168-173, referring to *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶ 184 (**CLA-94**); *Bayindir v. Pakistan*, ¶¶ 89, 100-102 (**CLA-95**); *Biwater Gauff v. Tanzania*, ¶¶ 260, 343 (**RLA-196**); *Bahloul v. Tajiikistan*, ¶ 155 (**CLA-96**); Born and Šćekić, pp. 234, 236, 250 (**CLA-83**); *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶¶ 190-191 (**CLA-97**); *Kazakhstan v. Ascom Group*, pp. 50, 52-53 (**CLA-98**). *See also* Rejoinder on Jurisdiction, ¶¶ 177-179; Hearing Transcript, 220:7-19.

[367] Counter-Memorial on Jurisdiction, ¶ 169, referring to *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶ 184 (**CLA-94**); *Bayindir v. Pakistan*, ¶¶ 89, 100-102 (**CLA-95**); *Biwater Gauff v. Tanzania*, ¶¶ 260, 343 (**RLA-196**); *Bahloul v. Tajiikistan*, ¶ 155 (**CLA-96**).

[368] Counter-Memorial on Jurisdiction, ¶ 170.

C. THE INVESTOR STATUS OBJECTION

176. The Respondent's third objection related to Mr. Deripaska's citizenship.[369] Following disclosure of copies of Mr. Deripaska's Russian passports,[370] the Respondent stated that it would "not insist on further documentation as regards Mr. Deripaska's Russian nationality."[371]

D. THE INVESTMENT OBJECTION

177. The Respondent's fourth objection is that the Tribunal lacks jurisdiction because the Claimant has failed to prove that he holds any investment protected under Article 1 of the FRY-Russia BIT.[372] By contrast, the Claimant contends that he has made an investment in the sense of the FRY-Russia BIT.[373]

178. The Parties' positions are summarized below with respect to the three embedded issues in the objection, namely: (i) whether the Claimant has provided evidence for his alleged investments; (ii) whether the FRY-Russia BIT protects indirect investments; and (iii) whether the alleged investments were "invested by" the Claimant.

1. Whether the Claimant failed to provide evidence for his alleged investments

The Respondent's Position

179. According to the Respondent, the Claimant failed to meet his burden of proving the existence of his alleged investments before the events that are alleged to constitute Treaty breaches.[374] The Respondent posits that the Claimant has failed to establish "all the facts necessary for the Tribunal's jurisdiction, including as to his ownership, and the nature and existence, of each alleged protected investment."[375] It submits that these "alleged investments essentially derive from the Claimant's purported interest in the Argat and Kounch trusts," neither of which, according to the Respondent, have been sufficiently proven to be owned and controlled by the Claimant.[376] The Respondent submits that the Claimant's presentation of a non-exhaustive list of investments to be supplemented at a later date is unacceptable, as the Tribunal's *ratione materiae* jurisdiction must be assessed.[377] The Respondent specifically addresses the Claimant's

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369 Statement of Defence, ¶ 358, referring to Notice of Arbitration, ¶ 6.6; Statement of Claim, ¶ 2.7.
370 Counter-Memorial on Jurisdiction, ¶ 183, referring to **C-338**; **C-339**; **C-340**.
371 Reply on Jurisdiction, ¶¶ 343-344.
372 Statement of Defence, ¶ 363; Memorial on Jurisdiction, ¶ 40.
373 Counter-Memorial on Jurisdiction, ¶ 188; Claimant's Post-Hearing Brief, ¶ 86.
374 Statement of Defence, ¶ 364; Memorial on Jurisdiction, ¶¶ 47-48; Reply on Jurisdiction, ¶ 345-346; Hearing Transcript, 106:21-25.
375 Reply on Jurisdiction, ¶ 351.
376 Respondent's Post-Hearing Brief, ¶¶ 175-176; Hearing Transcript, 107:13-109:11, 110:11-112:13.
377 Reply on Jurisdiction, ¶¶ 350-351.

indirect shareholding in KAP and RBN,[378] and raises concerns of "fundamental fairness and good practice and good order" regarding the Claimant's "belated" reference in its Rejoinder to a shareholder loan from Shasta Universal.[379]

180. In respect of the Claimant's indirect shareholding in KAP and RBN, the Respondent argues that the Claimant has not proven his alleged investments. The Respondent relies on *Blue Bank v. Venezuela* and *Guardian Fiduciary v. Macedonia* to emphasize the "importance of knowing the full structure of a trust in terms of tribunal jurisdiction."[380] Due to uncertainty and a lack of evidence regarding entities and trust structures in the Claimant's investment structure, the Respondent contends that it remains difficult to ascertain the scope and extent of such ownership.[381] The Respondent submits that inconsistencies between the descriptions of investments in the Notice of Arbitration and the Statement of Claim further support its position.[382] It also contends that the documentation that the Claimant has provided in support of his purported investments is excessively redacted such that it and the Tribunal are prevented from "analyzing any potential limitations and mechanisms which possibly hinder Mr. Deripaska's ownership or control of [the purported investments]."[383]

181. In respect of the Claimant's alleged indirect shareholder loans, the Respondent maintains that the Claimant has not proven "that he made any of the other alleged contributions upon which he bases his claims,"[384] and objects to the Claimant's standing in this regard.[385] Further, the Respondent contends that contributions were made by CEAC, En+ or Shasta, with no relationship to the Claimant, and that the loan agreements do not include the Claimant as a contracting party.[386] The Respondent rejects the Claimant's attempt to distinguish the present circumstances from *BG Group v. Argentina* and *El Paso Energy International Co. v. Argentina*, submitting instead that claims for indirect shareholder loans and indirect monetary contributions "should not be countenanced here."[387]

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[378] Reply on Jurisdiction, ¶ 350.
[379] Hearing Transcript, 95:19-97:2.
[380] Reply on Jurisdiction, ¶ 363, citing *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, ¶¶ 167-173 (**RLA-337**); *Guardian Fiduciary Trust Ltd. v. Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015, ¶¶ 134, 135 (**RLA-338**) .
[381] Memorial on Jurisdiction, ¶¶ 43-45, referring to **R-112**, p. 210; **R-113**, pp. 44, 73; Reply on Jurisdiction, ¶ 355.
[382] Reply on Jurisdiction, ¶¶ 348-349.
[383] Reply on Jurisdiction, ¶ 360.
[384] Reply on Jurisdiction, ¶ 365; Respondent's Post-Hearing Brief, ¶ 177.
[385] Hearing Transcript, 104:19-106:16.
[386] Reply on Jurisdiction, ¶¶ 366-367; Respondent's Post-Hearing Brief, ¶ 183; Hearing Transcript, 109:19-110:10. 112:22-113:13.
[387] Respondent's Post-Hearing Brief, ¶¶ 182-184. *See also* Hearing Transcript 104:19-106:16

The Claimant's Position

182. The Claimant submits that, at this stage, it only need to establish the "existence of a covered investment,"[388] as distinct from the "precise scope of the investment" which is to be established at the merits stage.[389] The Claimant contends that he has been an indirect shareholder, owning and controlling KAP and RBN at all relevant times.[390] Specifically, he indirectly owned KAP and RBN from the time of their respective acquisition on 27 July 2007 and 17 October 2005 until the present, remaining a shareholder even after he lost effective control of both companies upon their bankruptcy in 2013.[391] The Claimant notes that "the Respondent itself accepted that CEAC (and, consequently KAP and RBN) is controlled by Mr. Deripaska" in submissions made in other arbitrations.[392]

183. The Claimant presents evidence of his "ownership of investments and procurement of those investments at his direction,"[393] which he claims specifically and clearly demonstrates: (i) his indirect shareholding in KAP and RBN at the time of their acquisition in 2005;[394] (ii) his indirect shareholding in KAP and RBN today;[395] (iii) his control over KAP and RBN through an indirect shareholding;[396] (iv) his debt interest in KAP, RBN and Shasta and contributions of funds for the acquisition of KAP and RBN.[397] The Claimant dismisses the Respondent's suggestion that it has been prejudiced by the introduction of the Shasta loan only in the Rejoinder on Jurisdiction,[398] and similarly rejects the Respondent's argument that he lacks standing to claim for indirect shareholder loans.[399]

184. The Claimant reserves an alleged right to submit supplemental evidence of these investments at a later stage, noting that "the exact amount of an investment is of course immaterial for the

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[388] Hearing Transcript, 223:4-6.
[389] Hearing Transcript, 223:4-13.
[390] Counter-Memorial on Jurisdiction, ¶¶ 188-202; Rejoinder on Jurisdiction, ¶ 183; Hearing Transcript, 223:18-224:3.
[391] Counter-Memorial on Jurisdiction, ¶ 190.
[392] Rejoinder on Jurisdiction, ¶ 203, citing **C-337**; **C-405**.
[393] Rejoinder on Jurisdiction, ¶ 191.
[394] Counter-Memorial on Jurisdiction, ¶ 192, referring to **C-3**; **C-4**; **C-341**; **C-342**; **C-343**; **C-344**; **C-345**; **C-346**; **C-347**; **C-348**; **C-349**; **C-350**; **C-351**; **C-352**; **C-353**; **C-354**; **C-355**. *See* Rejoinder on Jurisdiction, ¶ 187(a), referring to **C-3**; **C-4**.
[395] Counter-Memorial on Jurisdiction, ¶ 193, referring to **C-347**; **C-350**; **C-351**; **C-355**; **C-356**; **C-357**; **C-358**; **C-359**; **C-360**. *See* Rejoinder on Jurisdiction, ¶ 187(a), referring to **C-359**.
[396] Counter-Memorial on Jurisdiction, ¶¶ 194-199; Hearing Transcript, 228:4-25.
[397] Counter-Memorial on Jurisdiction, ¶ 200, referring to Witness Statement of Dmitry Potrubach, 13 July 2017 (**CWS-2**); **C-3**; **C-4**; **C-17**; **C-54**. *See* Rejoinder on Jurisdiction, ¶ 187(b)-(c), referring to **C-3**; **C-4**; **C-17**; **C-54**; **C-401**; **C-402**; **C-403**; **C-404**; Hearing Transcript, 229:1-230:8.
[398] Hearing Transcript, 230:16-22.
[399] Hearing Transcript, 230:23-232:18.

purposes of establishing jurisdiction."[400] The Claimant also contends that he is not required to prove that investments have been made directly from him or his personal accounts because, according to him, the FRY-Russia BIT covers indirect investments.[401]

185. Regarding the Claimant's alleged control over KAP and RBN through indirect shareholding, the Claimant submits that "legal capacity to control a company or companies should be ascertained with a reference to the percentage of shares held."[402] He submits that "the described structure of KAP and RBN ownership makes evident that [he] exercised control over the investment by virtue of trust instruments and through consecutive possession of majority of shares and voting rights by each company in the structure."[403] According to the Claimant, the fact that he is separated from KAP and RBN by multiple layers of companies is of no significance with regard to protections he is owed under the Treaty,[404] nor does his loss of control over KAP and RBN in 2013 deprive him of any such rights absent a rule of continuous ownership and control of investments.[405] The Claimant denies that his resignation as president of EN+ and Rusal is relevant to these proceedings,[406] and declines to clarify alleged interests of other persons in those companies.

186. The Claimant explains that his powers under two trust instruments presented in these proceedings in redacted form are not limited, and he exercises full control over the assets as an ultimate beneficiary.[407] He relies on the witness statement of Mr. Fenwick QC to support this proposition, and submits that "there is nothing in the redacted parts of either Trust Deed … which may vary or restrict" his powers and rights.[408] The Claimant further rejects and distinguishes the

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[400] Rejoinder on Jurisdiction, ¶ 189, citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶ 137 (**RLA-255**). *See also* Counter-Memorial on Jurisdiction, ¶ 201.

[401] Rejoinder on Jurisdiction, ¶¶ 206-209, citing *Standard Chartered Bank v. Tanzania*, ¶ 199 (**RLA-95**); *Chevron Corp and Texaco Petroleum Corp. v. Ecuador*, Interim Award, 1 December 2008, ¶ 112 (**CLA-256**).

[402] Counter-Memorial on Jurisdiction, ¶ 194, referring to *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 264 (**CLA-106**).

[403] Counter-Memorial on Jurisdiction, ¶ 194. *See also* Hearing Transcript, 227:5-228:3.

[404] Counter-Memorial on Jurisdiction, ¶ 195, citing *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 253 (**RLA-95**); *Borissov et al. v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 320 (**CLA-107**); *Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 215 (**CLA-108**).

[405] Counter-Memorial on Jurisdiction, ¶ 196, citing *El Paso Energy International Co. v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 135 (**CLA-109**).

[406] Counter-Memorial on Jurisdiction, ¶¶ 197-199.

[407] Rejoinder on Jurisdiction, ¶ 194.

[408] Rejoinder on Jurisdiction, ¶¶ 197-199, citing Witness Statement of Justin Francis Quintus Fenwick, 2 October 2018, (**CWS-7**). *See also* Hearing Transcript, 224:4-227:3.

Respondent's interpretation of *Blue Bank v. Venezuela* and *Guardian Fiduciary v. Macedonia* to conclude that he has "proven his unlimited indirect ownership of KAP's and RBN's shares."[409]

2. Whether the FRY-Russia BIT protects indirect investments

The Respondent's Position

187. The Respondent first argues that Article 1(2) of the FRY-Russia BIT's silence as to indirect investments suggests that the Treaty does not protect such investments.[410] According to the Respondent, "customary international law does not protect indirect investments by default," and the FRY-Russia BIT requires an active relationship between the investor and its investment.[411] The Respondent argues that the principle *verba aliquid operari debent* "requires that effect be given to the expansive terms 'directly or indirectly' so that treaties with this stipulation can be meaningfully distinguished from treaties without it."[412] The Respondent further submits that its "interpretation fully accords with the principle of *effet utile.*"[413] Accordingly, the Respondent submits that the FRY-Russia BIT's silence on the protection of indirectly owned or controlled investments limits the Tribunal's jurisdiction *ratione personae* to claimants who directly own or control a protected investment.[414] This interpretation, it says, is supported by the chosen wording of the FRY-Russia BIT.[415]

188. Second, the Respondent submits that its interpretation of Article 1(2) of the FRY-Russia BIT finds support in investment arbitration practice and commentary. While acknowledging the lack of consensus on this matter, the Respondent argues that arbitral tribunal practice of denying indirect investment claims absent explicit language in the relevant BIT is "much more persuasive in the present circumstances" and should be adopted here.[416] The Respondent notably relies on *Berschader v. Russia* and *HICEE v. Slovakia* for the proposition that the protection of indirect investments needs to be explicitly included in the text of the BIT.[417] The Respondent maintains

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[409] Rejoinder on Jurisdiction, ¶¶ 200-200, citing *Blue Bank v. Venezuela* (**RLA-337**); *Guardian Fiduciary Trust Ltd. v. Macedonia* (**RLA-338**).
[410] Statement of Defence, ¶¶ 380-388; Counter-Memorial on Jurisdiction, ¶¶ 205-210; Reply on Jurisdiction, ¶¶ 370-376; Hearing Transcript, 99:3-6.
[411] Memorial on Jurisdiction, ¶¶ 49-50.
[412] Statement of Defence, ¶ 385, citing Douglas, ¶ 578 (**RLA-69**). *See also* Respondent's Post-Hearing Brief, ¶ 181.
[413] Reply on Jurisdiction, ¶ 372.
[414] Statement of Defence, ¶ 386, citing Douglas, ¶ 580 (**RLA-69**).
[415] Hearing Transcript, 99:7:21.
[416] Statement of Defence, ¶ 389. *See also* Respondent's Post-Hearing Brief, ¶ 178.
[417] Statement of Defence, ¶¶ 390-399, citing *Berschader and Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006, ¶¶ 142, 150 (**RLA-89**); *HICEE B.V. v. Slovakia*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 Mary 2011, ¶ 147 (**RLA-90**). *See* Reply on Jurisdiction, ¶¶ 378-384; Hearing Transcript, 101:4-102:10.

that the Claimant's position otherwise misreads the Treaty, misapplies the practice of investment arbitration,[418] and misinterprets *Berschader*.[419]

189. Third, the Respondent submits that the treaty practices of the Russian Federation, the FRY, and Montenegro are all relevant in interpreting the FRY-Russia BIT, and confirm that the Treaty was not intended to protect indirect investments.[420] It submits that these practices are consistent with the view that States use express language (rather than silence) in BITs to depart from the rules of customary international law.[421] The Respondent notes that several BITs adopted by these States employ express language to achieve coverage of indirect investments,[422] whereas "the vast majority" do not, thereby indicating that Montenegro and the Russian Federation "generally have embraced a restrictive policy in this regard."[423] It argues that this restrictive policy has been demonstrated by the Russian Federation in *Sedelmayer v. Russia*, making specific reference to the dissenting opinion of the Russian arbitrator in that case.[424] The Respondent also contends that Montenegro has demonstrated the same restrictive policy, noting that only its recent BIT with Azerbaijan is expressly limited to direct investments.[425] The Respondent adds that these practices confirm that the Russian Federation, the FRY, and Montenegro each "understood how to extend the protections of the BIT to indirectly-owned investments," and that their decision not do so in the FRY-Russia BIT is obvious and decisive.[426]

190. In any event, the Respondent submits that even if the FRY-Russia BIT were to protect indirect investments, the Claimant's purported investment is too far removed "given the structure of the alleged chain of companies between KAP and RBN, and Mr. Deripaska's roles therein."[427] It submits that the Claimant's role exceeds the permitted "cut off" point for indirect investments, which it argues "lies in establishing the extent of the consent to arbitration of the host State,"[428] is assessed on the "totality of circumstances,"[429] and is exceeded where there is "only a remote

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[418] Reply on Jurisdiction, ¶¶ 370-384.
[419] Respondent's Post-Hearing Brief, ¶ 179.
[420] Statement of Defence, ¶¶ 402-404, citing *Berschader v. Russia*, ¶ 147 (**RLA-89**); Respondent's Post-Hearing Brief, ¶ 180.
[421] Statement of Defence, ¶¶ 400-401, referring to *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, p. 15, ¶ 50 (**RLA-91**); *Loewen Group Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 226 (**CLA-15**).
[422] For example, the Russia-Belgium BIT, the USA-Russia BIT, the FRY-Austria BIT, the Montenegro-Finland BIT, and the Montenegro-Belgium/Luxembourg BIT.
[423] Statement of Defence, ¶ 401; Reply on Jurisdiction, ¶ 386.
[424] Reply on Jurisdiction, ¶¶ 387-396, citing *Sedelmayer v. Russia*, SCC, Award, 7 July 1998, Section 4.1, pp. 36-37 (**CLA-114**); Respondent's Post-Hearing Brief, ¶ 180; Hearing Transcript, 102:11-103:6.
[425] Reply on Jurisdiction, ¶ 397, citing Montenegro-Azerbaijan BIT, Article 1(1) (**CLA-35**).
[426] Statement of Defence, ¶ 403.
[427] Reply on Jurisdiction, ¶ 400; Respondent's Post-Hearing Brief, ¶ 185; Hearing Transcript, 114:14-16.
[428] Respondent's Post-Hearing Brief, ¶ 185, citing **RLA-58**.
[429] Hearing Transcript, 114:17-117:17.

connection to the affected company."[430] The Respondent submits that its consent should not be extended to the Claimant.[431]

The Claimant's Position

191. The Claimant contends that he made an "investment" in the sense of Article 1(2) of the Treaty, which encompasses "every kind of asset," including those held indirectly,[432] and does not reflect a requirement that investments be directly owned.[433] He therefore contends that he "need only demonstrate that he [has] an investment that falls under one of the categories of protected investments under the Treaty."[434]

192. Beginning with the text of the Treaty, the Claimant submits that Article 1(2) defines "investment" in the broadest possible terms to mean "every kind of asset."[435] He notes that the Treaty provides a non-exhaustive list of qualified investments, including "stocks, shares and other forms of participation."[436] The Claimant contends that, contrary to Montenegro's position and with reference to the Treaty's preamble and Article 31(1) of the VCLT, the principle of *effet utile* favors a broad interpretation of the meaning of investment in light of the FRY-Russia BIT's stated object and purpose of "encouraging investments and creating favorable investment conditions."[437] The Claimant further submits that this interpretation is consistent with the

[430] Reply on Jurisdiction, ¶¶ 401-409, citing *Enron v. Argentina*, ¶¶ 42, 52, 55-56 (**RLA-58**); *Guardian Fiduciary Trust v. Macedonia*, ¶¶ 6, 126, 132-137 (**RLA-338**).
[431] Respondent's Post-Hearing Brief, ¶ 185.
[432] Counter-Memorial on Jurisdiction, ¶¶ 203-204; Rejoinder on Jurisdiction, ¶ 210; Hearing Transcript, 233:6-8..
[433] Rejoinder on Jurisdiction, ¶¶ 213-218.
[434] Claimant's Post-Hearing Brief, ¶ 82.
[435] Counter-Memorial on Jurisdiction, ¶¶ 204, 206.
[436] Counter-Memorial on Jurisdiction, ¶ 206. *See also* Claimant's Post-Hearing Brief, ¶ 83, Hearing Transcript, 233:6-13.
[437] Counter-Memorial on Jurisdiction, ¶¶ 205-210; Rejoinder on Jurisdiction, ¶¶ 214-217; Hearing Transcript, 233:14-24.

approach taken by a number of arbitral tribunals,[438] and that the cases and academic authorities Montenegro cites are irrelevant, distinguishable or have been misinterpreted.[439]

193. The Claimant submits that the treaty practice of the FRY, the Russian Federation, and Montenegro does not support the Respondent's case.[440] The Claimant contends that: (i) arbitral tribunals have not regarded such practice as a reliable means of treaty construction;[441] (ii) the practice of these States with third parties has varied widely; and (iii) the Russian Federation's practice "indicates that Article 1 *does* cover indirect investments."[442]

194. The Claimant addresses the Respondent's cut-off point objection, arguing that the Respondent should be precluded from raising the "untimely," "newly formulated [cut-off point] objection" in

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[438] Counter-Memorial on Jurisdiction, ¶¶ 211-222, citing *Borissov v. Uzbekistan*, ¶¶ 129, 241, 317 (**CLA-107**); *Pezold v. Zimbabwe*, ¶¶ 310, 323-324, 326 (**CLA-108**); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 137 (**CLA-110**); *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶¶ 4.4, 5.15, 6.49 (**CLA-111**); referring to *Guaracachi America Inc. and Rurelec PLC v. Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶¶ 348-353 (**CLA-112**); *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶¶ 123-124 (**CLA-113**); *Sedelmayer v. Russia*, ¶ 2.1.5 (**CLA-114**); *Société Générale v. Dominican Republic*, ¶ 32 (**CLA-115**). *See* Rejoinder on Jurisdiction, ¶¶ 218-223, citing *Flemingo v. Poland*, UNCITRAL, Award, 12 August 2016, ¶¶ 296, 303, 305 (**CLA-258**); *National Grid PLC v. Argentina*, Award, 3 November 2008, ¶ 126 (**RLA-158**); *HOCHTIEF A.G. v. Argentina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ¶ 157 (**CLA-259**); *Inmaris Perestroika Sailing Maritime Services GmbH et al. v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 110 (**CLA-260**); *Gas Natural SDG S.A. v. Argentina*, ICSID Case No. ARB/09/10, Decision on the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 34 (**CLA-189**); Hearing Transcript, 238:3-240:1.

[439] Counter-Memorial on Jurisdiction, ¶¶ 223-228, citing *Berschader v. Russia*, ¶¶ 1, 47, 137-147, 150, 402 (**RLA-89**); *HICEE v. Slovakia*, ¶ 34 (**RLA-90**); J. Baumgartner, *Treaty Shopping in International Investment Law* (Oxford UP, 2017) (**CLA-116**). *See* Rejoinder on Jurisdiction, ¶¶ 224-232, citing M. Bungenberg et al., *International Investment Law, a Handbook* (2015), ¶ 84, n.172 (**CLA-117**); R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), pp. 25-26 (**CLA-261**); Hearing Transcript, 235:4-238:2.

[440] Counter-Memorial on Jurisdiction, ¶¶ 229-235; Rejoinder on Jurisdiction, ¶ 233; Hearing Transcript, 240:2-243:24.

[441] Counter-Memorial on Jurisdiction, ¶¶ 230-232, citing *Guaracachi v. Bolivia* (**CLA-112**); *Señor Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, ¶ 109 (**CLA-118**); *Berschader v. Russia*, ¶ 147 (**RLA-89**).

[442] Rejoinder on Jurisdiction, ¶ 238. *See also* Counter-Memorial on Jurisdiction, ¶¶ 233-235, citing Montenegro-Finland BIT, 14 November 2008, Article 1(1) (**CLA-26**); Montenegro-Denmark BIT, 11 February 2009, Article 1(1) (**CLA-27**); Montenegro-Belgium/Luxembourg BIT, 16 February 2010, Article 1(2) (**CLA-31**); Montenegro-Azerbaijan BIT, 16 September 2011, Article 1(1) (**CLA-35**); Slovakia-FRY BIT, 30 January 1996, Article 1(1) (**CLA-121**). *See also* Rejoinder on Jurisdiction, ¶¶ 235-238, citing Czech Republic-FRY BIT, 13 October 1997, Article 1(1) (**CLA-119**); Greece-FRY BIT, 25 June 1997, Article 1(1) (**CLA-120**); Montenegro-UAE BIT, 26 March 2012, Article 1(1) (**CLA-262**); Montenegro-Moldova BIT, 20 June 2011, Article 1(1) (**CLA-263**); Montenegro Foreign Investment Law, Article 3 (**CLA-264**); Azerbaijan-Syria BIT, 8 July 2009 (**CLA-265**); Azerbaijan-Estonia BIT, 7 April 2010 (**CLA-266**); Azerbaijan-Czech Republic BIT, 17 May 2011 (**CLA-267**); Azerbaijan-Serbia BIT, 8 June 2011 (**CLA-268**); Azerbaijan-Turkey BIT, 25 October 2011 (**CLA-269**); Azerbaijan-Albania BIT, 9 February 2012 (**CLA-270**); Azerbaijan-San Marino BIT, 25 September 2015 (**CLA-271**); Azerbaijan Model BIT (**CLA-272**); Russia-Bahrain BIT, 29 April 2014, Article 1(1) (**CLA-273**); Russia-Cambodia BIT, 3 March 2015, Article 1(2) (**CLA-274**); Russia-Iran BIT, 23 December 2015, Article 1(1) (**CLA-275**); Russian Federation Model BIT, Article 1(1)(b) (**CLA-276**); Decree of the Government of the Russian Federation No. 992, 20 September 2016 (**CLA-277**); Law of the Russian Federation of 9 July 1999 No. 160-FZ (**CLA-278**, **CLA-279**).

accordance with clause 3.6 of Procedural Order No. 1.[443] Alternatively, the Claimant objects that the Respondent's argument is absent of "any sound legal basis" because no cut-off point rule exists in the FRY-Russia BIT,[444] and arbitral tribunals and commentators have denied the existence of such rule.[445] Even if such a rule existed, the Claimant submits "it would not apply in the present case" because caselaw demonstrates that it "has only been envisaged for entities that were so remote from the original investment that they could not have been foreseen by the host State."[446] According to the Claimant, the Respondent could and did foresee the Claimant's investment. In this regard, the Claimant submits that "Montenegro has been fully aware of Mr Deripaska's active participation in the investment since its acquisition in 2004."[447]

3. Whether the alleged investments were "invested by" the Claimant

The Respondent's Position

195. The Respondent submits that the Claimant's "remote ownership" of the shares in KAP is insufficient to establish that he "invested" within the meaning of the FRY-Russia BIT,[448] which defines "investment" in Article 1(2) as "every kind of asset invested by the investors of a Contracting Party in the territory of the other Contracting Party." The Respondent invokes *SCB v. Tanzania* to argue by analogy that "[t]he phrase 'invested by' establishes that the purported investor must have been actively involved in the investment undertakings in the territory of Montenegro."[449]

196. The Respondent submits that the Claimant was not "actively involved" and "did not directly and actively participate"[450] in the purported investments. As a result, "this case could, at best, pertain to an asset *held* by an investor of Russia in the territory of Panama."[451] That the Claimant may have been "publicly viewed as the primary person behind the investments," according to the Respondent, is "irrelevant and misplaced."[452] The Respondent notes that there has been "no

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443 Rejoinder on Jurisdiction, ¶¶ 240-242.
444 Rejoinder on Jurisdiction, ¶¶ 244-245, citing **C-1**; *Société Générale v. Dominican Republic*, ¶¶ 10-11, 45, 51 (**CLA-115**).
445 Rejoinder on Jurisdiction, ¶ 246, referring to *Enron v. Argentina*, ¶¶ 55-57 (**RLA-58**); *Noble Energy Inc. v. Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, ¶ 82 (**RLA-333**); *Flemingo v. Poland* (**CLA-258**); Hearing Transcript, 244:10-245:20.
446 Rejoinder on Jurisdiction, ¶¶ 248-252, referring to *Enron v. Argentina*, ¶¶ 55, 56 (**RLA-58**); *Société Générale v. Dominican Republic*, ¶ 50 (**CLA-115**); *Flemingo v. Poland* (**CLA-258**); **CWS-1**; **CWS-7**; Claimant's Post-Hearing Brief, ¶ 85
447 Claimant's Post-Hearing Brief, ¶ 85. *See also* Hearing Transcript, 247:15-249:2.
448 Statement of Defence, ¶¶ 405-406, 409.
449 Statement of Defence, ¶¶ 407-412, citing *Standard Chartered Bank v. Tanzania*, ¶¶ 222, 230, 232 (**RLA-95**); Reply on Jurisdiction, ¶¶ 411-417.
450 Respondent's Post-Hearing Brief, ¶ 186; Hearing Transcript, 104:19-106:16.
451 Memorial on Jurisdiction, ¶ 51, emphasis in original.
452 Reply on Jurisdiction, ¶ 420.

contemporaneous showing that any person acted in [the Claimant's] name or on his behalf at any meetings with the Government."[453] On these grounds, the Respondent submits that the Claimant has not met his evidentiary burden to demonstrate his control of the investment.[454]

The Claimant's Position

197. The Claimant denies that the FRY-Russia BIT requires the Claimant's active participation in his investments in KAP and RBN.[455] He contends that nothing in the language of the BIT requires such active participation[456] and that arbitral tribunals have rejected such an interpretation of similar language.[457]

198. Alternatively, the Claimant contends that he has discharged his burden of proof in showing that he actively participated in his investments. He points to various examples of active participation in the KAP, RBN and Pljevlja investments,[458] including personal participation in negotiations, taking decisions to invest, strategic management and appointment of management teams, taking decisions regarding disputes, participating in settlement discussions and appointment of negotiators and participating in board meetings.[459]

199. The Claimant also contends that *SCB v. Tanzania* was decided according to language not reflected in the FRY-Russia BIT and has been criticized as being "unduly formalistic."[460]

E. THE CLAIMANT'S THRESHOLD ARGUMENTS ABOUT ADMISSIBILITY OBJECTIONS

200. As a general proposition, the Claimant objects to hearing the Respondent's fifth to ninth objections at this stage of the proceedings, arguing that they are admissibility objections which should be heard with the merits of the case.[461] The Respondent on the other hand contends that

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[453] Respondent's Post-Hearing Brief, ¶ 187. *See also* Respondent's Post-Hearing Brief, ¶¶ 186-188.
[454] Reply on Jurisdiction, ¶¶ 421-422.
[455] Counter-Memorial on Jurisdiction, ¶¶ 236-262; Rejoinder on Jurisdiction, ¶ 254; Claimant's Post-Hearing Brief, ¶ 84; Hearing Transcript, 249:3-6.
[456] Counter-Memorial on Jurisdiction, ¶¶ 238-243; Rejoinder on Jurisdiction, ¶¶ 255-257, referring to *Mytilineos v. Serbia and Montenegro*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2016, ¶¶ 50, 127, 129-131 (**CLA-123**); *Borissov v. Uzbekistan*, ¶¶ 310-312 (**CLA-107**); Hearing Transcript, 249:12-20.
[457] Counter-Memorial on Jurisdiction, ¶¶ 244-258, referring to *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**RLA 95**); Hearing Transcript, 249:21-250:7.
[458] Counter-Memorial on Jurisdiction, ¶¶ 259-261; Rejoinder on Jurisdiction, ¶¶ 263-265, referring to **C-361**; **C-363**; Witness Statement of Artem Volynets, 4 June 2018 (**CWS-6**).
[459] Rejoinder on Jurisdiction, ¶¶ 259-260. *See also* Claimant's Post-Hearing Brief, ¶ 84.
[460] Counter-Memorial on Jurisdiction, ¶¶ 245-251, citing J.V. Goeler, "Third-Party Funding in International Arbitration and its Impact on Procedure," *International Arbitration Law Library* (Kluwer Law International, 2016), p. 246 (**CLA-122**); Rejoinder on Jurisdiction, ¶ 258, referring to *Standard Chartered Bank v. Tanzania* (**RLA-95**); Hearing Transcript, 250:8-251:7.
[461] Counter-Memorial on Jurisdiction, ¶¶ 25-30. *See also id.*, ¶¶ 264-269, 311-315, 373-378; Rejoinder on Jurisdiction, ¶¶ 310(a), 313-316, 343, 395, 397.

the admissibility objections should be determined at this time.[462] The Parties' respective positions on this issue are summarized below.

The Claimant's Position

201. The Claimant submits that "the Tribunal must first establish whether it has jurisdiction before addressing questions as to admissibility."[463] He argues that if the Tribunal decides to hear the admissibility objections during the jurisdictional phase, it will either exceed its powers under Article 21(1) of the UNCITRAL Rules, or will assume the existence of its jurisdiction over this dispute.[464] He cites the decision in *Chevron v. Ecuador*, which considered that a respondent's admissibility objections, "where not amounting to or overlapping with its jurisdictional objections, should be treated under Articles 15 and 21 of the UNCITRAL Arbitration Rules as issues relating to the merits phase of [the] arbitration proceedings."[465] Otherwise, adds the Claimant, in the words of the tribunal in *Infinito Gold v. Costa Rica*, "the Parties can be deprived of the opportunity to fully present and defend their case, as required by fundamental principles of procedure."[466]

202. The Claimant argues that the UNCITRAL Rules are silent on admissibility,[467] and that Article 21 of the UNCITRAL Rules does not accord to a tribunal the power to rule on admissibility objections at a preliminary phase.[468] He contrasts this with Article 41(5) of the ICSID Arbitration Rules, and submits that the power therein to rule on objections "that a claim is manifestly without

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[462] Reply on Jurisdiction, ¶¶ 430-450, 660-670, 751-760.

[463] Counter-Memorial on Jurisdiction, ¶¶ 263-269; Rejoinder on Jurisdiction, ¶ 25, referring to *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, ¶¶ 5.62, 5.65 (**CLA-227**); *Bosh Int. Inc. and B&P Ltd. Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, ¶ 136 (**CLA-231**); *Micula et al. v. Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 63 (**CLA-63**); *Gavrilovic v. Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, ¶ 412 (**CLA-232**). *See also* Rejoinder on Jurisdiction, ¶¶12-20.

[464] Counter-Memorial on Jurisdiction, ¶¶ 30, 37-38, citing I. Brownlie, *Principles of Public International Law* (6th ed., Oxford UP, 2003), p. 457 (**CLA-57**); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, ¶¶ 6.4.1-6.4.2, 6.6.1 (**CLA-60**); *Isolux Infrastructure Netherlands B.V. v. Spain*, SCC Case V2013/153, Final Award, 17 July 2016, ¶ 709 (**CLA-61**).

[465] Counter-Memorial on Jurisdiction, ¶ 39, citing *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, UNCITRAL, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, ¶ 4.91 (**CLA-62**).

[466] Counter-Memorial on Jurisdiction, ¶ 41, citing *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶ 241 (**CLA-65**).

[467] Counter-Memorial on Jurisdiction, ¶¶ 335-344, referring to *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Preliminary Award on Jurisdiction and Admissibility, 7 August 2002, ¶¶ 122-126 (**RLA-202**).

[468] Counter-Memorial on Jurisdiction, ¶¶ 34-35, citing M. Potestà and M. Sobat, "Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily," *Journal of International Dispute Settlement* (2012), pp. 26-27 (**CLA-59**); *Methanex v. United States*, ¶¶ 122-126 (**RLA-202**); Rejoinder on Jurisdiction, ¶ 13.

legal merit" is broader in scope than that in Article 21 of the UNCITRAL Rules.[469] He also argues that the authorities relied on by the Respondent to show that admissibility has been dealt with at a preliminary phase are distinguishable on the facts from the present case.[470]

203. The Claimant also contends that hearing admissibility objections at this stage raises due process concerns. He points to authorities which, he says, lead to the conclusion that a risk of breach of due process will be created if the allegations of inadmissibility are not joined to the merits.[471] He further submits that to decide on the Respondent's five admissibility objections would require the Tribunal to "go further than preliminary objections,"[472] and contends that the Tribunal should afford him a margin of appreciation on his statement of facts so as to give him a full opportunity to present his claim.[473]

204. Finally, the Claimant rejects the Respondent's argument that his agreement to bifurcation vested the Tribunal with authority to hear admissibility objections. He argues that his consent to bifurcation "does not preclude him from arguing that certain objections should be joined to the

[469] Counter-Memorial on Jurisdiction, ¶¶ 31-35, referring to *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, ¶ 6.1.1 (**RLA-133**); *Brandes Investment Partners LLP v. Venezuela*, ICSID Case No. ARB/08/3, Decision, 2 February 2009, ¶¶ 44-55 (**CLA-58**).

[470] Rejoinder on Jurisdiction, ¶¶ 16-20, citing *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8: Regarding Bifurcation of the Procedure, 14 April 2014, ¶¶ 2, 118 (**RLA-216**); *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Procedural Order No. 4: Decision on Bifurcation, 18 November 2016, ¶¶ 4.6, 4.8 (**RLA-209**); *Achmea v. Slovakia*, PCA Case No. 2013-12, Jurisdiction and Admissibility, 20 May 2014, ¶ 120 and n.161 (**CLA-55**); *Apotex v. United States*, ¶ 4 (**RLA-351**); *Veteran Petroleum Ltd. (Cyprus) v. Russia*, UNCITRAL, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶ 13 (**RLA-352**); *European American Investment Bank A.G. (EURAM) v. Slovakia*, UNCITRAL, Award on Jurisdiction, 22 October 2012, ¶ 39 (**CLA-198**); *Copper Mesa v. Ecuador*, ¶¶ 5.65, 10.4 (**CLA-227**); *Chevron and Texaco v. Ecuador*, ¶¶ 4.27-4.29, 4.53-4.54; 4.96 (**CLA-62**); *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 60 (**CLA-115**); *ICS Inspection and Control Services Ltd. v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 254 (**RLA-13**); S.A. Pauker, "Admissibility of Claims in Investment Treaty Arbitration," *Arbitration International* (2018) (**RLA-347**); Y. Shany, "Questions of Jurisdiction and Admissibility before International Courts," *Hersch Lauterpacht Memorial Lectures* (Cambridge UP, 2016), p. 138 (**RLA-357**); Madsen Report, ¶ 23 (**RER-3**).

[471] Rejoinder on Jurisdiction, ¶¶ 27-29, citing *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶¶ 111-112, 114-115 (**CLA-233**); K. Sauvant, *Yearbook on International Investment Law & Policy* (2009-2010), p. 116 (**CLA-234**); *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Decision on jurisdiction, 12 February 2010, ¶¶ 47, 51 (**CLA-235**); *Infinito Gold v. Costa Rica*, ¶ 241 (**CLA-65**); T. Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, (Cameron May, 2005), p. 322 (**CLA-236**); J. O. Voss, *The Impact of Investment Treaties on Contracts Between Host States and Foreign Investors* (Brill, 2010), p. 173 (**CLA-237**); *Methanex v. United States*, ¶ 110 (**RLA-202**).

[472] Rejoinder on Jurisdiction, 30, referring to *Rompetrol v. Romania*, ¶ 115 (**CLA-233**); *Venezuela Holdings B.V. et al. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 177 (**CLA-147**).

[473] Counter-Memorial on Jurisdiction, ¶¶ 343-344, citing *Infinito Gold v. Costa Rica*, ¶ 241 (**CLA-65**).

merits" in circumstances where the Claimant made a timely objection in his Counter-Memorial on Jurisdiction.[474]

The Respondent's Position

205. The Respondent argues that the Tribunal should consider all of its admissibility objections at this time.[475] In its view, it is "not an absolute rule" that a tribunal should first decide its jurisdiction prior to considering admissibility objections; rather the Tribunal has a "preliminary competence" to decide such objections.[476]

206. The Respondent submits that there is authority to support an interpretation of the UNCITRAL Rules as empowering a tribunal to decide on admissibility objections as a preliminary matter,[477] and Article 41(5) of the ICSID Arbitration Rules does not prove otherwise.[478] It further argues that the Tribunal has an inherent power to consider admissibility objections as a preliminary matter, relying on academic commentary to that effect,[479] and that Swedish law does not preclude the Tribunal from deciding issues of admissibility as a preliminary matter.[480]

207. The Respondent further argues that, in any event, the Parties have now vested this Tribunal with the authority to decide admissibility objections, in particular once the Claimant agreed to bifurcation without qualification notwithstanding the Respondent's explicit references to admissibility in its Request for Bifurcation.[481] It also points out that the Tribunal, in its Procedural Order No. 3, indicated that the admissibility objections would be addressed in a preliminary phase,[482] and contends that the Claimant should be "estopped from opposing the adjudication of Respondent's admissibility objections" at this time.[483]

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474 Rejoinder on Jurisdiction, ¶¶ 22-23.
475 Reply on Jurisdiction, ¶¶ 430-450, 660-670, 751-760; Hearing Transcript, 19:9-11.
476 Reply on Jurisdiction, ¶¶ 480-484, referring to Shany, p. 142 (**RLA-357**).
477 Reply on Jurisdiction, ¶¶ 438-450, citing *Philip Morris v. Australia*, ¶ 118 (**RLA-216**); *Methanex Corp. v. United States*, ¶ 109 (**RLA-202**); *Achmea v. Slovakia*, Jurisdiction and Admissibility, ¶ 120 (**CLA-55**); *Resolute v. Canada*, ¶ 4.12 (**RLA-209**); Hearing Transcript, 19:15-21:21.
478 Reply on Jurisdiction, ¶¶ 433-437, citing Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session (New York, February 9-13, 2009), UNCITRAL, 42nd Session, UN Doc. A/CN.9/669 (2009), p. 10, ¶ 39 (**RLA-96**); S. Nappert, C*ommentary on the UNCITRAL Arbitration Rules 2010: A Practitioner's Guide* (2012), p. 90 (**RLA-344**); D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules – A Commentary* (2013), p. 452 (**RLA-345**); J. Paulsson, G. Petrochilos, *UNCITRAL Arbitration Rules*, Section III, Article 23 (Kluwer Law International 2017), ¶ 11 (**RLA-346**).
479 Reply on Jurisdiction, ¶¶ 451-454, citing Douglas, ¶¶ 130-132 (**RLA-69**); *National Grid Plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, ¶ 51 (**RLA-355**); *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, ¶¶ 165-172 (**RLA-356**); *Alps Finance and Trade A.G. v. Slovakia*, UNCITRAL, Award, 5 March 2011, ¶¶ 196, 197 (**RLA-178**); *Berschader v. Russia*, ¶¶ 95-97 (**RLA-89**).
480 Reply on Jurisdiction, ¶¶ 455-457, citing Madsen Report, ¶ 12 (**RER-3**).
481 Reply on Jurisdiction, ¶¶ 458-479, citing Claimant's letter of 14 November 2017.
482 Reply on Jurisdiction, ¶ 473.
483 Reply on Jurisdiction, ¶¶ 474-479. *See also* Hearing Transcript, 21:22-25:19.

208. Finally, the Respondent argues that consideration of its admissibility objections would not threaten the Claimant's rights to due process because: (i) the Claimant's argument to the contrary is unsupported by *Infinito Gold v. Costa Rica*;[484] (ii) the Tribunal's authority to consider admissibility objections in a preliminary phase "implies that such bifurcation does not violate due process";[485] (iii) the Claimant's unreserved agreement to bifurcation demonstrates the absence of genuine due process concerns;[486] (iv) the Claimant has not demonstrated that the admissibility objections are intertwined with the merits;[487] and (v) though the assessment of admissibility questions "require[s] to some extent an assessment of certain factual issues," arbitral cases indicate that "this fact does not preclude tribunals from assessing jurisdictional and admissibility objections in a preliminary phase."[488]

F. THE SHAREHOLDER CLAIMS OBJECTION

209. The Respondent's fifth objection is that the Claimant's claims are all inadmissible shareholder claims, and that the Claimant is not entitled to pursue derivative shareholder claims for the alleged harm suffered by CEAC or En+ in this arbitration.[489] The Claimant maintains that the Respondent's objection is premature, but argues in the alternative that his claim is admissible. The Parties' positions are summarized below.

The Respondent's Position

210. The Respondent argues that the Claimant's claims clearly concern "rights that, if extant, belong only to CEAC and/or En+ and not to Claimant."[490] These claims, the Respondent observes, relate to: (i) En+'s participation in the Pljevlja Tender; (ii) CEAC's shares in KAP and RBN; (iii) CEAC and En+'s contractual relations with the Respondent under the Settlement Agreement; and (iv) CEAC and En+'s creditor position in KAP's insolvency.[491] According to the Respondent, the Claimant cannot "arrogate[] to himself En+'s and CEAC's purported rights and

[484] Reply on Jurisdiction, ¶¶ 487-488, citing *Infinito Gold Ltd. v. Costa Rica*, ¶ 241 (**CLA-65**).
[485] Reply on Jurisdiction, ¶ 489.
[486] Reply on Jurisdiction, ¶¶ 490-493.
[487] Reply on Jurisdiction, ¶¶ 494-495.
[488] Reply on Jurisdiction, ¶¶ 496-501, referring to *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.9 (**CLA-143**); *Apotex Inc. v. United States*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150 (**RLA-351**); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 61 (**RLA-17**); *Empresas Lucchetti S.A. v. Peru*, ICSID Case No. ARB/03/4, Annulment, Dissenting Opinion of Sir Franklin Berman, 13 August 2007, ¶ 17 (**RLA-362**).
[489] Statement of Defence, ¶ 414; Memorial on Jurisdiction, ¶ 53.
[490] Statement of Defence, ¶ 417; Reply on Jurisdiction, ¶¶ 510-512. *See also* Statement of Defence, ¶¶ 415-416, 421.
[491] Statement of Defence, ¶ 418, referring to Statement of Claim, ¶¶ 1.10, 1.14.

legal positions" in this arbitration,[492] especially since he may not even be "a shareholder in any company which was directly involved in any relevant matter in Montenegro."[493]

211. Relatedly, the Respondent submits that the Claimant "does not allege or seek to protect rights that belong directly to him, but rather the rights that belong to his companies."[494] The Respondent argues that general international law does not extend the scope of shareholder claims as established under municipal law, so that the object of a shareholder claim is always "a shareholding in the relevant company."[495] As a result, general international law recognizes the principle that a limited liability company is an entity distinct from its shareholders and bars those shareholders from pursuing claims for the wrong inflicted on the company.[496] The Respondent further submits that "all three ICJ cases that Claimant invokes in fact support Respondent's view that the general principle of international law is separability between the company and its shareholder, which further bars shareholders from pursuing a claim for the damages inflicted upon their company, i.e. reflective loss shareholder claims."[497]

212. Accepting that investment treaties may, in general, prevail as *lex specialis* over customary international law, the Respondent argues that the FRY-Russia BIT does not extend the scope of shareholder claims such as to entitle the Claimant to pursue derivative shareholder claims for alleged harm suffered by CEAC or En+.[498] The Respondent argues that the inclusion of the word "shares" in the definition of the term "investment" means that a shareholding in "a local company owned by a foreign investor with the requisite nationality" constitutes a protected investment.[499] The Respondent submits, however, that this does not mean that shareholders are entitled to pursue indirect claims with respect to the assets of the company.[500] According to the Respondent, the default position of international law on this matter is that shareholder claims are only admissible if allowed by an express provision of the relevant investment treaty[501] – and the FRY-Russia BIT includes no such provision. The FRY-Russia BIT's silence on the matter requires, according to

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[492] Statement of Defence, ¶¶ 419-420, 424.
[493] Memorial on Jurisdiction, ¶ 54.
[494] Reply on Jurisdiction, ¶ 529.
[495] Statement of Defence, ¶ 425, referring to Douglas, ¶ 750 (**RLA-69**).
[496] Statement of Defence, ¶¶ 426-433, citing *Kunhardt & Co., Mixed Claims Commission United States-Venezuela*, Award, RIAA, Vol. IX, 17 February 1903, p. 172 (**RLA-98**); *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3 ("***Barcelona Traction***"), ¶¶ 38, 44 (**RLA-99**); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, ¶¶ 155-156 (**CLA-125**); M. Sasson, *Substantive Law in Investment Treaty Arbitration* (Kluwer Law International, 2010), pp. 143-144 (**RLA-97**).
[497] Reply on Jurisdiction, ¶¶ 524-534, citing *Guinea v. DRC*, ¶ 155 (**CLA-125**); *Barcelona Traction*, ¶ 44 (**RLA-99**); *Elettronica Sicula S.p.A.*, ¶¶ 69, 70 (**RLA-91**); Demirkol, p. 399 (**CLA-124**).
[498] Statement of Defence, ¶ 424, 434; Reply on Jurisdiction, ¶¶ 535-555; Respondent's Post-Hearing Brief, ¶ 204.
[499] Statement of Defence, ¶¶ 436-437. *See also* Respondent's Post-Hearing Brief, ¶ 204.
[500] Statement of Defence, ¶¶ 436-437.
[501] Statement of Defence, ¶¶ 439-441, citing *HICEE v. Slovakia*, ¶ 147 (**RLA-90**).

the Respondent, "interpretation of the term 'shares' consistent with its ordinary meaning,"[502] an interpretation that it submits supports its position.[503]

213. The Respondent asserts that there are no exceptional circumstances in the present case that warrant admitting the Claimant's shareholder reflective loss claims.[504] The four possible exceptions, identified by Professor Douglas in his academic writings, do not apply to the Claimant's case, nor to the Claimant himself. In particular:[505] (i) the Claimant's indirect shareholding means that only CEAC could rely on the assertion that assets of the company have been expropriated, rendering shareholding in the company worthless;[506] (ii) only where the company which suffered alleged injury has been deprived of a remedy to redress the alleged injury can a claim be made;[507] (iii) the companies in which the Claimant holds shares, companies which are "five corporate layers removed from KAP and RBN," have not been deprived of the capacity to sue";[508] and, similarly, (iv) "[t]he companies in which the Claimant holds shares have not been subjected to a denial of justice."[509]

214. Alternatively, the Respondent submits that the Claimant's shareholder claims give rise to unacceptable "risks" that are recognized in international commentary, namely an unfair multiplicity of actions, potential prejudice to "multiple levels of creditors" and interference with the fair distribution of companies' funds.[510]

The Claimant's Position

215. While maintaining that the Respondent's objection is premature, the Claimant argues in the alternative that his claim is admissible. First, he submits that ICJ jurisprudence in the *Barcelona Traction*, *Diallo* and *ELSI* cases demonstrate that, as a matter of customary international law, shareholders' claims are not prohibited *per se*, and that the respective regime might be altered in the particular context of investment treaties.[511] The Claimant further contends that "a significant number of tribunals" have endorsed shareholder claims based on broad BIT provisions

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[502] Respondent's Post-Hearing Brief, ¶ 204.
[503] Respondent's Post-Hearing Brief, ¶¶ 204-206.
[504] Statement of Defence, ¶¶ 442-443; Reply on Jurisdiction, ¶¶ 556-574; Respondent's Post-Hearing Brief, ¶ 208.
[505] Reply on Jurisdiction, ¶¶ 557-558, citing Douglas, pp. 415, 416 (**RLA-69**).
[506] Reply on Jurisdiction, ¶¶ 559-563.
[507] Reply on Jurisdiction, ¶¶ 564-568.
[508] Reply on Jurisdiction, ¶¶ 569-571.
[509] Reply on Jurisdiction, ¶¶ 572-574.
[510] Reply on Jurisdiction, ¶¶ 575-588, citing Douglas, p. 455 (**RLA-69**).
[511] Counter-Memorial on Jurisdiction, ¶¶ 270-278, referring to *Barcelona Traction*, ¶¶ 47, 64, 89-90 (**RLA-99**); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, ¶ 88 (**CLA-125**); *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, p. 15 (**RLA-91**).

considered to "supersede[] international customary law as *lex specialis*."[512] As applied to the present case, the Claimant maintains that his claims are admissible given that the "broad scope of investments" covered by the FRY-Russia BIT, which, he says "enshrines protection for shareholders"[513] and is supported by the practice of international courts and tribunals.[514]

216. Third, the Claimant notes that his claim is for injury to his rights as a shareholder. As an investor under the FRY-Russia BIT, according to the Claimant, he "has standing under the FRY-Russia BIT and is entitled to vindicate his rights as indirect shareholder in KAP, RBN, CEAC and EN+."[515] He further contends that there are no additional circumstances, including alleged undermining of the bankruptcy proceedings in Montenegro, that would render his claims inadmissible.[516]

217. Alternatively, the Claimant submits that shareholders may be protected even in the absence of an express treaty provision to that effect.[517] The Claimant submits that this conclusion remains the same even under a more narrow view on the admissibility of shareholders' claims, given that, according to the Claimant: (i) his investments in KAP and RBN have been expropriated by

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[512] Counter-Memorial on Jurisdiction, ¶¶ 279-284, citing *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶¶ 44-48 (**CLA-126**); *CMS v. Argentina*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶¶ 69, 72, 75 (**CLA-127**); *Suez et al. v. Argentina*, ICSID Case No. ARB/03/17, (**CLA-128**); *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, and *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on Liability, 30 July 2010, ¶ 50 (**CLA-129**); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶¶ 73-74 (**CLA-130**); *Azurix v. Argentina*, Annulment Decision, ¶ 110 (**RLA-147**); *Siemens v. Argentina*, ¶¶ 141-142, 355 (**CLA-110**); *Teinver v. Argentina*, ¶¶ 217-219 (**CLA-88**); *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶ 89 (**CLA-131**); *Gami Investments Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, ¶ 38(b) (**CLA-133**); *Busta and Anor. v. Czech Republic*, SCC Case No. V 2015/014, Final Award, 10 March 2017, ¶¶ 192-193 (**CLA-134**); *BG Group v. Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 156 (**CLA-24**); Sasson, p. 145 (**RLA-97**); Alexandrov, p. 28 (**CLA-132**); *Barcelona Traction*, Separate Opinion of Judge Fitzmaurice, ¶ 18 (**CLA-135**); *Barcelona Traction*, Separate Opinion of Judge Jessup, ¶ 52 (**CLA-136**); *Barcelona Traction*, Separate Opinion of Judge Gros, ¶ 15 (**CLA-137**); *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, USA, Reparation Commission, RIAA Vol. II, 5 August 1926, p. 790 (**CLA-138**); Douglas, ¶¶ 800-816 (**RLA-69**); Sasson, p. 145 (**RLA-97**).

[513] Rejoinder on Jurisdiction, ¶ 273.

[514] Rejoinder on Jurisdiction, ¶¶ 274-275, referring to *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, ¶¶ 67-68 (**CLA-289**); *Siemens v. Argentina*, ¶ 137 (**CLA-110**); *Teinver v. Argentina*, ¶¶ 229-230 (**CLA-88**); *Natural Gas v. Argentina*, ¶¶ 33-35 (**CLA-189**); *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2 Decision on Objection to Jurisdiction, 11 May 2005, ¶ 81 (**CLA-290**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, ¶¶ 92-94, Appendix 1 (**RLA-71**).

[515] Rejoinder on Jurisdiction, ¶ 281, citing *Azurix v. Argentina*, Annulment Decision, ¶¶ 106-109 (**RLA-147**); *Total v. Argentina*, ¶ 81 (**RLA-229**); *Camuzzi v. Argentina*, ¶ 66 (**CLA-290**); *Flemingo v. Poland*, ¶ 310 (**CLA-258**); D. Bentolila, "Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration," *Trade Law and Development* (2010), Vol. II, No. 1, p. 94 (**CLA-291**).

[516] Rejoinder on Jurisdiction, ¶ 294-298, citing *Azurix v. Argentina*, Annulment Decision, ¶ 114 (**RLA-147**); C. Schreuer, *Shareholder Protection in International Investment Law, Transnational Dispute Management*, 23 May 2005, p. 14 (**CLA-280**).

[517] Rejoinder on Jurisdiction, ¶ 279, citing *Enron v. Argentina*, ¶ 46 (**RLA-58**).

Montenegro; (ii) this is the only forum where he can effectively seek redress; (iii) he has lost control and management rights over KAP and RBN following the bankruptcy proceedings, and therefore cannot advance claims on their behalf; and (iv) he has been denied justice in Montenegrin courts.[518]

G. THE STANDING OBJECTION

The Respondent's Position

218. The Respondent's sixth objection is that upon CEAC's initiation of the Third Arbitration against Montenegro under the Cyprus-Montenegro BIT and the ICSID Convention, the Claimant lost his standing to submit a claim in his own name for the same underlying acts.[519]

219. First, citing *Orascom v. Algeria,*[520] the Respondent argues that "by instructing CEAC to submit a notice of dispute against Montenegro on 20 August 2013, Claimant chose to 'crystallize' the dispute against Respondent at that level of the corporate chain," and thus "lost his standing to submit the same dispute against Respondent before this Tribunal."[521] Examining a situation where a claimant had initiated an arbitration against the Algerian Government months after instructing one of its subsidiaries to do the same, the *Orascom* tribunal held that "the existence of several legal foundations for arbitration does not necessarily mean that the various entities in the shareholder chain could make use of the existing arbitration clauses to assail the same measures and to recover the same economic loss under any circumstances."[522] The Respondent asserts that, as in *Orascom*: (i) the disputes submitted before this Tribunal and under the Cyprus-Montenegro BIT are the same; (ii) crystallization of the dispute occurred when the first notice of dispute was sent (*i.e.*, on 20 August 2013) or when the request of arbitration was submitted to ICSID (*i.e.*, in March 2014); and (iii) all of the entities higher up in the corporate chain were placed in a position of being made whole for the alleged harm after one entity in the same corporate chain had exercised its right to arbitrate against the Respondent.[523]

220. The Respondent maintains that *Orascom* findings are instructive because "all of the circumstances relevant for crystallisation of the dispute and loss of Claimant's legal standing exist in the present case too."[524] It rejects the Claimant's attempts to distinguish *Orascom*,

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[518] Counter-Memorial on Jurisdiction, ¶ 285, referring to Statement of Claim, ¶¶ 5.91-5.112, 6.18-6.24; Counter-Memorial on Jurisdiction, ¶¶ 206-235; Rejoinder on Jurisdiction, ¶¶ 289-293.
[519] Statement of Defence, ¶ 447; Memorial on Jurisdiction, ¶ 55; Reply on Jurisdiction, ¶¶ 589-617.
[520] *Orascom TMT Investments S.à.r.l. v. Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017 (**RLA-101**). *See* Statement of Defence, ¶¶ 448-452.
[521] Statement of Defence, ¶¶ 463-464.
[522] *Orascom v. Algeria*, ¶ 495 (**RLA-101**). *See also id.*, ¶¶ 9, 412, 414.
[523] Statement of Defence, ¶¶ 451-462; Reply on Jurisdiction, ¶ 616.
[524] Reply on Jurisdiction, ¶¶ 598, 601.

arguing that: (i) the decisive moment for crystallization of the *Orascom* dispute was the filing of the first notice of dispute;[525] (ii) the "strategic reasons" at issue in *Orascom* were irrelevant to the tribunal's finding;[526] and (iii) the conclusion of a settlement agreement in *Orascom* was not relevant for the crystallization of the dispute and claimant's consequent loss of standing.[527]

221. Second, the Respondent submits that "[s]ince it is undisputed that CEAC consented to ICSID arbitration for submission of the dispute against the Respondent, Claimant does not have a right to seek relief for the same dispute before this Tribunal" or any other forum.[528] The Respondent invokes Article 26 of the ICSID Convention, which provides:

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

According to the Respondent, Article 26 prevents the Claimant from submitting claims to this Tribunal because it "provides for exclusivity of ICSID arbitration once consent is given."[529] Such consent, according to the Respondent, crystallized either when CEAC submitted the notice of dispute in August 2013 or when a request for arbitration was submitted in the Third Arbitration.[530] The Respondent maintains that Article 26 applies "in the context of parallel proceedings initiated by different claimants in the same corporate chain," supporting that position with arbitral cases and commentary from Professor Gaillard.[531]

The Claimant's Position

222. The Claimant maintains that he has legal standing in the present case, and argues that *Orascom* is distinguishable on the basis that: (i) the claimant in that case had attempted to retry settled claims, and thereby review the terms of a settlement agreement; (ii) that claimant had admitted to orchestrating the proceedings for strategic reasons; and (iii) an award in that case would have constituted double recovery since the economic harm in the proceedings was the subject of the settlement.[532] By contrast, the Claimant argues that while the factual background of his claims

[525] Reply on Jurisdiction, ¶ 605(i), referring to *Orascom v. Algeria*, ¶¶ 415, 496 (**RLA-101**).
[526] Reply on Jurisdiction, ¶ 605(ii), referring to Counter-Memorial on Jurisdiction, ¶ 325.
[527] Reply on Jurisdiction, ¶ 605(iii).
[528] Statement of Defence, ¶¶ 465-467.
[529] Reply on Jurisdiction, ¶ 608.
[530] Reply on Jurisdiction, ¶¶ 615-617.
[531] Statement of Defence, ¶¶ 468-469; Reply on Jurisdiction, ¶¶ 610-614, citing E. Gaillard, "Abuse of Process in International Arbitration," *ICSID Review*, 2017, p. 9 (**RLA-105**); *Lanco International Inc. v. Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998, ¶ 31 (**RLA-104**).
[532] Counter-Memorial on Jurisdiction, ¶¶ 290-296, referring to *Orascom*, ¶¶ 521, 524-525, 531-532, 544.

in this case is similar to those CEAC brought in the Third Arbitration, those CEAC claims have "never been reviewed on the merits."[533]

223. The Claimant rejects the Respondent's invocation of Article 26 of the ICSID Convention to preclude him from bringing a dispute before this Tribunal. He argues that Article 26 applies only where both parties have consented to ICSID jurisdiction,[534] which Montenegro never did, as the ICSID tribunal confirmed in dismissing the case on that basis.[535] He also notes that, for standing purposes, he and CEAC are different entities.[536]

224. The Claimant also rejects the Respondent's reliance on Professor Gaillard's discussion of *Ampal v. Egypt*.[537] In his view, that case is inapposite as it related to parallel proceedings, whereas this case is initiated by the ultimate beneficial owner of the relevant investments following dismissal on jurisdictional grounds of claims brought by his investment vehicle.[538]

H. THE ABUSE OF PROCESS OBJECTION

The Respondent's Position

225. The Respondent's seventh objection is that by initiating four proceedings against Montenegro, the Claimant has abused the dispute settlement process and thus breached the Parties' duty to arbitrate in good faith.[539] The Respondent argues that the initiation of multiple proceedings in the context of "overall bad faith conduct" results in the inadmissibility of the Claimant's claims.[540] The Respondent asserts that the prohibition against abuse of process applies here as it is reflective of the principle of good faith, which, in the context of treaty claims, can be invoked "with regard to the context and the way in which a party, usually the investor, initiates its treaty claim seeking protection for its investment."[541] The Respondent adds that the Tribunal must

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[533] Counter-Memorial on Jurisdiction, ¶ 296, referring to **R-91**; Alexandrov, p. 30 (**CLA-132**); Rejoinder on Jurisdiction, ¶¶ 302-304 citing *Orascom*, ¶¶ 497-518; F. Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and Theory*, pp. 91-92 (**CLA-292**).

[534] Counter-Memorial on Jurisdiction, ¶¶ 297-307; Rejoinder on Jurisdiction, ¶¶ 305-306.

[535] Counter-Memorial on Jurisdiction, ¶ 303; Rejoinder on Jurisdiction, ¶ 308.

[536] Counter-Memorial on Jurisdiction, ¶ 304.

[537] Counter-Memorial on Jurisdiction, ¶¶ 304-306, referring to *Ampal-American Israel Corp. et al. v. Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016 (**CLA-142**); Gaillard (**RLA-105**).

[538] Counter-Memorial on Jurisdiction, ¶¶ 304-306.

[539] Statement of Defence, ¶¶ 475-477, 479, citing *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II, ¶ 54 (**RLA-106**); *Libananco Holdings Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶ 78 (**RLA-108**); Memorial on Jurisdiction, ¶ 56; *See also* Reply on Jurisdiction, ¶¶ 618-657.

[540] Respondent's Post-Hearing Brief, ¶ 211.

[541] Memorial on Jurisdiction, ¶¶ 58-60, citing *Abaclat et al. v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶¶ 646-649 (**RLA-119**). *See also* Statement of Defence, ¶¶ 478-479.

enforce compliance with this duty by declaring the Claimant's claims inadmissible.[542] According to the Respondent, three particular circumstances show why the Claimant's conduct constitutes an abuse of process.

226. First, the Respondent argues that the Claimant's initiation of this arbitration, in parallel with three other proceedings concerning the same impugned measures and the same alleged harm, constitutes an abuse of process.[543] In support of this contention, the Respondent cites the awards in *Orascom* and in *Eskosol v. Italy*, in which investment arbitral tribunals have held that an abuse of process may result from the initiation of multiple proceedings concerning the same dispute by entities at different levels of the same corporate chain or by a company and its sole shareholder.[544] The Respondent also relies on the decision of the tribunal in *RSM v. Grenada*, which found abusive a claimant's initiation of an ICSID arbitration over contractual claims that another tribunal already had decided.[545] The Respondent submits that the Claimant's attempt to distinguish its references to *Phoenix* and *Orascom* falls short because he focuses "on aspects of those cases that are not pertinent to Respondent's arguments."[546] The Respondent rejects the Claimant's invocation of *Caratube II* as based on circumstances different from those here.[547]

227. Second, the Respondent contends that the initiation of multiple proceedings is abusive as it gives the Claimant an illegitimate advantage by: (i) "multiplying the costs of proceedings for resolution of the same dispute"; (ii) "forcing Respondent into a position of having to defend against and win each of the arbitrations, while Claimant needs only succeed before a majority of one of the tribunals"; (iii) "promoting the possibility of conflicting decisions"; and (iv) "posing a risk of double recovery."[548]

228. Third, and finally, the Respondent argues that the Claimant's failure to personally join CEAC in the Third Arbitration regarding the same measures and the same dispute also constitutes an abuse of process.[549] According to the Respondent, "there seems to be widespread agreement that, where the subject matter in two proceedings is the same, there is an abuse of process if the claims asserted before the second forum could and should have been raised in the earlier proceedings."[550]

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[542] Statement of Defence, ¶ 480.
[543] Statement of Defence, ¶¶ 482-483, citing Gaillard, pp. 8-9 (**RLA-105**); Memorial on Jurisdiction, ¶ 62.
[544] Statement of Defence, ¶¶ 484-489, citing *Orascom v. Algeria*, ¶¶ 542, 543, 545, 548 (**RLA-101**); *Eskosol S.p.A. in liquidazione v. Italy*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017, ¶ 167 (**RLA-112**). *See* Reply on Jurisdiction, ¶¶ 629-634; Respondent's Post-Hearing Brief, ¶ 213.
[545] Memorial on Jurisdiction, ¶¶ 57, 64-66, citing *RSM v. Grenada*, ¶¶ 7.3.1-7.3.7 (**RLA-133**).
[546] Reply on Jurisdiction, ¶¶ 629-636.
[547] Reply on Jurisdiction, ¶¶ 637-641.
[548] Statement of Defence, ¶ 494. *See* Memorial on Jurisdiction, ¶ 63.
[549] Statement of Defence, ¶¶ 496-497.
[550] Statement of Defence, ¶ 495.

The Respondent submits that as the present case is "largely based on Montenegro's alleged breaches of the Settlement Agreement and KAP SHA," it "amounts to Claimant's further attempt to … 're-litigate and overturn the findings' of another tribunal." The Tribunal should, according to the Respondent, "dismiss [the Claimant's] abusive claims in their entirety."[551]

229. The Respondent submits that "adverse impact" is "not part of the test for establishing abuse of process," as the Claimant argues.[552] If it were, however, the Respondent explains that "the present case is rife with adverse impacts resulting from the duplicative claims."[553] These are: (i) the imposition of procedural constraints;[554] (ii) a general adverse impact on the State and its capacity and resources to defend multiple cases;[555] and (iii) an adverse impact on the Respondent's investment programs, investment openness and reputation.[556] The case also "constitutes one of many examples of Claimant's financial harassment of Respondent."[557]

The Claimant's Position

230. The Claimant submits that initiation of multiple proceedings does not generally constitute an abuse of process under international law.[558] He points out that the cases the Respondent invokes, *Phoenix* and *Orascom*, contain significant differences from this case, including a manipulation of the international investment protection system and attempts to receive double recovery through multiple claims.[559] The Claimant instead considers the *Caratube II* case to be instructive, as the tribunal there upheld jurisdiction and rejected abuse of process claims in circumstances where the previous proceedings had been dismissed for lack of jurisdiction.[560] The Claimant argues by analogy that this arbitration is the only forum in which he can enforce his investment rights, and therefore there is no abuse of process in spite of the previous related proceedings.[561]

231. The Claimant argues that the four proceedings, which the Respondent categorizes as reflecting an abuse of process, are "reasonable and fully justified in each particular case," and have no

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[551] Memorial on Jurisdiction, ¶ 66, citing *RSM v. Grenada*, ¶ 7.3.6 (**RLA-133**).
[552] Reply on Jurisdiction, ¶ 647.
[553] Reply on Jurisdiction, ¶ 649.
[554] Reply on Jurisdiction, ¶¶ 650-652.
[555] Reply on Jurisdiction, ¶¶ 653-654.
[556] Reply on Jurisdiction, ¶ 655.
[557] Memorial on Jurisdiction, ¶¶ 67-69.
[558] Hearing Transcript, 252:21-253:5.
[559] Counter-Memorial on Jurisdiction, ¶¶ 318-319, referring to *Phoenix Action, Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144 (**RLA-109**); *Orascom v. Algeria* (**RLA-101**); Hearing Transcript, 253:22-258:9, citing *Union Fenosa* (**CLA-350**).
[560] Counter-Memorial on Jurisdiction, ¶¶ 321-323, referring to *Caratube International Oil Co. LLP and Devincci Salah Hourani v. Kazakhstan,* ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶¶ 377-378, 383, 496-497 (**CLA-146**).
[561] Counter-Memorial on Jurisdiction, ¶ 323; Rejoinder on Jurisdiction, ¶ 310(b).

adverse impact on the present arbitration.[562] According to the Claimant, the proceedings are not identical nor mutually exclusive because: (i) the parties are not identical; (ii) there is no risk of double recovery as the cases arise from different causes of action; and (iii) the proceedings were initiated in different *fora* under different dispute-resolution clauses.[563]

232. The Claimant also denies that there has been an abuse of process, submitting that these proceedings were commenced in good faith. He argues that the Respondent's position is based on "purely prejudicial characterisations" and a failure to meet the high threshold of proof to establish abuse of process.[564]

233. Finally, the Claimant submits that "abuse of rights or abuse of process are not generally recognized under Swedish law."[565]

I. THE CONTRACT CLAIMS OBJECTION

234. The Respondent's penultimate objection is that the Claimant's claims are inadmissible because they do not arise from the FRY-Russia BIT but rather from contracts concluded by CEAC and En+.[566] It argues that the Claimant cannot pursue such claims in this arbitration because he is not party to the relevant contracts and because these contract claims in any event have been waived, settled or decided, and cannot be "repackaged and presented as treaty claims."[567] The Respondent maintains that this objection can and should be considered in a preliminary phase of proceedings.[568]

235. The Claimant maintains that the Tribunal should not consider this objection to admissibility during the jurisdictional stage. Alternatively, he submits that his claims are admissible because they are pure treaty claims under the BIT, that he may invoke provisions of the Settlement

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[562] Counter-Memorial on Jurisdiction, ¶¶ 324-332; Rejoinder on Jurisdiction, ¶¶ 310(c), 326; Claimant's Post-Hearing Brief, ¶ 101.

[563] Counter-Memorial on Jurisdiction, ¶¶ 326-332, referring to *Sanum v. Lao*, ¶¶ 366-367 (**CLA-144**); *RSM v. Grenada*, ¶ 7.1.5 (**RLA-133**); *Eskosol v. Italy*, ¶ 167 (**RLA-112**); *CME Czech Republic BV v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (**CLA-148**); *Czech Republic v. CME Czech Republic B.V.*, Judgment of SVEA Court of Appeal, Case No. T 8735-01, 15 May 2003, p. 98 (**CLA-149**); Hårdeman and Permyakova Report, ¶ 44-45 (**CER-3**); Rejoinder on Jurisdiction, ¶¶ 311(c), 327-334. *See also* Claimant's Post-Hearing Brief, ¶ 101; Hearing Transcript, 258:24-261:9.

[564] Rejoinder on Jurisdiction, ¶¶ 320-324, referring to *Chevron v. Ecuador (I)*, Interim Award, ¶ 144; *Renée Rose Levy and Gremcitel S.A. v. Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 186 (**RLA-75**); Claimant's Post-Hearing Brief, ¶ 101; Hearing Transcript, 253:7-21..

[565] Hearing Transcript, 258:13-14.

[566] Statement of Defence, ¶ 499; Memorial on Jurisdiction, ¶ 71; Respondent's Post-Hearing Brief, ¶ 189.

[567] Statement of Defence, ¶ 499.

[568] Reply on Jurisdiction, ¶¶ 660-670.

Agreement and the KAP SHA in support of his treaty claims, and that the Respondent acted in the exercise of its sovereign powers at all relevant times.[569]

236. The Parties' positions are summarized below with respect to the four embedded issues in the objection: (i) whether the Claimant may pursue claims arising from CEAC's and En+'s contracts (the KAP SPA, the RBN SPA, the Settlement Agreement and the KAP SHA); (ii) whether all claims arising out of CEAC's and En+'s contracts have been either waived, settled or decided; (iii) whether the alleged breaches of CEAC's and En+'s contracts may amount to breaches of the FRY-Russia BIT; and (iv) whether, even assuming that the Claimant's claims are not based in contract, the contractual issues should be deemed resolved.

1. Whether the Claimant may bring claims arising from CEAC's and En+'s contracts

The Respondent's Position

237. The Respondent submits that the Claimant's claims of indirect expropriation and denial of fair and equitable treatment – which he presents as treaty claims – are in fact contractual in nature.[570] It argues that these claims concern Montenegro's alleged breaches of obligations arising by the sole virtue of contracts entered into with CEAC or En+ (*i.e.*, the KAP SPA, RBN SPA, Settlement Agreement, and KAP SHA), and are thus purely matters of contract.[571] It submits that those claims relate, at least to some extent, to: (i) securing an electricity supply for KAP; (ii) ensuring KAP's financial liquidity and the restructuring of KAP's debts; (iii) reducing KAP and RBN's workforces; and (iv) KAP's governance.[572] The Respondent submits that a "claim under a BIT must be self-standing," which it says is not the case here.[573] The Respondent also contends that a "claimant's own characterisation of the legal foundation of its claims cannot be determinative because an investment treaty tribunal is not a court of general jurisdiction with adjudicative power to determine any disputes between investors and states."[574] It presents several cases as analogous to the present facts and in which the claimant's claims were held to be inadmissible, being *TSA*

[569] Counter-Memorial on Jurisdiction, ¶¶ 335-370. *See also* Claimant's Post-Hearing Brief, ¶ 100.
[570] Statement of Defence, ¶ 504; Reply on Jurisdiction, ¶¶ 671-691; Respondent's Post-Hearing Brief, ¶¶ 189-202.
[571] Statement of Defence, ¶¶ 505-536.
[572] Statement of Defence, ¶¶ 507-509. *See also* Hearing Transcript, 140:20-141:10.
[573] Hearing Transcript, 136:17-140:19.
[574] Statement of Defence, ¶¶ 502-503, citing Douglas, ¶ 503 (**RLA-69**); ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003, Judgment (Preliminary Objection), 6 November 2003, ¶ 16 (**RLA-117**); *SGS v. Philippines*, ¶ 26 (**RLA-118**). *See also* Respondent's Post-Hearing Brief, ¶ 190.

v. Argentina,[575] *Azinian v. Mexico*,[576] *Hamester v. Ghana*,[577] *Waste Management v. Mexico (II)*[578] and *Pantechniki v. Albania*,[579] on which basis the Respondent argues that the Claimant's claims "must suffer the same fate."[580]

238. As a result, argues the Respondent, the Claimant is not entitled to enforce rights under CEAC's or En+'s contracts as he is not a party to those agreements.[581] Moreover, the Respondent submits that it is "highly relevant" that the Second Arbitration "found no contract breaches towards CEAC, but rather the opposite: namely, that CEAC breached the Settlement Agreement."[582] For the Respondent, that the Claimant invokes a case "out of the same purported entitlement that it invoked in the contractual [Second Arbitration]" renders these claims inadmissible.[583]

239. In another vein, the Respondent argues that it is highly relevant that the "Claimant was not a party to the Settlement Agreement and the KAP SHA and, therefore, may not pursue claims arising under such contracts." The Respondent further questions "how contracts to which [the Claimant] was not a party could form the basis for his expectations or any other supposed right."[584]

The Claimant's Position

240. The Claimant submits that his claims are pure treaty claims arising out of the BIT, as they arise out of the Respondent's failure to meet its obligations thereunder as to fair and equitable treatment and expropriation.[585] He argues that while the contractual undertakings may provide a factual background to the treaty claims, they do not constitute their legal basis.[586] He further submits that the Respondent's conduct regarding electricity supply, bankruptcy proceedings, KAP's liquidity and debt restructuring, and the reduction of KAP and RBN's workforce breached legitimate expectations based on matters that fall outside the scope of contractual violations.[587]

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[575] Reply on Jurisdiction, ¶¶ 674-676, citing *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Concurring Opinion of Arbitrator Georges Abi-Saab, 19 December 2008, ¶¶ 4-5 (**RLA-393**).
[576] Reply on Jurisdiction, ¶¶ 677-679, citing *Azinian et al. v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 90 (**RLA-391**).
[577] Reply on Jurisdiction, ¶¶ 680-681, citing *Gustav F W Hamester GmbH & Co. KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 329 (**RLA-162**).
[578] Reply on Jurisdiction, ¶ 682, citing *Waste Management Inc. v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 175 (**RLA-394**).
[579] Reply on Jurisdiction, ¶¶ 683-687, citing *Pantechniki S.A. Contractors & Engineers v. Albania*, Award, 30 September 2009, ¶¶ 64, 67 (**RLA-179**).
[580] Reply on Jurisdiction, ¶ 688.
[581] Statement of Defence, ¶¶ 537-541, citing Douglas, ¶ 817 (**RLA-69**).
[582] Reply on Jurisdiction, ¶ 690.
[583] Reply on Jurisdiction, ¶¶ 690-691. *See also* Hearing Transcript 118:20-124:25.
[584] Reply on Jurisdiction, ¶¶ 724-725.
[585] Counter-Memorial on Jurisdiction, ¶ 346.
[586] Rejoinder on Jurisdiction, ¶ 347.
[587] Rejoinder on Jurisdiction, ¶¶ 348-357; Hearing Transcript, 270:17-271:11.

Similarly, he claims he has suffered a denial of justice and unlawful expropriation, which fall outside the scope of contractual violations and "are not covered by the objection."[588]

241. The Claimant argues that it is irrelevant that he was not a party to the contracts between CEAC, En+ and the Respondent because, on his view, his claims arise out of the BIT and not the Settlement Agreement or the KAP SHA.[589] He refers to the award in *Parkerings-Compagniet AS v. Lithuania*, where the tribunal considered that it was not relevant whether the claimant was a party to an underlying agreement, and contends that when ruling on breaches of a BIT, the only relevant status is that of the claimant as investor.[590]

2. Whether all claims arising from CEAC and En+ contracts have been waived, settled or decided

The Respondent's Position

242. The Respondent submits that even if the Claimant is entitled to pursue claims arising from CEAC's or En+'s contracts, "the waiver and settlement of these claims by CEAC and En+ should apply equally to Claimant himself in the context of the present case."[591] The Respondent makes three points in this regard.

243. First, it submits that all claims arising from events before the closing date of the Settlement Agreement (*i.e.*, 26 October 2010) were waived or settled under the Settlement Agreement itself.[592] These include claims based on the privatization of the Pljevlja Power Station and alleged breaches of the KAP SPA. Clause 27.1 of the Settlement Agreement provides:

> As per Closing CEAC on the one hand, and the [State of Montenegro] and the Parties 1-3 on the other hand waive any rights or claims they may have against each other and asserted in the Arbitration Proceedings. This waiver shall include any claim regardless of whether such claim is accepted or disputed, known or unknown, due or not due yet. CEAC, the Parties 1-3 and the [State of Montenegro] accept this waiver.[593]

As regards Montenegro's €1,500,000 outstanding debt towards KAP pursuant to Clause 7.1.9 and Annex 9 of the KAP SPA,[594] the Respondent notes that it is covered by Clause 17.2 of the Settlement Agreement, which provides that "[a]fter the Closing Date no provision of the SPAs

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588 Hearing Transcript, 264:3; Rejoinder on Jurisdiction, ¶¶ 358-361. *See also* Hearing Transcript, 264:25-266:3.
589 Counter-Memorial on Jurisdiction, ¶ 351.
590 Counter-Memorial on Jurisdiction, ¶¶ 349-353, referring to *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 258-259 (**RLA-159**).
591 Statement of Defence, ¶¶ 543-545; Reply on Jurisdiction, ¶¶ 718-745.
592 Statement of Defence, ¶¶ 547-550.
593 **C-5**, Clause 27.1.
594 *See* Statement of Claim, ¶¶ 5.54(b), 5.77.

and its annexes may give rise to any right or obligation of any Party or serve as a basis for any claim (present or future)."[595]

244. Second, the Respondent submits that most issues of fact and law the Claimant raises were already determined by the arbitral tribunal in the Second Arbitration, whose final award has the force of *res judicata*.[596] The authorities the Claimant invokes to argue that Swedish law is relevant are, according to the Respondent, "inapposite" and "fail to support his position."[597] Instead, "the law applicable to matters of jurisdiction and admissibility, which in the present case includes issues of *res judicata* and collateral estoppel, is primarily the BIT (*i.e.* international law)."[598] Relying on commentary, the Respondent submits that applying *res judicata* or the collateral estoppel principle to bar "investment tribunals from the reconsideration of issues already determined by other tribunals is 'a principled and fair approach to a sensible result.'"[599] The Respondent submits that the Claimant's interpretation of *RSM* and *Eskosol*, being that only direct or sole shareholders can be considered "identical" to their subsidiaries, is "wrong."[600] It contends that the Claimant has failed to explain why he should be excluded from "the single economic entity with CEAC and En+ when, in Claimant's own words, he personally directed all CEAC's and EN+'s actions for his own benefit."[601]

245. Third, the Respondent argues that all claims arising from events after March 2012 also were waived under the waiver of future claims relating to a "failure of restructuring" under Clause 28.5 of the Settlement Agreement.[602] The Respondent notes that this concerns the Claimant's claims relating to: "(i) the affordable long-term supply of electricity to KAP; (ii) negotiations of KAP's restructuring; (iii) the Deutsche Bank loan acceleration; and (iv) initiation of KAP's bankruptcy."[603] The Respondent submits that such waiver was made pursuant to Clause 28.5 of the Settlement Agreement, which states:

> Safe for the provisions of the clause 28.4.7, herein any other legal consequence of the Failure of this Agreement is expressly excluded. CEAC, En+, KAP and RBN shall have

[595] Statement of Defence, ¶¶ 551-552; **C-5**, Clause 17.2.
[596] Statement of Defence, ¶¶ 555-568.
[597] Reply on Jurisdiction, ¶¶ 726, 730-736, citing *Case Concerning the Factory at Chorzów (Germany v. Poland)*, P.C.I.J. (Ser. A), No. 13, Dissenting Opinion of Judge Anzilotti, 16 December 1927 (**CLA-155**).
[598] Reply on Jurisdiction, ¶¶ 727-729.
[599] Reply on Jurisdiction, ¶ 737, referring to G. Griffith and I. Seif, "Chapter 8: Work in Progress: Res Judicata and Issue Estoppel in Investment Arbitration," *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, N. Kaplan, M. Moser (eds) (Kluwer Law International, 2018), p. 126 (**RLA-399**).
[600] Reply on Jurisdiction, ¶¶ 738-742, citing *RSM v. Grenada* (**RLA-133**); *Eskosol v. Italy* (**RLA-112**).
[601] Reply on Jurisdiction, ¶ 738.
[602] Statement of Defence, ¶¶ 569-570.
[603] Statement of Defence, ¶ 569.

> no claim of whatsoever kind against the [State of Montenegro] or the Parties 1-3 as a result of such Failure or out of this Agreement.[604]

The Respondent adds that the tribunal in the Second Arbitration interpreted Clause 28.5 similarly, noting that under that provision, "Montenegro and its agencies also enjoy an equivalent and reciprocal exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by KAP, CEAC and En+ 'of whatsoever kind' arising from the Settlement Agreement."[605] In this respect, the Respondent refers to the Claimant's characterization of CEAC and EN+ as his "investment vehicles," and argues that this must mean that all claims relating to events after March 2012 have been waived.[606]

The Claimant's Position

246. The Claimant contends that the Respondent cannot rely on provisions of the Settlement Agreement or the KAP SHA to bar his claims because *res judicata* does not attach to the arbitral tribunal's determination in the Second Arbitration. The Claimant notes that international and Swedish law require identical parties, identical claims, and identical legal grounds in order for *res judicata* to apply,[607] and none of these is satisfied here.

247. First, the Claimant submits that he is not in privity with CEAC or En+ as he is not a director or shareholder of either. The Claimant notes a "strict requirement" of identity between parties under Swedish law for the purposes of *res judicata* and argues that none of the recognized exceptions apply to the current case.[608] He cites *CME Czech Republic B.V. v. Czech Republic* to counter the Respondent's proposition of a "single economic entity," and rejects the Respondent's reliance on *RSM v. Grenada* and *Eskosol v. Italy* as supportive of its privity argument. In respect of *RSM*, the Claimant notes that "it was particularly the fact of 100% ownership which drove the Tribunal to conclude on privity and binding force of the previous award."[609] In respect of *Eskosol*, he highlights the tribunal's comment that where a local company is wholly owned by a foreign shareholder, it might be abusive to permit subsequent arbitration over the same dispute by one after the other, noting that this situation does not apply to the Claimant's case.[610]

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[604] **C-5**, Clause 28.5.
[605] Statement of Defence, ¶ 571, citing **R-27**, ¶ 494.
[606] Statement of Defence, ¶ 572.
[607] Counter-Memorial on Jurisdiction, ¶ 355.
[608] Counter-Memorial on Jurisdiction, ¶¶ 356-358, referring to Hårdeman and Permyakova Report, ¶¶ 23-25 (**CER-3**); *Czech Republic v. CME*, p. 98 (**CLA-149**); Rejoinder on Jurisdiction, ¶ 380.
[609] Rejoinder on Jurisdiction, ¶ 383, citing *RSM v. Grenada*, ¶ 7.1.6 (**RLA-133**).
[610] Rejoinder on Jurisdiction, ¶ 384, citing *Eskosol v. Italy*, ¶ 167 (**RLA-112**).

248. Second, the Claimant argues that he relies on different legal grounds than in the Second Arbitration. As summarized above,[611] it is the Claimant's view that the First and Second Arbitrations arose out of contractual disputes based on the KAP and RBN SPAs, respectively, and not the BIT.[612] Further, according to the Claimant, "[t]he Parties appear to agree" that three of the Claimant's claims are "indisputably treaty claims." He submits that these are: (i) failure to afford fair and equitable treatment, with regards to "breaching his legitimate expectations as to the conduct of KAP's bankruptcy proceedings and the acquisition of TPP Pljevlja," "wrongful commencement of the bankruptcy proceedings," "harassment of KAP's officials," and "denial of justice";[613] (ii) "indirect expropriation of the Claimant's investment by wrongful commencement of bankruptcy proceedings and exercise of influence over the bankruptcy proceedings";[614] and (iii) direct expropriation.[615]

249. Third, on the Claimant's view, the Respondent fails to distinguish between the statement of reasons and the operative part of the award in the Second Arbitration. According to the Claimant, both international law and Swedish law: (i) distinguish between these parts of an award; (ii) extend only *res judicata* to an award's operative parts; and (iii) do not extend the principles of *res judicata* to an award's reasoning.[616]

250. Fourth, the Claimant contends that the *lex arbitri* applies to matters of *res judicata* and that under Swedish law, the incorrect application of *res judicata* constitutes an incorrect assessment of jurisdiction and is a ground for setting aside an award.[617]

3. Whether the alleged breaches of contract may amount to Treaty breaches

The Respondent's Position

251. The Respondent submits that, in any event, the Respondent's alleged breaches of contractual obligations owed to CEAC and En+ do not amount to breaches of the FRY-Russia BIT for at least four reasons: (i) a State's contractual violation is not by itself a violation of international

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611 *See* ¶ 240 above.
612 Counter-Memorial on Jurisdiction, ¶¶ 359; Rejoinder on Jurisdiction, ¶ 385, referring to *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, ¶¶ 169-172, (**CLA-160**); Hearing Transcript, 272:3-8.
613 Claimant's Post-Hearing Brief, ¶ 87(a), referring to Statement of Claim, sections V.C.6, V.C.1, V.F, V.E.8, V.G.
614 Claimant's Post-Hearing Brief, ¶ 87(b), referring to Statement of Claim, section VI.B.1.
615 Claimant's Post-Hearing Brief, ¶ 87(c), referring to Statement of Claim, section VI.B.2.
616 Counter-Memorial on Jurisdiction, ¶¶ 360-361, referring to Hårdeman and Permyakova Report, ¶¶ 16, 47-49 (**CER-3**); Rejoinder on Jurisdiction, ¶ 386.
617 Counter-Memorial on Jurisdiction, ¶ 362, referring to Hårdeman and Permyakova Report, ¶ 19 (**CER-3**); Rejoinder on Jurisdiction, ¶¶ 387-388, citing Douglas, p. 120 (**CLA-92**); Hårdeman and Permyakova Report, ¶ 54(i) (**CER-3**).

law; (ii) the Claimant cannot enforce rights arising from a contract to which he is not bound nor transform such contractual rights into his own alleged treaty rights; (iii) the Claimant failed to allege "any extra-contractual conduct in relation to Respondent's exercise of contractual rights"; and (iv) the Claimant has not proved that the Respondent's alleged contractual breaches resulted from the exercise of its sovereign authority so as to engage its international responsibility under the FRY-Russia BIT.[618]

252. The Respondent further submits that the Claimant "has failed even to state his *prima facie* case on the merits."[619] Specifically, the Respondent argues that the Claimant's claims fail to meet the jurisdictional requirements under the FRY-Russia BIT as to "(i) the factual matters, (ii) the legal norms invoked and (iii) the relief sought."[620] First, it submits that the Claimant "is unable, even *prima facie*, to establish the facts that he alleged as the basis for Montenegro's purported breaches."[621] The applicable test in this regard, according to the Respondent, requires that the claim be "well founded."[622] However, the arbitral tribunal in the Second Arbitration "effectively rejected in full all of CEAC's claims of Respondent's liability to CEAC for breaches of various contracts with Claimant's affiliates CEAC and En+."[623]

253. Second, the alleged facts, if established, would not give rise to the alleged Treaty breaches since, *inter alia*, the impugned actions of Montenegro were "manifestly non-sovereign."[624] The Respondent rejects the Claimant's argument that "any conduct attributable to the State is sovereign,"[625] instead arguing that "not all acts of the State or its organs are an exercise of sovereign power."[626]

254. With respect to the Claimant's expropriation claims, the Respondent adds that insofar as the Claimant's investment consists, in essence, of purely contractual rights, such rights "cannot be expropriated because they are incapable of being alienated to a third party."[627] With respect to the Claimant's legitimate expectations claims, the Respondent submits that they are based in contract, as the relevant obligations invoked "could only arise on the basis of a contract"[628] or a

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[618] Statement of Defence, ¶¶ 574-583; Reply on Jurisdiction, ¶¶ 692-717. *See also* Respondent's Post-Hearing Brief, ¶ 194.
[619] Memorial on Jurisdiction, ¶¶ 72-87. *See also* Hearing Transcript, 125:1-18.
[620] Memorial on Jurisdiction, ¶ 74, referring to *Total v. Argentina*, ¶ 52 (**RLA-229**).
[621] Memorial on Jurisdiction, ¶ 78.
[622] Hearing Transcript, 125:19-128:16. .
[623] Memorial on Jurisdiction, ¶ 78. *See also* Hearing Transcript, 128:23-129:10.
[624] Memorial on Jurisdiction, ¶ 85. *See also* Hearing Transcript, 134:7-14.
[625] Respondent's Post-Hearing Brief, ¶ 197, referring to Hearing Transcript, 266:21-268:12, Counter-Memorial on Jurisdiction, ¶¶ 372-376.
[626] Respondent's Post-Hearing Brief, ¶ 197. *See also* Respondent's Post-Hearing Brief, ¶¶ 197-200; Hearing Transcript, 134:15-135:24.
[627] Memorial on Jurisdiction, ¶ 88; Respondent's Post-Hearing Brief, ¶ 196.
[628] Respondent's Post-Hearing Brief, ¶ 195(i).

"general statute," which is "without a specific representation made by the State to the individual investor" and cannot give rise to legitimate expectations.[629]

The Claimant's Position

255. The Claimant contends that the alleged breaches of contract constitute violations of the BIT because the Respondent acted in the exercise of its sovereign powers and the relevant conduct was attributable to the State at all times.[630] He submits that sovereign conduct is more than simply the adoption of legislation, and argues that "an aggregate of state's acts" may amount to a breach of a BIT.[631] He also argues that it is a well-settled rule that the conduct of a State organ is considered to be an act of that State,[632] and that it becomes irrelevant whether that conduct is commercial if it is accompanied by a denial of justice, as the Claimant submits is the case.[633]

256. In particular, the Claimant contends that the following actions by Montenegro were a clear exercise of its sovereign powers: (i) the Montenegrin Parliament's mandate that the Government "take over control of KAP" from "the foreign partner"; (ii) entering into and performing contractual agreements with CEAC and En+, stating that its primary goal was to support KAP and RBN so that they can "once again fulfil their important role within the Montenegrin economy," and agreeing to issue "sovereign payment guarantees" to KAP's lenders; [634] (iii) "failing to secure to KAP an affordable long-term supply of electricity" [635]; (iv) "expropriating the Claimant's investment"[636]; and (v) "failing to cooperate in KAP and RBN's workforce reduction."[637]

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[629] Respondent's Post-Hearing Brief, ¶ 195(ii).

[630] Counter-Memorial on Jurisdiction, ¶ 365; Rejoinder on Jurisdiction, ¶¶ 369-371; Claimant's Post-Hearing Brief, ¶ 88; Hearing Transcript, 266:16-268:7.

[631] Counter-Memorial on Jurisdiction, ¶¶ 366-370, referring to *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina (Vivendi I)*, ICSID Case No. ARB/97/3, Decision of Annulment, 3 July 2002, ¶ 112 (**RLA-120**); *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 360, 364 (**RLA-142**); *Luigiterzo Bosca v. Lithuania*, PCA Case No. 2011-04, Award, 17 May 2013, ¶ 297 (**CLA-156**); Rejoinder on Jurisdiction, ¶¶ 370-371; Claimant's Post-Hearing Brief, ¶ 89.

[632] Rejoinder on Jurisdiction, ¶¶ 372-374, citing Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 4 (**RLA-200**); *Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.89 (**CLA-301**); *Eureko v. Poland*, ¶ 127 (**RLA-63**); *Flemingo v. Poland*, ¶ 424 (**CLA-258**).

[633] Rejoinder on Jurisdiction, ¶¶ 375-377, citing R. D. Bishop, J. Crawford, W. M. Reisman, *Foreign Investment Disputes: Cases, Materials, and Commentary* (2005), p. 802 (**CLA-302**); Hearing Transcript, 268:1-270:8.

[634] Counter-Memorial on Jurisdiction, ¶ 365; Rejoinder on Jurisdiction ¶¶ 372, 375, referring to Resolution of the Parliament of Montenegro, dated 8 June 2012 (**C-133**). *See also* Statement of Claim, ¶ 4.13.

[635] Claimant's Post-Hearing Brief, ¶ 91.

[636] Claimant's Post-Hearing Brief, ¶ 97.

[637] Claimant's Post-Hearing Brief, ¶ 99.

257. Finally, the Claimant argues that the question of whether all acts and omissions by the Respondent and its state organs possess a sovereign character is a matter for the merits.[638] This is because, according to the Claimant, in this jurisdictional phase the Tribunal "has a limited ability to scrutinize the factual background of claims and evidence submitted by the Parties."[639]

4. Whether underlying contractual issues should be deemed resolved even if the claims are not based in contract

The Respondent's Position

258. Should the Tribunal find that the Claimant's claims are not based in contract, the Respondent argues that the Tribunal is bound by the findings of the tribunal in the Second Arbitration by virtue of the doctrine of collateral estoppel.[640] Such a determination "does not require scrutiny of the facts," but instead could be based simply on a comparison between CEAC's assertions in the Second Arbitration and the Claimant's claims here, which would reveal that the relevant issues already have been decided.[641]

259. The Respondent submits that the findings of the tribunal in the Second Arbitration "fulfil all the conditions for the application of the collateral estoppel doctrine" because: (i) the facts and issues discussed in the Second Arbitration were "distinctly put in issue"; (ii) the tribunal in the Second Arbitration decided them; and (iii) "the resolution of those issues was necessary for resolving claims pursued by CEAC and Respondent before the [Second Arbitration] tribunal."[642]

The Claimant's Position

260. The Claimant submits that the present proceedings are his only available forum to pursue investment treaty claims against Montenegro.[643] He points out that while CEAC's claims in the Third Arbitration were identical to those he submits here, those claims were never reviewed on the merits and therefore no *res judicata* attaches.[644]

261. As for collateral estoppel, the Claimant submits that application of that principle also requires "identity of parties, objects and cause." He refers to *Eskosol v. Italy*, where the arbitral tribunal

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[638] Claimant's Post-Hearing Brief, ¶¶ 90, 100.
[639] Claimant's Post-Hearing Brief, ¶ 90.
[640] Statement of Defence, ¶¶ 584-591, citing *RSM v. Grenada*, ¶¶ 7.1.1-7.1.2, 7.1.5, 7.1.7 (**RLA-133**); M. Stanivuković, "Investment Arbitration: Effects of an Arbitral Award Rendered in a Related Contractual Dispute," Yearbook on International Arbitration (2015), p. 150 (**RLA-111**); Reply on Jurisdiction, ¶¶ 743-745, citing *Eskosol v. Italy*, ¶ 167 (**RLA-112**). *See also* Hearing Transcript, 130:20-133:15.
[641] Respondent's Post-Hearing Brief, ¶ 201; Reply on Jurisdiction, ¶¶ 743-745.
[642] Statement of Defence, ¶ 590.
[643] Counter-Memorial on Jurisdiction, ¶ 332; Rejoinder on Jurisdiction, ¶ 334.
[644] Counter-Memorial on Jurisdiction, ¶ 331(c); Rejoinder on Jurisdiction, ¶ 329.

rejected the respondent's objection because the parties were not identical.[645] The Claimant contends that since he is not identical to CEAC or En+, there is no party identity in this case and the doctrine of collateral estoppel does not apply.[646]

J. THE TIME BAR OBJECTION

The Respondent's Position

262. The Respondent's final objection is that the Claimant lost any right he might have had to submit a claim for breach of his purported legitimate expectation of acquiring the Pljevlja Power Station by neglecting to exercise such right for nearly ten years.[647] According to the Respondent, the general international law principle of prescription (that "a claimant shall not unreasonably delay the pursuit of its claim") applies and renders the Claimant's claims inadmissible.[648] The Respondent submits that the principle of prescription is demonstrated through the decisions of arbitral tribunals in *Nordzucker* and *Grand River*,[649] and is also supported authority "recognizing prescription as a separate, and independent, ground for the loss of the right to claim under international law."[650]

263. In light of this, the Respondent argues that the Claimant's TPP Pljevlja claim is time-barred because: (i) his "delay in pursuit of his claim is unreasonable";[651] (ii) that delay is "solely and entirely attributable to Claimant";[652] and (iii) such delay caused prejudice to the Respondent, including complications in gathering evidence.[653]

The Claimant's Position

264. The Claimant argues that this objection should be dismissed because "neither international law, nor the FRY-Russia Treaty set any time limits with respect to investment claims."[654] According to the Claimant, international law establishes no general time limits for bringing investment

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645 Rejoinder on Jurisdiction, ¶¶ 391-393, citing *Eskosol v. Italy*, ¶ 171 (**RLA-112**).
646 Rejoinder on Jurisdiction, ¶¶ 380, 394.
647 Statement of Defence, ¶¶ 592-593, 598-601. *See* Statement of Claim, ¶¶ 5.44-5.47; Memorial on Jurisdiction, ¶ 92; Reply on Jurisdiction, ¶¶ 768-775.
648 Statement of Defence, ¶¶ 594, 597; Reply on Jurisdiction, ¶¶ 761-767.
649 Reply on Jurisdiction, ¶¶ 761-764, referring to Statement of Defence, ¶¶ 594-596.
650 Reply on Jurisdiction, ¶ 767, referring to I. Brownlie, *Principles of Public International Law* (5th ed., Oxford UP, 1998), pp. 506, 507 (**RLA-30**); *Nordzucker AG v. Poland*, UNCITRAL, Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-136**).
651 Reply on Jurisdiction, ¶¶ 768-771.
652 Reply on Jurisdiction, ¶ 772.
653 Reply on Jurisdiction, ¶¶ 773-774.
654 Counter-Memorial on Jurisdiction, ¶¶ 379-384; Rejoinder on Jurisdiction, ¶¶395, 398, 400, referring to *Bosva v. Lithuania*, ¶ 120 (**CLA-156**); P. J. Martinez-Fraga and J. M. Pampin, "Reconceptualising the Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform beyond Historical Legacies," *NYU Journal of International Law and Politics*, Vol. 50 (2018), p. 862 (**CLA-303**).

claims,[655] and the BIT has no precise rule on the matter either.[656] The Claimant also argues that the Respondent has not supported by evidence its assertions as to unreasonable delay and disadvantage.[657]

265. The Claimant disputes the Respondent's reliance on *Nordzucker* and *Grand River*. According to the Claimant, the *Nordzucker* tribunal found that international law does not specify "the time period which must elapse in order to render extinctive prescription operative," nor did it find that only unreasonable delay needs to be established. He submits that *Grand River* dealt with a specific time limit in NAFTA which does not apply to the FRY-Russia BIT.[658] The Claimant further contends that arbitral tribunals have referred to requirements to establish extinctive prescription, namely: (i) the existence of unreasonable delay; (ii) that such delay be attributable to the claimant; (iii) that, as a result, the respondent State has been severely prejudiced and suffered harm.[659] The Claimant submits that because neither Party has been actually disadvantaged by the passage of time in this case, "there are no grounds to argue extinctive prescription."[660]

VIII. TRIBUNAL'S ANALYSIS OF THE BIT VALIDITY OBJECTION

266. The Tribunal begins its analysis with the Respondent's principal objection: that the FRY-Russia BIT is not valid and binding on Montenegro. That is the logical place to start, since the FRY-Russia BIT is the only basis for jurisdiction that the Claimant invokes, and all of its other objections in one way or the other depend on particular terms of that BIT. If the FRY-Russia BIT is not operative to begin with, this Tribunal is not empowered even to consider the remaining objections.

267. In assessing the BIT Validity Objection, the Tribunal is grateful for the assistance provided by both Parties' experts in this area, Professor Tams for the Claimant and Professor Hollis for the Respondent. The Tribunal found their detailed reports and oral presentations to be both clear and

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[655] Counter-Memorial on Jurisdiction, ¶ 380, citing *UAB v. Latvia*, ¶ 535 (**CLA-162**); *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Reports 1992, p. 240, ¶ 32 (**CLA-159**); *Gavazzi v. Romania*, ¶ 147 (**CLA-160**); *Salini v. Argentina*, ¶ 84 (**CLA-161**); Rejoinder on Jurisdiction, ¶ 401, referring to *Fuchs v. Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, ¶ 263 (**CLA-304**); *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, 3 March 2010, Award (**CLA-32**); B.E. King, "Prescription of Claims in International Law," *British Yearbook on International Law*, Vol. 15 (1934), pp. 88-90 (**CLA-305**); *Salini v. Argentina*, ¶¶ 88-90 (**CLA-161**).

[656] Counter-Memorial on Jurisdiction, ¶ 380, referring to Statement of Defence, ¶ 594.

[657] Rejoinder on Jurisdiction, ¶ 402.

[658] Counter-Memorial on Jurisdiction, ¶¶ 381-382, citing *Nordzucker v. Poland* (**RLA-136**); *AES Corp. and Tau Power B.V. v. Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 179 (**CLA-163**). *See also* Rejoinder on Jurisdiction, ¶ 403.

[659] Counter-Memorial on Jurisdiction, ¶ 383, referring to *Salini v. Argentina*, ¶¶ 88, 90 (**CLA-161**).

[660] Counter-Memorial on Jurisdiction, ¶ 383; Rejoinder on Jurisdiction, ¶ 403.

appropriately nuanced, as befits the complicated area of State succession. While the Tribunal's ruling is based on its own assessment of the applicable law and the evidence, not in deference to the opinions of either expert, it found their sophisticated analyses of the underlying issues to be extremely helpful in clarifying the important matters in dispute.

A. PRELIMINARY REMARKS: THE ISSUES NOT IN DISPUTE

268. Before analyzing the various matters in contention between the Parties, it is useful to summarize briefly those which appear not to be in dispute.

269. First, there is no bilateral investment treaty that was directly negotiated, signed and ratified between Russia and Montenegro *as such*, following Montenegro's declaration of independence from the State Union in 2006. It is precisely because of the absence of any such directly signed BIT that the question arises, in this case, whether Montenegro and Russia nonetheless are bound to each other under the earlier BIT that Russia negotiated and signed with the FRY. The Parties agree that the FRY-Russia BIT became binding on the State Union, following the restructuring of the FRY into the State Union in 2003.[661] The question is whether the FRY-Russia BIT thereafter became binding on Montenegro after it seceded from the State Union in 2006.

270. The Parties also appear to agree broadly on the *bodies* of law applicable to this question, although not necessarily with the interpretation of various principles arising under such law. First, both Montenegro and Russia are parties to the VCLT, which in Part II sets out certain general principles regarding the "Conclusion and Entry into Force of Treaties."[662] As set out in VCLT Article 11, this includes the notion that there are various "Means of Expressing Consent to be Bound by a Treaty," including "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[663] At the same time, however, the VCLT specifies in its Article 73 that "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States …."[664] In other words, the issue of State succession to treaties is considered a special area that the VCLT recognized would be subject to its own separate regime.

271. As to that separate regime, the Parties further agree that it is *not* governed for purposes of this case by the VCSST. In particular, while the VCSST undoubtedly was an effort to achieve for State succession the same type of "codification and progressive development of the law" that

[661] Hearing Transcript, 30:11-18.
[662] VCLT, Part II (**CLA-2**).
[663] VCLT, Article 11 (**CLA-2**).
[664] VCLT, Article 73 (**CLA-2**).

motivated the development of the VCLT,[665] the VCSST has never achieved the broad acceptance that the VCLT commands. Overall, while some 116 States are now parties to the VCLT, only 23 States have ratified the VCSST.[666] Of more immediate import, although Montenegro is a party to the VCSST, Russia is not. The Parties agree that as a result, Montenegro is not bound by the VCSST's provisions with respect to its bilateral relations with Russia.[667] The only way any VCSST provision could apply with respect to the Montenegro-Russia relationship is if such a provision reflected customary international law that would govern in any event, irrespective of any codification into the VCSST.

272. However, while scholars consider that a few provisions in the VCSST do reflect customary international law,[668] they also agree that many other VCSST provisions do *not* have this status.[669] Of particular import for this case, the Parties agree that Article 34 of the VCSST, which provides a presumption of automatic succession to all treaties previously in force for a predecessor State except in the case of newly independent States emerging from colonization,[670] is *not* a

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[665] VCLT, Preamble (**CLA-2**); *see also* VCSST, Preamble (**CLA-166**) (affirming that "questions of the law of treaties *other than those that may arise from a succession of States* are governed by the relevant rules of international law, including those rules of customary international law which are embodied in the [VCLT]") (emphasis added).

[666] *Compare* United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (VCLT) and https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en (VCSST); *see also* B. Stern, "General Concluding Remarks," *Dissolution, Continuation and Succession in Eastern Europe* (B. Stern, ed., 1998), p. 202 (**RLA-403**) (noting that VCSST rules "are conventionally binding only upon a very small number of States").

[667] Statement of Defence, ¶ 234 (the Respondent contending that the VCSST "binds only its State parties i.e., when all or both relevant States in question are party to the VCSST"); Counter-Memorial on Jurisdiction, ¶¶ 128-129 (the Claimant acknowledging that "[u]nlike Montenegro, Russia is not a party to VCSST. Claimant thus agrees with Respondent that in relations with Russia, Montenegro cannot be deemed a universal continuator (successor) of the [State Union] under the VCSST regime").

[668] *See, e.g.*, Stern, pp. 164-165 (**RLA-223**) (considering that the rules reflected in the VCSST's initial Articles 4 through 14 "are customary," in the sense that they are "merely *the translation, in the field of State succession, of fundamental general principles of international law*") (emphasis added).

[669] *See, e.g.*, Stern, p. 202 (**RLA-403**) (noting that "the doctrine … is almost unanimous in considering that the [VCSST] contained more progressive developments than rules designed to codify pre-existing customary law," which "did not exist at the time of elaboration of the Convention" in 1978); Crawford, p. 424 (**RLA-218**) (noting that the VCSST was "criticized for departing from established international law"); Aust, p. 365 (**RLA-219**) (describing the VCSST as "contain[ing] much that is a progressive development … Overall, the [VCSST] is not a reliable guide to such rules of customary law on treaty succession as there may be."); D. Vagts, *State Succession: The Codifiers' View*, p. 276 (1993) (**CLA-321**) (the VCSST's "ambition also included a certain measure of 'progressive development' of the law as well as pure codification of existing law"); *see also* C. Tams, "State Succession to Investment Treaties: Mapping the Issues," *ICSID Review*, Vol. 31, No. 2 (2016), p. 325 (2016) (**RLA-298**) (describing the VCSST as "an over-ambitious attempt at codification based on overarching principle").

[670] VCSST, Article 34(1) ("When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed …") (**CLA-166**). Article 34(2) makes clear that Article 34(1) establishes a presumption rather than an invariable rule, by providing that "Paragraph 1 does not apply if: (a) the States concerned otherwise agree; or (b) it appears from the treaty or is otherwise established that the application of the treaty in respect

codification of any general customary international law rule of automaticity.[671] This is consistent with the view of most scholars that there is no overarching customary international law presumption of automatic succession. Indeed, many believe that in the context of bilateral treaties, the opposite presumption (a "clean slate" doctrine) must apply, subject to certain exceptions.[672] Even those who observe some trends towards revisiting the "clean slate" approach acknowledge that it would be premature to posit the universal acceptance of an opposite presumption, namely automatic continuity.[673] Thus, putting the issue of "presumptions" aside, the most that can be said regarding bilateral treaties in general is that, as a practical matter, "the fate of these treaties is generally decided through negotiation between the successor State and the other party."[674]

273. Given these considerations, it appears undisputed that the BIT Validity Objection must be decided not as a matter of VCSST interpretation, or under some overarching customary international law principle of automatic succession to all bilateral treaties. Rather, the Objection will turn on one of two grounds the Parties have hotly contested, namely: (a) whether there is *something distinctive about BITs* that warrants recognition of a special customary international law principle of automatic succession in that specific context, or (b) whether even in the absence of such a principle, Montenegro and Russia should be *deemed to have agreed* to treaty continuity, either generally with respect to all bilateral treaties previously in force for the State Union or specifically with respect to the FRY-Russia BIT.

274. The Tribunal examines these contentions in turn. First, in Part VIII.B below, it assesses the Claimant's contention that Montenegro automatically succeeded to the FRY-Russia BIT based

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of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation"). VCSST, Article 34(2) (**CLA-166**).

671 Statement of Defence, ¶ 235 (Respondent contending that "[t]here is no basis to contend that [Article 34] forms part of customary international law"); Counter-Memorial on Jurisdiction, ¶ 128 (Claimant agreeing that "[t]he automatic succession rule embodied in Article 34 … has not yet become customary international law").

672 *See, e.g.*, Brownlie, p. 663 (**RLA-30**) ("as a matter of general principle a new state … cannot be bound by a treaty, and in addition other parties to a treaty are not bound to accept a new party … by operation of law. The rule of non-transmissibility … applies both to secession of 'newly independent states' … and to other appearances of new states by the union or dissolution of states"); Crawford, pp. 438-439 (**RLA-218**) (same); Aust, pp. 365-366 (**RLA-219**) ("[a] new State does not succeed automatically to bilateral treaties, other than to territorial treaties and suchlike"); Shaw, pp 971, 974 (**RLA-220**) ("In the case of bilateral treaties, … the presumption is one of non-succession …. With regard to the seceding territory itself, the leading view appears to be that the newly created state will commence international life free from the treaty rights and obligations applicable to its former sovereign").

673 *See, e.g.*, Shaw, pp. 735-736, 740 (**RLA-282**) (while "[t]he presumption in the past has been one of non-succession, … there has been some more recent practice demonstrating a tendency to question or to reverse this rule or presumption," but "[p]ractice has, however, been inconsistent, and it would be premature to assert that a new rule or presumption had been established as a matter of international law"; "Whether … it is possible to say that the international community is moving towards a position of a presumption of continuity, is in reality difficult to establish.").

674 International Law Association, Final Report on Aspects of the Law of State Succession, Part V (Conclusions), ¶ 8 (2008) (**RLA-407**).

on a purported customary international law rule of automatic succession for BITs. In the following part VIII.C, the Tribunal assesses the evidence of an agreement on succession, either express or tacit, examining in sequence the implications of: (i) Montenegro's unilateral statements in 2006 (Section VIII.C.1); (ii) the 2006 exchange of diplomatic notes between Montenegro and Russia (Section VIII.C.2); (iii) any useful inferences from Montenegro's succession practice with other States (Section VIII.C.3); (iv) any useful inferences from the status of other FRY-Russia treaties as between Russia and Montenegro (Section VIII.C.4); (v) any useful inferences from public reporting of BITs in force (Section VIII.C.5); and finally, (vi) any useful inferences from the several letters issued between 2016 and 2018 by the Russian Ministry of Foreign Affairs (Section VIII.C.6). The Tribunal's conclusion on the BIT Validity Objection is set forth in Section VIII.D.

B. AUTOMATIC SUCCESSION TO BITS

275. The fact that customary international law does not dictate a rule or presumption of automatic succession for treaties *in general* does not, of course, preclude the possibility of such a customary law rule or presumption existing for one or more *special subsets* of treaties. Indeed, it is widely recognized that a rule of continuity exists in at least some areas, such as for treaties establishing boundaries between neighboring states,[675] or for so-called "territorial treaties" addressing the use of a territory for the benefit of another State (*e.g.*, water or navigation rights).[676]

276. The Claimant contends that the Tribunal should recognize a similar rule of automatic succession in the context of BITs. As discussed in Section VII.A.2(a) above, its argument proceeds essentially by analogy, *first* positing that the weight of jurisprudence now supports recognizing an automatic succession rule for multilateral human rights conventions,[677] and *second* contending that there are critical commonalities between such conventions and investment treaties that support extending an equivalent rule to BITs.[678] The Respondent disagrees with both propositions, raising doubts about whether an automatic succession rule is now definitively established for human rights conventions,[679] but arguing that even if that were the case, there

[675] *See, e.g.*, Stern, p. 165 (**RLA-223**) (stating that there is a customary rule of compliance with boundary treaties agreed by a predecessor State, which Article 11 of the VCSST duly reflects); Crawford, p. 439 (**RLA-218**) (describing boundary treaties as an "important exception" to the clean slate doctrine); A. Zimmerman, J. Devaney, "Succession to Treaties and the Inherent Limits of International Law," *Research Handbook on the Law of Treaties* (2014), pp. 532-533 (**CLA-168**).

[676] *See, e.g.*, Stern, p. 195 (**CLA-175**) (stating that "no one disputes" the rule reflected in Article 12 of the VCSST, which has a "customary character"); Aust, p. 366 (**RLA-219**); Shaw, p. 735 (**RLA-282**).

[677] Counter-Memorial on Jurisdiction, ¶ 130; Rejoinder on Jurisdiction, ¶¶ 34, 38-40; Claimant's Post-Hearing Brief, ¶ 16.

[678] Counter-Memorial on Jurisdiction, ¶¶ 131-133; Rejoinder on Jurisdiction, ¶¶ 35, 41, 49-61; Claimant's Post-Hearing Brief, ¶¶ 17-19.

[679] Reply on Jurisdiction, ¶¶ 66-68; Respondent's Post-Hearing Brief, ¶¶ 6, 24.

would be no basis for recognizing a comparable customary rule in the very different context of BITs.[680]

277. The Tribunal does not agree with this sequence of analysis. While the issue of succession to human rights conventions is an important and fascinating topic, there is no need for this Tribunal to express an opinion on that issue, which the ICJ itself has declined thus far to resolve.[681] There is simply no state practice or *opinio juris* in existence to support a principle of automatic succession for bilateral investment treaties. The Tribunal cannot endorse a new rule of customary international law by analogy alone in circumstances where that analogy has no grounding in positive law. There are, moreover, structural differences between human rights law and investment law that would make such an analogy controversial. Basic human rights are not contingent: they are vested regardless of specific qualifications such as citizenship or other legal entitlements. Rights under an investment treaty are very much contingent: only certain individuals or juridical persons possessing a particular nationality that have taken positive steps to acquire an investment in a particular State are granted the privileges envisaged by the treaty. The fact that international human rights instruments and investment treaties confer rights upon non-state actors is a fragile basis to construct an analogy because it ignores the fundamental assumptions underlying each distinct field of international law.

278. Yet the Claimant's argument for automatic succession for BITs rests largely on this analogy. This runs counter to the ICJ's recognition that establishing a rule of customary international law requires a consistent set of acts amounting to a "settled practice" among States as well as

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[680] Reply on Jurisdiction, ¶¶ 74-84; Respondent's Post-Hearing Brief, ¶¶ 7, 27-39.

[681] The issue was argued to the ICJ in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, where Bosnia and Herzegovina argued that it automatically became a party to the Genocide Convention on the date of its independence and Yugoslavia denied that was the case. The Court declined to make a determination on the point, on the grounds that even absent automatic succession, Bosnia and Herzegovina became a party as a result of its subsequent Notice of Succession. *See* ICJ Reports, 1996, p. 612 (**CLA-177**). The fact that the ICJ did not rule on the mechanism through which Bosnia and Herzegovina became a party to the Genocide Convention has been elaborated on in an article by Professor Stern, in this way: "With regards to Bosnia's participation in the Genocide Convention, the reasoning of the Court is hardly enlightening. It begins by acknowledging that Yugoslavia was a party to the Convention; it then notes that Bosnia gained independence and has become a Member of the United Nations; it concludes that to the extent that the Convention is open to 'any Member of the United Nations', Bosnia 'could become a party to the Convention through the mechanism of State succession'. However, the Court does not elaborate on the precise mechanism of state succession by which Bosnia became a party to the Convention. In other words, the Court contemplates all the possible modalities of Bosnian succession to the Genocide Convention: automatic succession, retroactive succession to the date of independence resulting from the notification of succession, and non-retroactive succession from the date of notification of succession. And just to ensure that all hypotheses remain open, the Court does not even formally rule out the possibility that Bosnia may be considered as having acceded to the Genocide Convention – which is in contradiction with the recognition that state succession occurred…" B. Stern, "Les questions de succession d'Etats dans l'Affaire relative à l'Application de la convention pour la prévention et la répression du crime de génocide devant la Cour internationale de Justice," in N. Ando, et al. (eds), *Liber Amicorum Judge Shigura Oda, La Haye* (Kluwer, 2002), pp. 285-305 (unofficial translation from French).

"evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it."[682] With respect to the first element, the State practice "should have been both extensive and virtually uniform,"[683] both for the particular State whose behavior is being considered and collectively among different States.[684] If there is too much inconsistency between the practice of States, this demonstrates the absence of sufficient practice to support a customary international law rule. In the *Fisheries* case, for example, the ICJ pointed out that while certain States had adopted a particular rule "both in their national law and in their treaties and conventions, … other States have adopted a different limit. Consequently, the … rule has not acquired the authority of a general rule of international law."[685]

279. In other words, new propositions of customary international law are never easy to establish. They would be particularly difficult to establish in the area of State succession, given certain realities of history and practice. First, it is incontrovertible that "State succession is a relatively rare occurrence," in light of the relative infrequency of "the birth and death of States raising problems of State succession."[686] Indeed, "before the disintegration of the former Soviet Union and the other socialist Republics, the only successions which had occurred since the drafting of the [VCSST] were a result of the process of decolonisation."[687] Even advancing the analysis to current times, there remain limited instances of State succession. Moreover, there are also significant differences in the ways that a "new State or States resulting from a territorial reorganisation may be regarded," including distinctions between "continuator" States that are viewed as continuing the legal identity of the former State, and "new" States emerging as a result of secession or dissolution.[688] Any search for consistent State practice regarding BIT succession would have to consider the potential relevance of these distinctions.[689]

280. In addition, there remains what Professor Stern has described as "the problem of interpreting and quantifying the significance of [the] practice: in other words, is it accompanied by any *opinio*

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[682] *See* International Law Commission, Third Report on Identification of Customary International Law, ¶ 13 (2015) (**RLA-297**) (quoting the *North Sea Continental Shelf* cases and several others); International Law Association, Final Report of the Committee on Formation of Customary (General) International Law, p. 6, ¶ 9 (2000) (**R-146**) (quoting the *North Sea Continental Shelf* and *Lotus* cases).
[683] *See* ILA Final Report, p. 20 (**R-146**) (quoting the *North Sea Continental Shelf* cases).
[684] *See* ILA Final Report, pp. 21-22 & n.51 (**R-146**) (citing the *Fisheries* and *Asylum* cases).
[685] ILA Final Report, p. 22 (**R-146**) (quoting ICJ).
[686] Stern, p. 198 (**RLA-403**).
[687] Stern, p. 202 (**RLA-403**).
[688] Stern, pp. 199-200 (**RLA-403**).
[689] *See*, *e.g.*, Brownlie, p. 663 (**RLA-30**) (stating that "the case where a continuing identity of legal personality is established is reserved for separate treatment," distinct from that applicable in the context of "cession, where the 'losing' state is not extinguished"); Crawford, pp. 426-427 (**RLA-218**) (positing a "'fundamental distinction' between … cases where the same state continues to exist" and those involving "the replacement of one state by another with respect to a particular territory").

juris or not?"[690] In other words, do successor States accept the continuing validity of BITs entered into by their predecessors because they consider themselves *bound* to succeed to those BITs as a matter of customary international law, or alternatively because they *choose* to avail themselves of the perceived benefits of those BITs, as a matter of free will? And does the same calculus apply to the counterparty State: does it accept a BIT with a successor State because it considers itself legally bound to extend the same commitments it made to the predecessor State, or does it agree to do so as an act of political choice? Even in the context of a broad range of bilateral agreements, not limited to the specific context of BITs, State practice in the succession area "besides … being rare, is often ambiguous."[691]

281. Applying these inquiries to this case, the Tribunal starts by observing that no international tribunal has accepted that there is a principle of automatic succession for bilateral investment treaties. To the contrary, tribunals have assumed that specific evidence of consent to a particular predecessor BIT is required.[692] Of course, this may be because the notion of a potential customary international law doctrine of BIT succession may not even have been floated in prior cases, making it apparently an issue of first impression in this one.[693] Indeed, even in the area of scholarship as distinct from caselaw, the possibility that customary international law regulates BIT succession appears to have been analyzed by only a few commentators. Moreover, among the scarce articles that do exist, the authors do not make any assertive case for a clear practice of automatic succession to BITs having yet emerged.[694] Even Professor Tams, the Claimant's

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[690] Stern, p. 202 (**RLA-403**).

[691] Stern, p. 202 (**RLA-403**); *see also* M. Craven, "The Problem of State Succession and the Identity of States Under International Law," *European Journal of International Law*, Vol. 9, pp. 150-151 (1998) (**RLA-422**) (noting that "state practice will rarely provide a substantive explanation for the fact of legal continuity. The assumption of rights and duties on the part of a successor state may variably be interpreted either as an explicit recognition of the operation of a norm of succession or as an assumption *de novo* of certain international rights and duties …. In both cases, evidence of consent may be provided, but in the absence of an express statement as to its import it cannot necessarily be construed as a recognition of succession in law.").

[692] *See, e.g.*, *EURAM v. Slovakia*, Award on Jurisdiction, ¶¶ 79, 81 (2012) (**RLA-224**) ("once Slovakia became an independent successor State, it could not be bound by the BIT, notwithstanding the fact that its predecessor State had signed and ratified the BIT, until it had taken the steps necessary to succeed to the BIT. Only once it had taken those steps could it be regarded as having concluded the BIT. … [T]he BIT would not have become applicable between Austria and the Respondent had it not been for the Exchange of Notes. The Tribunal therefore concludes that the BIT cannot be considered to have been concluded by the Respondent until, at the earliest, the date of the Exchange of Notes in 1994.").

[693] *See generally* Dumberry, p. 76 (**RLA-278**) (noting that while State succession to BITs has arisen in at least 28 investor-State arbitration cases, the issue "was barely addressed at all by most tribunals in their awards," likely because the respondent States did not challenge jurisdiction on this ground); Pereira Fleury, pp. 457-458 (**RLA-279**) (noting that "case law addressing these issues is scarce and the few cases touching upon state succession of BITs lack sufficient legal reasoning on the matter to clarify it"); Tams, p. 328 (**RLA-298**) ("Arbitral practice has yet to engage fully with the issues. Where succession questions have arisen, tribunals have generally preferred to tread softly.").

[694] *See, e.g.*, Dumberry, pp. 83-84 (**RLA-278**) (examining BIT succession practice after the break-ups of Czechoslovakia, the USSR and Yugoslavia, and concluding that it generally involved either notifications and agreements, features that "do not seem to support the position of automatic succession … whereby such notifications are unnecessary," or consultations and negotiations, which "suggest that the principle of

expert in this case, observed in an article predating his expert reports that the proposition of automatic succession to BITs was "anything but straightforward."[695]

282. The Parties provided only limited evidence regarding the BIT practice of recent successor States other than Montenegro, from which the Tribunal could be expected to draw any conclusions regarding a putative general practice of automatic succession to BITs. Nonetheless, from the information available, it appears that the practice does not necessarily proceed from a generally shared expectation of automaticity.

283. First, while in many cases successor States and their treaty partners apparently did opt to continue predecessor BITs, or entered into new BITs that expressly replaced the prior ones, this appears to have been the result of various processes of exchange and explicit agreement, not a mere assumption that the prior BITs continued to bind their behavior absent such agreement. For example, relying on 2016 UNCTAD data,[696] Professor Tams' published article reports that of the 16 BITs in force for Czechoslovakia as of its dissolution, the Czech Republic and its treaty partners "over time, agreed on the continued application" of 14 of these and "entered into new agreements" with the other two States;[697] nonetheless, he describes this outcome as the result of having "explicitly agreed" and thus "opted for" continuity.[698] Similarly, with respect to the SFRY, Professor Tams notes that it had concluded seven BITs as of its dissolution in 1992-1993, and that the FRY ultimately agreed with three States to continue, and with two others to replace, the prior SFRY BITs, with the situation described as "more equivocal" as to the final two.[699] Again, however, this outcome appears to have been the result of diplomatic exchanges reflecting a perception of choice.

automatic succession was actually not adopted by these States in their practice"); Genest, pp. 16-19 (**RLA-280**) (examining the French and Dutch approaches to BITs with the various States that emerged from dissolution of the former Socialist Federal Republic of Yugoslavia, and concluding that these involved negotiations resulting in consent to continue some BITs and to terminate others, which is not conduct consistent with acceptance of an automatic rule of continuity).

695 Tams, pp. 336, 342 (**RLA-298**) (also noting that "the argument in favour of automaticity is a difficult one").

696 Tams, p. 324 n.64 (**RLA-298**) (citing UNCTAD's "International Investment Agreement Navigator," accessed as of 1 March 2016). As discussed in Section VIII.C.5 below, while the Tribunal accepts that public reporting is not determinative of whether any particular BIT legally remains in force, reporting to rosters maintained by international organizations nonetheless is indicative, to some extent, of a State's contemporaneous understanding regarding the extent of its commitments. Presumably, Professor Tams considered so as well, given his reliance on UNCTAD data for purposes of the published article.

697 Tams, p. 14 (**RLA-277**); *see also* Tams, p. 330 (**RLA-298**).

698 Tams, pp. 330-331 (**RLA-298**). *See also* Dumberry, p. 84 (**RLA-278**) (noting with respect to the Czech Republic that "[w]hile almost all of these treaties have remained in force, the very fact that such negoation took place and that the continuation of bilateral treaties was agreed by the parties in exchanges of diplomatic notes suggest that the principle of *automatic* succession was actually *not* adopted by these States in their practice") (emphasis in original).

699 Tams, p. 329 (**RLA-298**).

284. Moreover, with respect to the SFRY BITs, Professor Tams' article focuses on the FRY, which initially claimed "continuator" status to the SFRY, and thus logically would be expected to act consistently with such a claim. By contrast, with respect to the *other* States emerging from the SFRY's dissolution, which did not claim continuator status and which Professor Tams' article does not discuss, the record appears to be more equivocal. The same source of UNCTAD data on which he relies reveals a number of instances of non-continuity, which belies the notion of a near-universally shared belief that successor States remain bound to prior BITs as a matter of customary international law. For example, while the SFRY had a BIT with Canada dating back to 1973,[700] neither Bosnia & Herzegovina nor Macedonia appears to have any BIT in force with Canada, either as a continuation of the predecessor SFRY treaty or as a replacement text.[701] Similarly, while the SFRY had a BIT with Egypt dating back to 1977,[702] Macedonia has no BIT in force with Egypt today: the two States signed one in 1999, which made no reference at all to the prior SFRY BIT, and the new BIT in any event was never ratified.[703]

285. This combination of facts – that continuation of BITs is by no means universal, and that even those States which do continue predecessor BITs generally do so following a process of diplomatic exchange, consultation or negotiation – does not support a finding that successor States generally consider themselves legally bound to continue prior BITs. Some may consider this to be the case, while others may simply choose to continue prior BITs as a matter of political will. In other words, the conduct in this area is simply "too ambiguous to be treated, without more, as constituting a precedent capable of contributing to the formation of a customary rule," absent positive evidence that States "intended, understood or accepted that a customary rule could result from, or lay behind, the conduct in question."[704] There is no such positive evidence available here.

286. For these reasons, the Tribunal cannot accept the Claimant's proposition, based on either State practice or *opinio juris*, that BITs constitute a special category of bilateral agreements (like boundary or other territorial treaties) which automatically continue in effect unless specifically terminated by agreement. In other words, the Claimant has not proven the basis to support a

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[700] Tams, p. 329, n.93 (**RLA-298**).
[701] *See* UNCTAD, International Investment Agreements Navigator, Listing of BITs for Canada, at *https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada*. The point is confirmed by Canada's own public listing of BITs in force, at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.
[702] Tams, p. 329, n.93 (**RLA-298**).
[703] *See* UNCTAD, International Investment Agreements Navigator, Listing of BITs for Egypt, at *https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt*, and the text of the 1999 Egypt-Macedonia treaty (not in force) at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1091/download.
[704] ILA Final Report, p. 36 (**R-146**).

novel finding of a customary international law doctrine of automatic succession to BITs. The Tribunal accordingly rejects the Claimant's contention that the FRY-Russia BIT is in force as between Montenegro and Russia on that basis alone. The Tribunal turns below to the Claimant's alternate case, that Montenegro and Russia succeeded to the FRY-Russia BIT on the basis of agreement, either express or tacit.

C. SUCCESSION BY AGREEMENT

287. In the absence of an applicable rule of automatic succession derived either from treaty or customary international law, the FRY-Russia BIT would bind Montenegro and Russia only if there is convincing evidence of an agreement on succession. The Parties agree that in principle, succession agreements may be either express or tacit,[705] although they disagree on the requisite elements of such agreements and on the sufficiency of the evidence presented in this case. The Tribunal examines each group of evidence separately below, together with its potential implications.

1. Montenegro's Unilateral Statements

288. First, the Claimant makes much of Montenegro's unilateral statements of 3 June 2006 upon independence. In particular, it emphasizes that in the Decision on Independence, Montenegro publicly stated that it "shall apply and take over international treaties and agreements concluded by and acceded to by the State Union of Serbia and Montenegro which relate to Montenegro and which are in conformity with its legal order."[706] The Claimant also cites the Declaration of Independence adopted the same day, which declared that Montenegro "shall, based on the principles of international law, establish and develop bilateral relations with other countries, accepting the rights and obligations which arise from the existing arrangements, and shall continue with its active policy of good neighbourly relations and regional cooperation."[707]

289. Clearly, these statements were not directed to Russia in particular, but were broad declarations of Montenegro's intent generally, with respect to international treaties previously in force for the State Union. The threshold question is whether such broad unilateral statements of political will could be sufficient, as a matter of law, to confirm the FRY-Russia BIT as continuing in force for the Montenegro-Russia relationship following Montenegro's secession from the State Union.

290. The Tribunal concludes that Montenegro's unilateral declarations could not have this effect on their own. First, even in the context of *multilateral* conventions to which a successor State may

[705] Claimant's Post-Hearing Brief, ¶ 23; Respondent's Post-Hearing Brief, ¶ 10.
[706] Decision on Independence, ¶ 3 (**RLA-25**).
[707] Declaration of Independence (**RLA-329**); *see also* **C-365**.

bind itself unilaterally, States are generally expected to confirm their intention through certain formalities, such as a notification, generally to the treaty depository, that identifies the relevant treaty or treaties to which the State wishes to succeed. Such notifications of succession to multilateral treaties provide States with an important "'fast track' method of participating in treaties," without having to "adhere to the formal mechanism of accession as if they were existing non-party states."[708] On the other hand, the expectation that a State at least identify which multilateral treaty or treaties it wishes to participate in helps to distinguish between general statements of political will, on the one hand, and unambiguous legal commitments to abide by the obligations imposed by a particular instrument, on the other. As the United Nations' Treaty Section explains:

> Frequently, newly independent States will submit to the Secretary-General "general" declarations of succession, usually requesting that the declaration be circulated to all States Members of the United Nations. The Secretary-General duly complies with such a request … but does not consider such a declaration as a valid instrument of succession to any of the treaties deposited with him, and he so informs the Government of the State concerned. …
>
> … [I]t has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document … which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.
>
> General declarations are not sufficiently authoritative to have the States concerned listed as parties …. In essence, those declarations usually indicate that a review of the treaties applied to the territory of the State before accession to independence is in progress …. [Any] presumption, while it could possibly be used by other States as a basis for practical action, can certainly not be taken as a formal and unambiguous acknowledgement of the obligations contained in a given treaty, since it can be unilaterally reversed at any time in respect of any treaty. …[709]

291. It is true that in the *Croatian Genocide Case*, the ICJ found that the FRY was bound by the multilateral Genocide Convention, even though its unilateral declaration of 27 April 1992, that it "shall strictly abide by all the commitments that the [SFRY] assumed internationally," did not mention any particular treaty. But the ICJ relied on additional indicia of an intent to be bound, beyond the FRY's general declaration. Among other things, it repeatedly referenced a contemporaneous formal Note from the Permanent Mission of Yugoslavia to the UN Secretary-General that affirmed the FRY "shall continue to fulfill all the rights conferred to, and obligations

[708] Shaw, p. 741 (**RLA-282**).

[709] United Nations Office of Legal Affairs, Treaty Section, Summary of Practice of the Secretary General as Depositary of Multilateral Treaties, ¶¶ 303-305 (**RLA-28**); *see also* A. Zimmerman, "State Succession in Treaties," *Max Planck Encyclopedia of Public International Law*, ¶ 7 (2006) (**CLA-169**) ("successor States willing to succeed to multilateral treaties of their predecessor State can, by way of a unilateral declaration addressed to the respective depository, confirm their succession …. [S]uch declarations of succession are only considered to bring about succession provided they are not of a general character, but instead list specific treaties to which the successor State wants to succeed."); G. Hafner and G. Novak, "State Succession in Respect of Treaties," pp. 408-409 (2014) **(CLA-171**).

assumed by, the [SFRY] in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia."[710] The ICJ also explained that "[t]he 1992 declaration and Note" should be considered in the context of "other consistent conduct" indicating a "unilateral acceptance of the obligations of the Genocide Convention."[711] In particular, the ICJ emphasized that "[a]s early as 1993," in the context of proceedings brought against it by Bosnia and Herzegovina,

> the FRY, while questioning whether the applicant State was a party to the Genocide Convention at the relevant dates, did not challenge the claim that it was itself a party …. This was still the situation when [in 1999] Croatia filed the Application instituting the present proceedings. During the period between the making of the 1992 declaration and that date, neither the FRY nor any other State for which the issue might have had significance questioned that the FRY was a party to the Genocide Convention …. It was not until March 2001 that the FRY took any further step inconsistent with the status which it had since 1992 been claiming to possess, namely that of a State party to the Genocide Convention.[712]

292. In other words, the ICJ judgment in the *Croatian Genocide* Case was based on its assessment of the overall context, and cannot stand for the proposition that a State's general declaration of intent to succeed to a predecessor's treaties necessarily suffices, standing alone, to bind that State to any *particular* multilateral treaty. It is notable, moreover, that in Montenegro's case, it did not act contemporaneously as if it believed that its general Declaration of Independence had itself instantaneously and unambiguously achieved succession to the multilateral treaties of the predecessor State Union, but instead followed up a few months later with a formal notification to the UN Secretary-General of the *specific* multilateral treaties to which it believed it had succeeded. On 10 October 2006, Montenegro's Ministry of Foreign Affairs wrote to UN Secretary-General Kofi Annan, "I hereby declare that the Government of the Republic of Montenegro succeeds to the treaties listed in the attached Annex and undertakes faithfully to perform and carry out the stipulations therein contained," as from 3 June 2006, the date that "the Parliament of Montenegro adopted the Declaration on Independence."[713] The Annex was a detailed, 62-page list of the specific multilateral treaties that were subject to the formal

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[710] *Croatian Genocide* Case, ¶ 99 (**CLA-67**). The judgment thereafter repeatedly referred to the "1992 declaration and Note" as a package, not addressing the legal effect of the declaration on its own. *See id.*, ¶¶ 100, 105, 108, 110, 117.

[711] *Croatian Genocide* Case, ¶ 110 (**CLA-67**).

[712] *Croatian Genocide* Case, ¶¶ 114-116 (**CLA-67**). The ICJ acknowledged that initially, in 1992, the FRY "was then claiming to be the continuator State of the SFRY, but it did not repudiate its status as a party to the Convention even when it became apparent that that claim would not prevail, and that the FRY was regarded by other States … as simply one of the successor States of the SFRY." *Id.*, ¶ 111.

[713] Letter from the Ministry of Foreign Affairs of Montenegro to the Secretary-General of the United Nations, 10 October 2006 (**RLA-29**).

notification of succession.[714] This is substantial evidence that Montenegro understood the importance of a formal notification of succession specific to particular treaties.

293. More importantly, even if certain forms of unilateral conduct may suffice to confirm a State's succession to *multilateral* treaties, it is broadly accepted that succession to *bilateral* treaties is qualitatively different. In the bilateral context, both States enter into the treaty relationship based on the particular identity of the counterpart State, and not simply on the basis of a willingness to accept certain common norms alongside a broad group of other States. Where the treaty counterpart changes its identity, therefore, *both* States – and not just the new successor State – have the option whether to continue the predecessor relationship, on the same or different terms or potentially not at all.[715] For this reason, it is generally accepted that unilateral statements by one State are insufficient to create a mutually binding obligation, which will not arise unless or until the other State in some fashion confirms its corresponding agreement.[716] This notion is reflected in Article 9(1) of the VCSST, which states that "[o]bligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory."[717] Notably, Article 9 is one of the VCSST provisions that is generally considered to reflect customary international law.[718] The Tribunal notes that the Claimant's expert, Professor Tams, has agreed in his writings that "unilateral statements [by the successor State] cannot bind putative treaty partners" in the context of bilateral agreements.[719]

294. This conclusion, specific to the law of treaty succession and the context of bilateral agreements, is not displaced by the more general international law doctrine regarding unilateral declarations. The Tribunal agrees with Professor Hollis that "[t]he law of State succession is in this respect, *lex specialis*."[720] Moreover, even if the law of unilateral declarations were to have some resonance in the context of treaty succession – notwithstanding the apparent silence on treaty succession by the ILC when it presented its proposed "Guiding Principles Applicable to

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[714] Letter from the Ministry of Foreign Affairs of Montenegro to the Secretary-General of the United Nations, 10 October 2006, Annex (**RLA-29**).

[715] *See, e.g.*, P. Dumberry, "State Succession to Bilateral Treaties," *Leiden Journal of International Law*, Vol. 28, pp. 24-25 (2015) (**RLA-410**); P.K. Menon, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts*, pp. 33-34 (1991) (**RLA-419**).

[716] *See, e.g.*, Zimmerman and Devaney, pp. 536-537 (**CLA-168**) ("unless the other State explicitly consents, can be said to have acquiesced, or otherwise implied its consent, neither a devolution agreement nor a unilateral declaration can have … any legal effect on any other State as such."); Genest, p. 10 (**RLA-280**).

[717] VCSST, Article 9(1) (**CLA-166**).

[718] *See, e.g.*, Stern, pp. 164-165, 169 (**RLA-223**).

[719] Tams, p. 332 (**RLA-298**).

[720] Second Hollis Report, ¶ 132.

Unilateral Declarations of States Capable of Creating Legal Obligations"[721] – it is a basic principle of that law both that (a) "[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms," and (b) "[i]n the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner."[722] The ICJ clearly stated both propositions in the *Nuclear Tests* cases.[723] The ICJ also subsequently indicated that particular caution should be exercised where a unilateral declaration had no specific addressee.[724] Indeed, the few cases where the ICJ has addressed unilateral declarations directed to the international community as a whole have concerned pledges to abide by highly specific obligations.[725] None of the ICJ cases discussed by the ILC in its commentaries on the "Guiding Principles" suggests that a State's very general declaration of intent with regard to a predecessor State's treaty relationships,[726] not alluding to any particular treaties nor directed to any particular treaty counter-parties, could constitute a legal undertaking to be bound to *all* prior bilateral treaties, as opposed to merely a political pledge or an indication of a plan of future work. There is certainly no suggestion that a unilateral declaration of this nature by one State could somehow bind all counterparty States, giving rise to the necessary mutuality of consent to succession.

295. This is not to suggest that a State's unilateral declaration of its intended status as a "successor State" is entirely without normative consequences. As previously noted, the VCLT treats the issue of State succession as a special regime, not governed definitively by its provisions. One of the notable features of this special regime, discussed further below, is that relatively informal exchanges between States can have binding consequences if they *do* reveal a mutuality of intent, without the need for additional parliamentary procedures as might be required to ratify or accede to a new treaty.[727] As a result, while one State's unilateral declaration cannot create a binding succession agreement, it may have the effect of putting the other State on notice that their

[721] Second Hollis Report, ¶¶ 133-134.
[722] ILC Guiding Principles, Guiding Principle 7, p. 377 (**RLA-26**).
[723] *See* ILC Guiding Principles, p. 377 (**RLA-26**) (citing *Nuclear Tests* cases).
[724] *See* ILC Guiding Principles, p. 377 (**RLA-26**) (citing *Frontier Dispute (Burkina Faso v. Republic of Mali)* case).
[725] *See* ILC Guiding Principles, pp. 376-377 (**RLA-26**) (discussing Egypt's declaration regarding the Suez Canal and France's declarations regarding suspension of nuclear tests in the atmosphere).
[726] It also goes without saying that for a unilateral declaration to have any binding legal effect, it must be issued by someone with recognized authority to speak for the State in international affairs. *See* ILC Guiding Principles, Guiding Principle 4, p. 372 (**RLA-26**). Because the Tribunal concludes that the Declaration and Decision on Independence were not capable on their own of creating a binding agreement on succession, even *arguendo* if they were made by authorized persons, there is no need for it to reach the contested issue of whether Montenegro's Parliament in fact would have had capacity to bind the State by a unilateral declaration. *See generally* Reply on Jurisdiction, ¶¶ 275-280 (questioning such capacity).
[727] *See Croatian Genocide* Case, ¶ 109 (**CLA-67**) (distinguishing "[a]ccession or ratification …, effected in writing in the formal manner set out in … Articles 15 and 16 of the Vienna Convention of the Law of Treaties," from "succession or continuation," for which documents "issued by the State concerned … may be subject to less rigid requirements of form").

respective *ensuing conduct* with regard to a particular treaty could be scrutinized for evidence of an informal agreement on succession (either express or tacit),[728] even absent the conclusion of constitutional formalities. Likewise, if the unilateral declaration is intended to induce the other State to take concrete steps in reliance and has this demonstrable effect, this potentially could give rise to arguments about preclusion or estoppel, with the aim of preventing the successor State thereafter from disputing its own intent to be bound.[729]

296. Another normative consequence of a State's general declaration of intent to succeed to predecessor treaties is that during the "twilight period" until its counterpart States respond with their positions, the status of any particular bilateral predecessor treaty resides in a form of limbo.[730] Absent a presumption of automatic succession (which the Tribunal has found does not apply in this context), the predecessor treaty cannot be treated as definitively in force, and therefore cannot be enforced unilaterally by one State against the other. Moreover, if the counterpart State ultimately *rejects* a unilateral overture about treaty continuity, that rejection is deemed to confirm non-continuity *ab initio*, *i.e.*, to confirm that the predecessor treaty *never* applied to the relationship between the two States, even during the twilight period where the seceding State's overture remained pending. On the other hand, if and when the other State ultimately *confirms* its willingness to continue the predecessor treaty with the self-declared successor State, that mutual consent is frequently presumed to operate *ex tunc*, without the treaty having lapsed during the interim period when the two States explored each other's position regarding continuity.[731] This presumption of no interim lapse for an ultimately confirmed successor relationship appears to operate even where the later exchange of diplomatic notes, or the other conduct confirming the mutual intent to continue the treaty relationship, is itself *silent*

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[728] As discussed further in Sections VIII.C.2 and VIII.C.4 below, one common form of express agreement is an exchange of diplomatic notes; one common reflection of a tacit agreement is through mutual implementation by both sides of a treaty terms, as a matter of actual practice.

[729] *See generally* Yearbook of the International Law Commission, 1974, Vol. II, Part One, p. 240 (**CLA-196**) (addressing potential application of estoppel or preclusion where "one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty").

[730] *See generally* Stern, pp. 315-316 (**RLA-223**) ("The real question for bilateral treaties is knowing what happens in the period from the succession to the time the States decide on the fate of the treaty in the future."); Tams, p. 331 (**RLA-298**) (explaining that "explicit party agreements determining the fate of prior treaties … may be difficult to trace and often are reached some time after the succession, leaving the law uncertain during the interim ('twilight') period").

[731] *See generally* Zimmerman and Devaney, p. 537 (**CLA-168**) ("While the exact determination of the time of the succession might sometimes be difficult to determine especially where the relevant developments are stretched over time, it might be said, with sufficient confirmation by State practice, that any declaration of succession, if made, has a retroactive effect to the moment in which the succession took place."); Menon, p. 33 (**RLA-419**) (suggesting that "the principle of retroactive application of the treaty has … been accommodated" to resolve "the dilemma" of an "interim period" in which there otherwise would be a "legal vacuum in the relationship between the new State and any other party to the treaty").

on the temporal issue.[732] In other words, there is an interesting practice in the succession regime in which the status of a predecessor treaty, vis-à-vis a seceding State and its potential treaty partners, is commonly defined *retroactively* based on the State parties' later statements or conduct. In this context, Professor Crawford has likened a State's general declaration of intent to succeed to unspecified treaties to "an *offer* of a grace period in which treaties remain in force on an interim basis *without prejudice to the declarant's legal position but subject to reciprocity*," with "[p]ractice … suggest[ing] that what eventually occurs is either termination or novation as the case may be in respect of the particular treaty."[733] Such a practice is unique to the succession regime, and runs counter to the general presumption of non-retroactivity of treaties that applies in the ordinary context of brand-new treaty relationships governed by the VCLT.[734]

297. In each of these instances, however, the predicate requirement for the two States to be bound by a predecessor treaty is *some statement or conduct by the second State*, in the wake of the would-be successor's unilateral declaration of intent to succeed, that reflects a comparable intention on its part.[735] Unless and until the second State confirms its intent by act or deed, the predecessor treaty cannot be regarded as continuing in force, and accordingly neither State – including the would-be successor whose offer has not been reciprocated – is bound to the other by the treaty's terms nor may enforce them against the other.

298. In an effort to strengthen his arguments for succession by virtue of Montenegro's unilateral declarations, however, the Claimant places particular emphasis on the Kosovo Declaration of Independence of 17 February 2008 as well as the Alma Ata Declaration of 21 December 1991, which he contends represent analogous State practice in form and legal effect to Montenegro's Declaration of Independence and Decision on Independence of 3 June 2006.[736]

299. Paragraph 9 of the Kosovo Declaration of Independence reads, in relevant part:

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[732] *See generally* VCSST, Article 24(2) (**CLA-166**) (in the context of newly independent States, explaining that "[a] treaty considered as being in force [as a result of express agreement or by reason of conduct reflecting tacit agreement] applies … from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established").

[733] Crawford, p. 441 (**RLA-218**) (emphasis added).

[734] *See* VCLT, Article 28 (**CLA-2**) ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.").

[735] *See generally* ILC Yearbook 1974, p. 240, Note 17 (**CLA-196**) (explaining that even where one State "may appear [from a unilateral declaration] to express a general intention to continue their predecessors' treaties, they frequently make the continuance of a particular treaty a matter of discussion and agreement with the other interested State. Moreover, *in all cases it is not simply a question of the intention of one State but of both*: of the inferences to be drawn from the act of one and the reaction – or absence of reaction – of the other.") (emphasis added).

[736] Claimant's Rejoinder on Jurisdiction, ¶¶ 92-93; Hearing Transcript, 174:3-176:5; Claimant's Post-Hearing Brief, ¶¶ 30-31, 42(b).

> We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Convention on diplomatic and consular relations.[737]

300. According to the Claimant:

> [T]he "Kosovo Declaration of Independence set out a position on succession using terms ("undertake") that were not quite as unambiguous as those used in the various Montenegrin statements ("accept", "apply", "adhere to"). Yet, the terms of Kosovo's Declaration were considered sufficiently clear for purposes of succession, with no further action required, by other States, including the United States – as evidenced in the Letter sent by President Bush the day after Kosovo adopted its Declaration.[738]

301. The Respondent takes issue with both this interpretation of the Kosovo Declaration and the Letter sent by President Bush. According to the Respondent, President Bush did not reply to the Declaration but instead to a diplomatic note sent by Kosovo.[739] There is some support for this in the text of President Bush's letter itself. President Bush refers to "[the President of Kosovo's] request to establish diplomatic relations with the United States."[740] The Kosovo Declaration, of course, did not contain an individualized appeal to establish diplomatic relations with the United States. An academic commentary on Kosovo's succession to bilateral treaties, co-authored by the former Senior Advisor to the Ministry of Foreign Affairs of Kosovo from 2008-2010, also records that:

> The Ministry of Foreign Affairs of Kosovo addressed a Note Verbal to all Embassies, Liaison and Diplomatic Offices accredited in Kosovo, and to the Foreign Ministries of all states that recognize Kosovo but do not have a representation within the State, asking for a list and the texts of concerned treaties.[741]

302. It is further stated that this Note Verbale was sent to the United States of America[742] and that, "[a]fter studying the replies, the Ministry proposed several Exchange of Notes on treaty succession. To date, the treaty succession agreements with Austria, Belgium, Czech Republic, Finland, Germany, and the United Kingdom have been concluded."[743] This firmly suggests that the Kosovo Declaration was not considered by other States to provide a sufficient legal basis for Kosovo's succession to obligations in treaties concluded by the SFRY.

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[737] **C-379**.
[738] Claimant's Post-Hearing Brief, ¶ 30.
[739] Respondent's Post-Hearing Brief, ¶ 88.
[740] **C-380**.
[741] Q. Qerimi, S. Krasniqi, "Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo," 14 German LJ 1639 (2013), p. 1639 (**CLA-240**).
[742] *Id.*, p. 1639 (**CLA-240**).
[743] *Id.*, p. 1640 (**CLA-240**).

303. Perhaps more importantly, however, President Bush's letter nowhere confirms that the United States considered itself to be bound by predecessor treaties towards Kosovo.[744] The Tribunal considers it very unlikely that the United States of America, unlike the other States that have subsequently entered into treaty succession agreements with Kosovo, would have considered itself bound by all the predecessor treaties of the SFRY towards Kosovo simply on the basis of the undertaking in the Kosovo Declaration coupled with a short letter from President Bush sent the following day that conveys the recognition of Kosovo's independence and sovereignty but makes no mention at all of the predecessor treaties.

304. The position in relation to the Alma Ata Declaration is also straightforward. The Declaration provides, in relevant part:

> With the formation of the Commonwealth of Independent States the USSR ceases to exist. Member states of the Commonwealth guarantee, in accordance with their constitutional procedures, the fulfillment of international obligations, stemming from the treaties and agreements of the former USSR.[745]

305. This cannot be read as a unilateral and binding undertaking on the part of each constituent member of the Commonwealth of Independent States to observe all the predecessor treaties of the USSR. This is confirmed by the "Memorandum of Understanding" of the constituent States that was issued a year after the Alma Ata Declaration "on the issue of succession in respect of treaties of the former USSR Union of mutual interest":

> 1. Virtually all multilateral international treaties of the former USSR are of common interest to the Commonwealth member states. At the same time, these agreements do not require any joint decisions or actions of the Commonwealth member states. The question of participation in these treaties is decided in accordance with the principles and norms of international law by each member state of the Commonwealth independently, depending on the specifics of each case, the nature and content of a treaty.
>
> 2. There are a number of bilateral treaties of the former Soviet Union that affect the interests of two or more (but not all) of the Commonwealth member states. These agreements require the adoption of decisions or actions on the part of those member states of the Commonwealth, to which these treaties are applicable. The method of negotiating and seeking mutually acceptable solutions adopted in international legal practice should be the basis for carrying out this work.[746]

306. These passages are inconsistent with the notion that the constituent member States of the Commonwealth of Independent States considered themselves to be bound by the predecessor treaties of the USSR at the time of the Alma Ata Declaration.

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[744] **C-380**.
[745] **C-378**.
[746] Memorandum of Understanding on the issue of succession in respect of treaties of the former USSR of mutual interest (**RLA-416**).

307. The Tribunal thus concludes that the State practice surrounding the Kosovo Declaration of Independence as well as the Alma Ata Declaration do not assist the Claimant's case, in attempting to establish succession simply as a result of Montenegro's unilateral declarations.

2. The Exchange of Diplomatic Notes

308. This background regarding the potential implications of Montenegro's unilateral declarations leads naturally to a discussion of its subsequent direct exchanges with Russia during the summer of 2006.

309. First, on 4 June 2006, the day after its Decision on Independence and Declaration of Independence, Montenegro's MFA addressed the following diplomatic note to Russia's Minister of Foreign Affairs:

> The Republic of Montenegro shall observe all principles of international law and all treaties and provisions of international agreements signed by the state union of Serbia and Montenegro. …
>
> The sovereign and independent Republic of Montenegro, [a] state with full international legal personality, is committed to the best traditions of humanism and civilization, European history, and a prosperous future for all citizens of the Republic of Montenegro and looks forward to develop broad cooperation and friendly relations with the Russian Federation.
>
> We would highly appreciate if the Russian Federation would recognize the Republic of Montenegro as a sovereign and independent state and we stand ready to initiate the process of establishing diplomatic relations between our two States as soon as possible.[747]

310. As can be seen from its text, the Montenegrin Note of 4 June 2006 has two distinct elements. In its first paragraph, the Note contains a unilateral declaration of intent, namely that Montenegro "shall observe all principles of international law and all treaties and provisions of international agreements" signed by the State Union. The declaration makes no distinction between multilateral treaties and bilateral treaties, nor does it identify any particular bilateral treaties previously in force with Russia; rather, the statement of Montenegro's intent applies facially to "all treaties and provisions of international agreements …." But there is no express request for a response confirming Russia's corresponding willingness to continue in effect for Montenegro the various bilateral treaties to which Russia previously had agreed with the State Union. By contrast, in the final paragraph of the Note, Montenegro makes an express request of Russia, namely for it to recognize Montenegro's sovereignty and independence from the former State Union. The final paragraph also declares Montenegro's "read[iness] to initiate" what it describes as a "process" for establishing diplomatic relations between the two States.

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[747] **R-74**.

311. Roughly three weeks later, in the Russian Note of 26 June 2006, Russia's MFA responded as follows:

> Ministry of Foreign Affairs of the Russian Federation presents its complements (sic) to the Ministry of Foreign Affairs of the Republic of Montenegro and, guided by the desire to develop bilateral cooperation between the Russian Federation and the Republic of Montenegro, has the honour to inform of the readiness of the Russian Federation to establish diplomatic relations with the Republic of Montenegro at the embassy level.
>
> In case the Montenegrin side agrees, this note and the note of the Ministry of Foreign Affairs of the Republic of Montenegro will form an agreement on the establishment of diplomatic relations, which will become applicable from the date of the exchange of notes.[748]

312. As can be seen from this text, Russia addressed Montenegro's express request for a response regarding the establishment of diplomatic relations. It declared its corresponding "readiness … to establish diplomatic relations" with Montenegro, and addressed Montenegro's reference to a "process" by stating its proposal for next steps (namely, that "an agreement" would be formed by the compilation of Russia's Note and a further note from Montenegro's MFA accepting that proposal). However, the Russian Note of 26 June 2006 was silent with respect to the issue of treaties that Montenegro had raised in the first paragraph of the Montenegrin Note of 4 June 2006. At this time, Russia neither acknowledged Montenegro's unilateral statement of intent to "observe … all treaties" of the State Union, nor did it indicate Russia's own corresponding position, namely whether it too would continue to observe bilateral treaties with respect to Montenegro. Russia did not address the treaty issue at all.

313. Later that summer, on 4 August 2006, Montenegro's MFA once again raised the treaty issue with Russia's MFA, in the Montenegrin Note of 4 August 2006:

> Ministry of Foreign Affairs of the Republic of Montenegro presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to inform that in accordance with item 3 of the Decision of Assembly of the Republic of Montenegro on declaration of the independence of the Republic of Montenegro dated June 8, 2006, the Republic of Montenegro is a state-successor to the State Union of Serbia and Montenegro with regard to international treaties and agreements which were concluded by the State Union of Serbia and Montenegro and to which it acceded and in this regard, the Republic of Montenegro confirms its readiness to observe all treaties and agreements that have been effective between the Russian Federation and the State Union of Serbia and Montenegro.[749]

314. As can be seen in the text, Montenegro here repeated the unilateral statement of "readiness to observe all treaties and agreements" previously in force that it had stated already in the Montenegrin Note of 4 June 2006. The fact that it repeated that statement in a further diplomatic note to Russia suggests that Montenegro did not then consider the first exchange to have resolved

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[748] **R-75**.
[749] **C-18**.

any open questions, either by virtue of its own unilateral declarations (in the Montenegrin Note of 4 June 2006 or in its preceding Decision on Independence or Declaration of Independence), or through Russia's response in the Russian Note of 26 June 2006. Rather, the logical conclusion from Montenegro's repetition of the point, and now adding for avoidance of doubt that it considered itself to be a "state-successor to the State Union of Serbia and Montenegro with regard to international treaties," is that it hoped to elicit an additional response from Russia, presumably one concurring that Russia too would continue to observe the predecessor treaties with respect to Montenegro.

315. Montenegro's second Note *did* indeed elicit a further response from Russia, but not with the express concurrence of treaty continuity that Montenegro presumably hoped to achieve. Rather, the Russian Note of 16 August 2006 stated as follows:

> Ministry of Foreign Affairs of the Russian Federation presents its complements (sic) to the Ministry of Foreign Affairs of the Republic of Montenegro and in connection with the note of the Ministry No 03/04-1414 of 4 August 2006 respectfully informs that the Russian side [*takes into consideration*] the readiness of the Republic of Montenegro as a successor of the State Union of Serbia and Montenegro to exercise powers and discharge obligations arising out of all international treaties that were effective between the Russian Federation and the State Union of the Serbia and Montenegro.[750]

316. The Tribunal acknowledges the Parties' dispute regarding the translation of the particular phrase that has been bracketed and italicized in the passage above. The Claimant proposes that the phrase "принимает к сведению" in the Russian original be translated as "takes note of" or, alternatively, "acknowledges,"[751] while the Respondent submits that "'takes into consideration' is more accurate, while the expression 'takes note of' is also a viable translation."[752] In the Tribunal's view, little turns on this translation dispute, as in any of the alternative translations, the phrase indicates only that Russia recognized Montenegro's statement, without offering any corresponding statement of its own position. Notably, the Russian Note of 16 August 2006 did *not* include any concrete proposal for reaching agreement with Montenegro with respect to treaty succession, the way the prior Russian Note of 26 June 2006 had suggested a process for reaching agreement with respect to diplomatic relations (*i.e.*, that "this note and the note of the Ministry of Foreign Affairs of the Republic of Montenegro will form an agreement on the establishment of diplomatic relations, which will become applicable from the date of the exchange of notes").[753] Under any of the alternative translations proffered by the Parties, the Russian response was non-committal.

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[750] **C-19** (brackets and emphasis added).
[751] Claimant's Post-Hearing Brief, ¶ 5.
[752] Respondent's Post-Hearing Brief, ¶ 106.
[753] **R-75**.

317. The Tribunal has no difficulty with the proposition that an agreement on succession can be concluded through a simple exchange of diplomatic notes, without additional formalities, provided that such notes reflect convincing evidence that both States intended to so agree, and did not require any additional steps before an agreement could be deemed concluded. Articles 11 and 13 of the VCLT refer to an "exchange of instruments" as one of the means by which States may express their consent to be bound by a treaty, with such consent expressed when "[t]he instruments provide that their exchange shall have that effect" or "[i]t is otherwise established that those States were agreed that the exchange of instruments shall have that effect."[754] It is uncontroversial that this mechanism – essentially, successive documents reflecting both a clear offer and a clear acceptance – is widely accepted as the functional equivalent of a jointly signed document. As the *EURAM* tribunal noted, an "exchange of diplomatic notes in the framework of the process of State succession … can be considered as equivalent to a ratification …."[755] But this all depends on the *content* of the notes, and in particular whether they indicate a mutual intent to be bound. In this case, the Tribunal is unable to find that the exchange of notes between Montenegro and Russia reflected mutual consent to continuity as between them of all prior FRY-Russia bilateral agreements. At best, the exchange may be seen as reflecting an offer by Montenegro of global continuity, without a corresponding acceptance by Russia.

318. The Tribunal acknowledges the Claimant's argument that in certain contexts, a State's acceptance of another State's offer of treaty continuity might be presumed from its silence, if surrounding circumstances support an inference that such silence was intended to convey acquiescence.[756] The Tribunal does not rule this out at the level of theory, such as where an offer of continuity was explicit as to the inferences (and thus the consequences) that would be drawn from silence. For example, if one State were to indicate that, absent prompt rejection of its offer by the other State, it would regard the predecessor treaty as continuing in force for both Parties and would proceed to act in reliance on such belief, *then* silence in response to this statement could be viewed as acceptance of the stated consequences, and thus as a *tacit* agreement on continuity (a subject discussed further below in Section VIII.C.4 below).

319. However, this is definitively *not* such a case. Nothing in Montenegro's diplomatic exchanges put Russia on notice of any such proposition, *i.e.*, by suggesting that Montenegro would infer Russia's consent to global treaty continuity simply from the absence of Russia's express rejection of continuity. Moreover, Russia's response was *not* simply silence, but rather a phrase that (however translated) indicated studied non-committal. In the Tribunal's view, it is not possible

[754] VCLT, Articles 11, 13 (**CLA-2**)
[755] *EURAM*, ¶ 79 (**RLA-224**).
[756] *See*, *e.g.*, Rejoinder on Jurisdiction, ¶¶ 94-95.

to infer Russia's acquiescence (much less its agreement) from the use of either the phrase "takes note of," "acknowledges," or "takes into consideration."

3. Inferences from Montenegro's Succession Practice with Other States

320. The inconclusive exchange of diplomatic notes between Montenegro and Russia on the subject of succession also must be contrasted with the very definitive processes that Montenegro followed with many other States after its Declaration of Independence, in order to reach express and detailed agreement on the continuity of various bilateral treaties of its predecessors, the FRY and the State Union.

321. The evidence indicates that with respect to its bilateral relationships, Montenegro entered into numerous express succession agreements. These generally were accomplished through an exchange of diplomatic notes, in which one State first would propose to continue specific treaties and the other then would accept, referencing the same identified treaties. For example, with respect to Israel, Montenegro first proposed an exchange of notes confirming that seven predecessor treaties would remain in force, and expressly requested Israel to "inform at its earliest convenience whether this proposal is acceptable."[757] Following "Bilateral Consultations, on the issuance of inheritance of Bilateral Agreements," Israel responded that several of the treaties were "no longer relevant" or "cannot be inherited," but that "[w]e may of course inherit immediately the three Agreements which we proposed earlier in a simple procedure of diplomatic notes' exchange, in a format which we have passed to you."[758] Montenegro replied with a note maintaining the proposal for only three treaties, to which it "request[ed] to be regarded as a successor … from the date of the Declaration of Independence of Montenegro, namely June 3, 2006," and proposed that "[i]f the foregoing proposal is acceptable … this Note and the affirmative Note of reply from the Government of the State of Israel … shall constitute an Agreement … that shall enter into force on the date of Israel's Note in reply."[759] Israel responded to "confirm that the proposal … is acceptable to … Israel and that the abovementioned Agreements shall be considered to be in force" as of June 3, 2006.[760]

322. Montenegro exchanged diplomatic notes with many other States, in each of which both counterparties identified the specific treaties that they were willing to consider as remaining in force. For example:

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[757] **R-247**.
[758] **R-249**.
[759] **R-248**.
[760] **R-250**. *See* **RLA-37**.

- Montenegro proposed to Germany an exchange of notes on succession to 37 listed agreements, which it was willing to accept would "remain in force … until signing of new agreements," in accordance with Montenegro's Decision on Independence, but requested Germany's "reply… as regards the succession" of these agreements.[761] Thereafter, the Parties apparently engaged in further discussions, because Germany eventually "propose[d] … the conclusion of [an agreement]" listing only 31 of the agreements as remaining in effect. Germany stated that "[s]hould the Government of Montenegro agree …, this Verbal Note and the Response of [Montenegro] expressing the consent … shall make the Agreement …, which shall come into effect on the date of the response to the verbal note." Montenegro responded that it "agrees to the wording of the Agreement," and accordingly, the two notes "shall make the Agreement … which shall come into effect on the date of this verbal note."[762]

- Montenegro proposed to the United States that "the following [five listed] agreements remain in force, as of June 3, 2006" and that "this note verbal, in conjunction with your note verbal as the response, to be considered as an agreement which affirms that the above stated agreements will remain in force, as of June 3, 2006." The United States replied that it "affirms that the five agreements from the list shall remain in force, as of June 3, 2006."[763]

- Montenegro sent a note to Denmark "concerning recognition of [Montenegro] and the commitments of [Montenegro]," following which Denmark "propose[d] to formalise which [of seven listed] bilateral agreements should be observed,"[764] and Montenegro responded accepting that five agreements remained in force, proposing an "alternative agreement" for a sixth, and promising to revert regarding the seventh.[765]

- Austria sent Montenegro a "list of interstate agreements … with the purpose of confirming their further validity between the two states," and Montenegro replied that "[t]he validity is confirmed" for all but one of those agreements, which required further domestic approval.[766]

- India sent Montenegro a list of seven treaties it had with the FRY and the State Union, referenced the proclamation of Montenegro's Parliament of willingness to honor predecessor treaties in general, and requested Montenegro's "confirmation if the above-mentioned Agreements, in their present form, are acceptable … and when can they be brought into force."[767] Montenegro replied confirming that the seven agreements remained in force.[768]

- Japan sent Montenegro a note listing 20 predecessor treaties it considered "applicable" between the two and another 10 it considered "have no meaning in

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761 **R-263**.
762 **C-313**.
763 **RLA-33**.
764 **R-163**.
765 **R-162**.
766 **R-154**. In a one-paragraph response to a 2018 inquiry by the Claimant's arbitration counsel, the Austrian Ministry of Europe, Integration and Foreign Affairs described this 2007 exchange of notes (which it said had followed certain "bilateral consultations") as having had "only declaratory effect." **C-390**. The letter did not explain the mechanism by which succession to the listed treaties otherwise occurred.
767 **R-165**.
768 **R-164**.

continuing to be effective between the two countries," and Montenegro replied "to confirm that [it] shares the recognition" of Japan with respect to these lists.[769]

- Finland sent Montenegro a note regarding three specified treaties, Montenegro replied that the two notes together "constitute the confirmation of maintaining the Convention and Agreements in force."[770]

- Cyprus confirmed that Montenegro's proposal "to the effect that the five treaties listed below are regarded as continuing in force … is acceptable."[771]

- Montenegro "propos[ed] an exchange of instruments" with Lithuania to confirm that two treaties remained in force, and Lithuania replied that it "agrees" that the two treaties "shall apply with respect to Montenegro."[772]

- Montenegro proposed a similar exchange of notes with Moldova with respect to three treaties, and Moldova responded that it "considers that the [two notes] constitute an agreement … regarding the Montenegrin succession to the treaties …, as well as their applicability in relations between [the two States], that shall enter into force on the date of the receipt of this Note by the Montenegrin side."[773]

- The Netherlands sent Montenegro a "draft of an Exchange of Notes containing a list of [eight specified] treaties which the Kingdom of the Netherlands proposes to continue," and Montenegro responded that it "agrees" and that the two notes together reflect an "agreement that the treaties referred to … constitute treaties between the Republic of Montenegro and the Kingdom of the Netherlands."[774]

- Belgium sent Montenegro a note specifically "propos[ing] that the bilateral agreements binding on" Belgium and the former State Union, which had been listed by name in a 2005 exchange of notes between those States, "shall continue to have effect between [Belgium and Montenegro] until they have either been confirmed or renegotiated by the two parties"; Montenegro responded "confirm[ing] the legal continuity of the bilateral agreements signed between [Belgium and the State Union] till they have been renegotiated by the two parties."[775]

323. The record also indicates that a number of Montenegro's succession agreements were reached only after in-person negotiations. In addition to the "Bilateral Consultations" with Israel referenced above,[776] for example, Montenegro and Greece first signed a joint Agreement to "convene, in due time, a meeting of a joint commission of experts to study the status of [predecessor] agreements … and … decide upon which of the[m] .. should continue to apply in the relations between the Parties."[777] Subsequently, Montenegro "propose[d] [an] exchange of

[769] **R-153**.
[770] **R-151**; **R-152**.
[771] **C-308**.
[772] **RLA-35**.
[773] **R-157**.
[774] **C-306**.
[775] **C-392**.
[776] **R-249**.
[777] **R-246**.

Notes" to the effect that 19 listed treaties would remain in force,[778] but Greece responded with its own list of 11 treaties that it "considers to remain in force," along with 10 "which are to be set aside" and one "which remains under consideration."[779] Following in-person negotiations,[780] Greece presented a further note referencing "conclusions from the bilateral consultations," that 12 identified treaties which should remain in force and requested Montenegro's response, which together with Greece's note would "be regarded as an agreement which will affirm that all of the above listed agreements remain in force …." Montenegro replied "to affirm that all of the above stated suggestions are acceptable" and that the two notes thus made up the two State's "Agreement … on Succession of Bilateral Agreements."[781] Montenegro conducted in-person talks to various degrees with various other States, before finalizing succession agreements expressly listing the continuing treaties.[782]

324. The Tribunal cannot accept the Claimant's suggestion that most or all of these express succession agreements were merely declaratory rather than constitutive,[783] such that the absence of *any* equivalent agreement between Montenegro and Russia has no probative weight by comparison. First, while the Claimant correctly observes that some of these agreements reference Montenegro's Decision on Independence,[784] the full context of the available diplomatic exchanges makes clear that this generally was for two reasons, namely (a) as a recitation of the statement of political will that led to Montenegro's proposal of a succession agreement, and (b) as

[778] **R-244**.
[779] **R-245**.
[780] **R-69**.
[781] **RLA-36**.
[782] *See, e.g.*, **R-155** (in a diplomatic note following in-person negotiations, Montenegro "accept[ed] that the Agreements [in an annexed list] proposed by the Belgian side during the visit of the Ambassador remain in force"); **R-32** (reflecting prior negotiation of a draft proposal by China of a list of treaties to remain in force and others to be terminated, together with a draft notice of consent by Montenegro); **C-311** (following "talks … regarding the succession to bilateral agreements," France "suggest[ed] that the Agreements listed in the Annex … should continue to bind France and Montenegro," and Montenegro "agree[d] that [France's letter], along with our reply to it, should be regarded as the agreement between our two governments"); **R-251**, **R-252**, **R-253**, **R-254**, **R-255**, **R-256**, **R-257**, **R-258**, **RLA-38** (Montenegro and Italy held several consultation meetings and exchanged several notes, adding and removing treaties from a list of those in force, before concluding a joint instrument stating that following Montenegro's declaration of independence, "it is necessary to define the legal framework between the two countries," and identifying 18 predecessor treaties that "shall remain in force" and confirming that all other predecessor agreements "are no longer in force"); **R-261**, **R-262** and **C-312** (following "bilateral consultations on the technical level," Montenegro sent Norway a "Draft Agreement … on succession of the treaties concluded [with the SFRY] that are still considered to be in force"; Norway responded with specific proposals, and Montenegro replied that "the foregoing proposals are acceptable" and that the two notes together "shall constitute an Agreement … which shall enter into force today"); **C-309** ("continuing the already commenced talks of succession" between Poland and Montenegro, Poland proposed an Agreement on Succession through which 16 predecessor treaties "shall remain in effect" and 7 others would not, and Montnegro "accept[ed] the proposal"); **RLA-39** (following several rounds of negotiations, Montenegro and Romania agreed on a formal Protocol under which 10 listed treaties "shall remain in force" but all other predecessor treaties "are no longer in force").
[783] *See, e.g.*, Claimant's Post-Hearing Brief, ¶¶ 55-56.
[784] Counter-Memorial on Jurisdiction, ¶ 71; Claimant's Post-Hearing Brief, ¶ 67(a).

a statement of the agreed retroactive effective date of the succession, even though the agreement itself was reached later. The Tribunal has already discussed above the unusual "retroactive" feature of succession agreements, in that they frequently are concluded following a "twilight period" of uncertainty but are then treated, after the fact, as eliminating the intervening uncertainty back to an agreed date in the past. Montenegro's exchange with Israel is a good example of this process, with the former proposing that its note and Israel's reply together "be considered as forming an agreement … *which will enter into force on the date the instrument with the reply of the State of Israel is received*," but which as of that "entry into force" of the agreement will result in Montenegro's "be[ing] considered as a successor to the above listed agreements from the date of entry into force of the Declaration of Independence of Montenegro from June 3, 2006."[785] In this formulation, the fact that the succession by agreement is back-dated to the date of Montenegro's independence does not mean that the whole exchange of diplomatic notes was unnecessary to formulate the agreement in the first place. Nor can such an inference be drawn (as the Claimant contends) from the use in some of the agreements of language such as "shall continue to apply" or "shall be maintained in force,"[786] which on a proper reading refers to the *effect* of the succession agreement (*i.e.*, continuity, applied retroactively to eliminate doubt), not to the supposed *unnecessary nature* of the agreement itself.

325. The Tribunal accepts that a number of Montenegro's agreements may be characterized as "inventory" agreements, and that on some occasions, States may use such agreements simply as a "consolidation" tool to "tidy up the position," even after succession to various treaties has already been formally agreed through other means.[787] At the same time, there is a "decidedly general practice" of States using such inventories precisely to distinguish between those "treaties maintained or modified and [those] deemed to have been terminated."[788] Indeed, Russia's own inventory practice with other former Yugoslav Republics (*e.g.*, Slovenia, Croatia, Bosnia & Herzegovina, and Macedonia) reveals significant differences among the lists of FRY treaties continued in force for some as opposed to others.[789] While the record does not allow any inquiry into whether those particular inventory agreements were preceded by diplomatic exchanges that

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[785] **RLA-37**.

[786] Counter-Memorial on Jurisdiction, ¶ 92(a). An example of such a prior agreement is the formal Protocol signed by Malta and Montenegro shortly after the latter's independence, in which the two States formally agreed to an interim arrangement in which "*pending the conclusion of new agreements*, the former agreements concluded between Malta and the [SRFY] shall remain applicable between Malta and the Republic of Montenegro." **C-395** (emphasis added). The two States thereafter met in person, and Malta followed up with a specific "list of these agreements that entered into force between Malta and the Republic of Montenegro with effect from 3 June 2006 and are still valid." **C-307.**

[787] Counter-Memorial on Jurisdiction, ¶¶ 86, 93, 96; Rejoinder on Jurisdiction, ¶ 139; Claimant's Post-Hearing Brief, ¶¶ 55, 59.

[788] Stern, p. 314 (**RLA-223**).

[789] *See* Respondent's Post-Hearing Brief, ¶¶ 67-68.

may have been earlier constitutive acts for particular treaties, the extent of the variation across Russia's inventories with respect to the FRY's treaty status does suggest a practice of case-by-case negotiations.

326. Thus, while any given inventory agreement may not be "dispositive" of the date on which a succession agreement was reached for each individual treaty, as the Claimant argues,[790] a frequent *practice* of emerging States concluding such agreements following their independence can nonetheless be indicative of their understandings and intentions regarding the need for such formalities. In the case of Montenegro, the sheer number of diplomatic exchanges Montenegro initiated with many different States, each time explicitly requesting an express response, is strong evidence that it understood *some* form of bilateral agreement to be necessary to confirm a mutual understanding of its succession to specifically identified predecessor treaties. The absence of *any* such specific exchanges with Russia, mentioning any particular treaties by name, is in stark contrast to the process demonstrably followed with respect to many other States.

327. In this regard, the Tribunal accepts the Claimant's point that the record does not reflect any particular process followed by Montenegro with respect to several other important trade partners.[791] As a result, the Tribunal is unable to determine for those other States whether there in fact is no express agreement in effect or simply an incomplete record. The Tribunal is also unable to determine whether, in the absence of express comprehensive agreements with those other partners, the States involved instead have reached *tacit* agreements on continuity with respect to particular treaties, by continuing to implement them in practice.[792] However, in the case of Montenegro and Russia, the situation is *not* one of an empty evidentiary record, but rather of an express exchange of diplomatic notes that failed to progress to an express succession agreement. As discussed above, Montenegro explicitly communicated "its readiness to observe all treaties and agreements that have been effective" between it and Russia,[793] albeit without listing any in particular or proposing a specific process to arrive at such a list, but Russia responded in an entirely non-committal fashion, acknowledging Montenegro's statement but indicating no views of its own. It is impossible for the Tribunal to read into this exchange the

[790] Counter-Memorial on Jurisdiction, ¶ 96.
[791] Counter-Memorial on Jurisdiction, ¶ 94 (identifying nine particular States not addressed in Respondent's Memorial on Jurisdiction); Reply on Jurisdiction, ¶¶ 106-109 (presenting succession agreements with three of the nine, and explaining its efforts to conclude a succession agreement with a fourth); Claimant's Post-Hearing Brief, ¶ 7 (requesting adverse inferences as a result of the Respondent's failure to produce various succession documents). For the avoidance of doubt, the Tribunal declines the request for adverse inferences, finding no reason to doubt the good faith of the Respondent's representations of a good faith search.
[792] *See generally* Section VIII.C.4, *infra*, discussing tacit continuity agreements revealed by mutual conduct in the form of continued implementation of a predecessor treaty.
[793] **C-18**.

conclusion of any express agreement between the two States, particularly against the backdrop of how Montenegro concluded such agreements with numerous other States.

328. This conclusion is further reinforced by the evidence that as of March 2007, just seven months after Russia's non-committal response, the two States apparently had "agreed to organize … consultations" during the first quarter of 2008 specifically aimed at "[i]ssues of inventory of the treaty-legal base of Montenegrin-Russian relations."[794] The record does not reveal the origins of this plan, nor what happened subsequently (*e.g.*, whether the consultations were held or perhaps were cancelled). Nonetheless, it is undisputed that no inventory agreement, itemizing the bilateral treaties that the two States agreed to be in force, was ever concluded. This reality, together with the very fact that further consultations initially were planned, reinforces the conclusion that the 2006 exchange of diplomatic notes between Montenegro and Russia did not itself result in any comprehensive agreement on succession.

4. Inferences from Status of other FRY-Russia Treaties

329. The Tribunal accepts that despite the absence of any *express* agreement between Montenegro and Russia either on global continuity of all predecessor treaties, or on a specific list of such treaties through an inventory process or otherwise, there remains the theoretical possibility of a *tacit* continuity agreement between the two States, as evidenced by subsequent conduct revealing a mutual understanding. As a matter of principle, it is widely accepted – and accepted by both experts in this case – that States may manifest intent to be bound by a treaty not only expressly but also tacitly, through conduct that reflects such an intention to be bound.[795]

330. For example, as the ILC has explained, States in practice frequently continue implementing the terms of predecessor treaties regulating day-to-day matters such as air transport and trade agreements, "allow[ing] existing … arrangements to run on provisionally until new ones are negotiated," in light of "the practical advantage of continuity" rather than disruption in the event of a succession.[796] Similarly, States likewise may continue to extend and accept assistance under technical or economic assistance agreements,[797] presumably because of a practical need to avoid a lapse in the operative benefits of these arrangements. The ILC observes that "[a] measure of '*de facto* continuity' has also been found in certain other categories of treaties such as those

[794] **R-172**.
[795] *See generally* VCSST, Article 24(1) ("a bilateral treaty … is considered as being in force between a newly independent State and the other State party when: (a) they expressly so agree; or (b) by reason of their conduct they are to be considered as having so agreed") (**CLA-166**); Claimant's Post-Hearing Brief, ¶ 23; Respondent's Post-Hearing Brief, ¶ 10.
[796] ILC Yearbook 1974, p. 237, Note 5 (**CLA-196**).
[797] *Id.*, p. 237, Note 6 (**CLA-196**).

concerning abolition of visas, migration or powers of consuls and in tax agreements."[798] The ILC describes these situations, where "continuity has quite often simply occurred" even prior to or without an express exchange of diplomatic notes, as reflecting "a tacit manifestation of the will of the interested States."[799] Otherwise explained, at some point the evidence of continued mutual implementation of a predecessor treaty simply becomes so compelling as to support a conclusion that the States must have tacitly consented to continuing the treaty in force; "the application of the treaty by both States necessarily implies an agreement to consider it as being in force."[800]

331. However, the fact that two States may tacitly agree to continue one or more predecessor treaties, by virtue of mutually implementing them in practice, does not imply that the States have agreed more broadly to continue in force *all* predecessor treaties, even those for which there is no evidence of continued implementation. Any agreement to be bound by a treaty must be clear and unambiguous, and this means that where the agreement is one manifested by conduct rather than by words, the conduct must be specific to the particular treaty.[801]

332. In this case, the Parties have devoted substantial effort to canvassing the status of FRY-Russia bilateral treaties other than the FRY-Russia BIT. In at least one instance, involving a 2005 Consular Convention ratified by the State Union in 2006,[802] Montenegro specifically advised Russia that "there is no need to re-ratify the Convention in the Parliament of the Republic of Montenegro,"[803] and after Russia in turn ratified it, the two States later signed a Protocol regarding the exchange of ratifications, confirming that the Convention would enter into force between them in April 2008.[804] In other instances, such as with respect to the 2000 Agreement on Free Trade,[805] the 1998 Agreement on International Road Transport,[806] and the 1995 Double

[798] *Id.*, p. 237, Note 7 (**CLA-196**).
[799] *Id.*, p. 238, Note 10 (**CLA-196**).
[800] *Id.*, p. 239, Note 14 (**CLA-196**).
[801] *See id.*, p. 240, Note 16 (**CLA-196**) (in the context of newly independent States, concluding that "[t]aking … into account both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the principle of self-determination, … the conduct of the particular States *in relation to the particular treaty* should be the basis of the general rule for bilateral treaties") (emphasis added).
[802] Consular Convention between the Russian Federation and Serbia and Montenegro, 7 November 2005 (**CLA-81**).
[803] **C-330**.
[804] **R-175**.
[805] Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on Free Trade between the Russian Federation and the Federal Republic of Yugoslavia, 28 August 2000 (**CLA-206**).
[806] Agreement between the Government of the Russian Federation that the Federal Government of the Federal Republic of Yugoslavia on International Road Transport, 4 November 1998 (**CLA-76**).

Taxation Agreement,[807] both States apparently conducted themselves – internally and, importantly, externally – as if the treaty continued to apply.[808] In at least one case, involving the 1962 Treaty on Legal Assistance in Civil, Family and Criminal Cases,[809] the status of the treaty was sufficiently unclear that Montenegro had to ask Russia in 2010 whether it continued to apply the treaty, to which it received a positive response.[810] Notably, Montenegro's "request to clarify this information" with Russia was prompted by a project of its Ministry of Foreign Affairs "for further work on the matter of succession of bilateral treaties and agreements by Montenegro,"[811] which suggests at a minimum some uncertainty on Montenegro's part regarding the status of various predecessor treaties, rather than an assumption of global continuity either by virtue of its 2006 Declaration on Independence or any mutual tacit consent with each counterpart State.

333. By contrast, the record is far less clear with respect to the continued mutual observance of other predecessor FRY-Russia treaties. In a number of cases debated by the Parties, the record consists primarily of responses procured by the Parties' respective counsel from various governmental agencies during 2018, in the midst of active arbitration of this dispute. Without in any way impugning counsel's conduct, the responses received to these 2018 inquiries at best reflect the particular agencies' understanding of treaty status for purposes of replying to the inquiry, without necessarily referencing any track record of actual practical implementation of the relevant treaties by the two States during the intervening years. Absent such a bilateral practice of continued implementation of a treaty's terms, it is far from clear that an agency's expression of views to a law firm making inquiries is sufficient in international law to constitute the kind of State "conduct" necessary to support a conclusion about tacit mutual consent.

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[807] Convention between the Government of the Russian Federation and the Union Government of the Federal Republic of Yugoslavia for the Avoidance of Double Taxation with respect to Taxes on Income and Property, 12 October 1995 (**CLA-70**).

[808] With respect to the Free Trade Agreement, *see* **R-174** (Russia's internal note regarding continued implementation), **C-367** (Montenegro's proposal to Russia of certain next steps under the Agreement), **C-320** (minutes of a subsequent joint Montenegro-Russia meeting), **R-66** (Montenegro's report to the European Commission), and **R-120** (Montenegro's report to UNCTAD); with respect to the Road Transport Agreement, *see* **R-178** and **C-319** (indicating that the two States continued to transport permits under the Agreement, even while negotiating an eventual updated agreement to replace the prior one); and with respect to the Double Taxation Agreement, *see* **R-179** (Montenegro's adoption of an internal practice of applying all double taxation agreements of the former State Union), **R-69** (Montenegro's communication of this practice to a third State); **C-326** and **C-422** (Montenegro's tax authorities listing the treaty in force in official database); **C-424** (Montenegro's report to the European Commission); **C-325** (Russia's tax authorities listing the treaty in force in official database).

[809] Treaty between the Union of Soviet Socialist Republics and Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil, Family and Criminal Matters, 24 February 1962 (**CLA-72**).

[810] *See* **C-316** (Montenegro asking Russia in 2010 whether it continued to apply the treaty), **C-317** and **R-119** (Russia replying that it did, particularly for enforcement of court orders), and **CLA-73** and **CLA-74** (Russian courts thereafter applying the treaty, including under requests of Montenegrin courts).

[811] **C-316**.

334. The Tribunal need not try to resolve definitively the status of each of these treaties, particularly on an incomplete record. It suffices to say that the Claimant has not demonstrated a sufficiently clear or consistent record of *comprehensive* State practice by Montenegro and Russia as to support an inference of a tacit agreement on continuity for *all* predecessor bilateral agreements,[812] as necessary to extend such a general tacit agreement to the FRY-Russia BIT in particular. At best, the record suggests a *case-by-case* approach, in which Montenegro and Russia have agreed expressly or tacitly to continue observing certain predecessor treaties, while remaining silent or inactive with respect to others. This case-by-case approach is not sufficient to support an inference of continuity with respect to the treaties where there has been no specific conduct by the two State Parties demonstrating a mutual intent to continue the treaties in force.

335. Most importantly, the record does not reveal any equivalent conduct by Russia and Montenegro implementing in practice the FRY-Russia BIT, which might be taken as persuasive evidence of their mutual tacit consent to continuity with respect to that treaty. To the contrary, there is no contention that Montenegro and Russia mutually continued to implement the FRY-Russia BIT in any way through bilateral dealings.[813] For example, neither State has previously accepted a claim being filed against it by an investor of the other State pursuant to Article 8 of the FRY-Russia BIT, nor has either State previously indicated its support for a claim filed by a home-State investor under that Article. Neither State apparently has sought State-to-State consultations pursuant to Article 9, regarding any aspect of interpretation or application of the FRY-Russia BIT; nor has either State invoked Article 10's procedures for settlement of disputes between the Contracting Parties.[814] To the contrary, there is no evidence of any direct exchanges at all, on any subject, between the two States regarding any aspect of the FRY-Russia BIT. Nor is there

[812] To the contrary, a number of Russian state agencies contacted by the counsel in 2018 disclaimed any current treaties in effect. *See, e.g.*, **R-181** (the National Information Center on the recognition of educational degrees stating that "there are no agreements with Montenegro"), which the Respondent contends refutes the notion that the predecessor Mutual Recognition of Diplomas Agreement, **RLA-312**, remains in effect); **R-182** (the Ministry of Construction stating that "in the construction sector there are no bilateral agreements on cooperation" with Russia), which the Respondent contends refutes the notion that the predecessor Construction Cooperation Agreement, **RLA-314**, remains in effect); **R-183** (the Ministry of Culture stating that "there is currently no regulatory and legal framework for Russian-Montenegrin cooperation in the field of culture"), which the Respondent contends refutes the notion that the predecessor Culture, Education, Science and Sport Cooperation Agreement, **R-216**, remains in effect); **R-188** (the Federal Service for Veterinary and Phytosanitary Surveillance stating that "[t]here are currently no bilateral agreements in the field of veterinary and phytosanitary surveillance between the Russian Federation and the Republic of Montenegro"), which the Respondent contends refutes the notion that the predecessor Veterinary Service Agreement, **RLA-318**, and Quarantine and Plant Agreement, **RLA-319**, remain in effect). The Tribunal acknowledges the Claimant's counter-arguments regarding these agreements, but sees no need to definitively rule on the status of each.

[813] The Tribunal addresses separately in Section VIII.C.5 below the asserted relevance of a unilateral listing (or a unilateral non-listing) of a particular treaty in public databases. This issue is distinct from the question of mutual implementation of a particular treaty in practice by both States in their continued bilateral dealings.

[814] **C-1**, Articles 8-10.

any evidence that either State concretely relied on actions or assurances from the other regarding the FRY-Russia BIT, so as to give rise to any arguable basis for estoppel or preclusion.[815]

336. In this regard, the Tribunal acknowledges the Claimant's argument that "BITs are 'dormant' international agreements," such that "they do not produce visible state practice" until such time as a particular dispute arises between an investor and a host State.[816] That may be true, but it does not change the analysis. The absence of a prior need to implement the terms of a predecessor treaty may explain why there is no record of specific State conduct with respect to that treaty. But this does not obviate the requirement that there be *some* demonstrable source of mutual consent to treaty continuity. In the absence of any express diplomatic exchanges about the treaty at all – and in particular in the context of an entirely non-committal response by one State to the other's overture about treaty continuity in general – the existence of concrete practice regarding a particular treaty becomes critical in determining the fate of that particular agreement. In this case, either State could have approached the other at any time from 2006 onwards about the status of the FRY-Russia BIT. They did not do so. The situation is thus entirely distinct from the classic example of tacit consent to continuity, under which the "reciprocal behaviour of two States proves unquestionably their desire to give effect in their relations to a specific treaty between one of them and the State predecessor to the other."[817] There is no evidence of such conduct here.

5. Inferences from Public Reporting of BITs in Force

337. The Tribunal accepts the Claimant's proposition that the presence or absence of a particular treaty from public reports and databases is in no way "authoritative" or "decisive" regarding the validity or invalidity of that treaty.[818] It does not agree, however, that such factors "cannot be considered as … evidence" and have "no evidentiary weight" at all.[819] The weight to be given to such evidence depends on several factors. One such factor is the degree to which a particular report or database is *based on input by States* themselves as opposed to third parties, or is of an

[815] As noted above, the International Law Commission has suggested that in some circumstances "one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty," which could give rise to arguments of "estoppel or *préclusion*" based on the principle of good faith reflected in Article 45 of the VCLT. Such circumstances in principle could make it difficult for one State to suddenly announce that a treaty had not continued in effect, despite its own past conduct and/or its past acceptance of the other's acts in reliance on its conduct. *See* ILC Yearbook 1974, Note 17 (**CLA-196**). The issue does not arise in this case, however, because Claimant has not pointed to any specific conduct by Montenegro with respect to the FRY-Russia BIT upon which either he or his home State, Russia, supposedly relied.

[816] Rejoinder on Jurisdiction, ¶¶ 149-150.

[817] *Re Bottali*, 78 ILR 105, 111 (1980) (**CLA-192**).

[818] Counter-Memorial on Jurisdiction, ¶ 119; Rejoinder on Jurisdiction, ¶ 143.

[819] Counter-Memorial on Jurisdiction, ¶ 119; Rejoinder on Jurisdiction, ¶¶ 141, 145.

institutional nature that States could be expected to monitor periodically for purposes of correcting any misreporting. Another relevant factor is the *consistency in reporting over time*, with consistent reports more likely to be instructive of a given State's understanding than a single report that deviates from its prior or subsequent reports. Finally, it is highly relevant whether *both States report the same status* regarding a given bilateral treaty, indicating a shared understanding regarding its validity. Even though such public reporting is not itself a path towards concluding an inter-State agreement on succession, the consistent separate representations by both States of their willingness to treat a predecessor treaty as remaining in force might well support a finding of mutual tacit consent to succession, essentially as an agreement on an outcome if not necessarily on the precise path taken to that outcome. By contrast, divergent reporting – with one reporting a particular bilateral treaty to be in force and the other not – is less indicative of a shared understanding and accordingly entitled to less weight.[820]

338. With the first factor in mind, the Tribunal sets aside the lists maintained by private organizations such as Global Arbitration Review and Kluwer Arbitration, which the Respondent invokes to some degree in its submissions.[821] Unlike databases maintained by international organizations, States are not expected to report treaty developments to these private organizations, nor should they be presumed even to monitor these private lists regularly for purposes of correcting mistakes. By contrast, the UNTS depends on formal registration of each listed treaty,[822] so *inclusion* of a particular treaty in the UNTS would be a significant fact. However, the *absence* of a particular treaty from the UNTS – such as the FRY-Russia BIT – is less instructive, because it appears that the UNTS in general is under-inclusive, omitting for example a number of BITs even though State parties have elsewhere reported them as being in force.[823]

339. The Tribunal next turns to the UNCTAD and ICSID databases, which are specific to international investment agreements. The information in these databases apparently is drawn largely from State reports,[824] and in any event States may be expected to be aware of the treaties listed for them by these institutions and to take action to correct any obvious errors or significant omissions. This may be why Professor Tams himself relied on UNCTAD data for purposes of his prior

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[820] *See generally* ILC Yearbook 1974, p. 239, Note 14 (**CLA-196**) (describing as a "less clear case" for succession the "situation[] where one State may have evidenced in some manner an apparent intention to consider a treaty as continuing in force – e.g., by listing the treaty amongst its treaties in force – but the other State has done nothing in the matter"). The ILC's treatment of such inconsistent "listing[s]" of treaties implies, *a contrario*, that it would consider a consistent listing by both States of a given treaty to be of more evidentiary weight.

[821] Memorial on Jurisdiction, ¶ 35.

[822] Reply on Jurisdiction, n.373.

[823] *See* Counter-Memorial on Jurisdiction, ¶ 119(a) (noting that 11 of the 14 BITs that Montenegro in 2009 reported to the European Commission as being in force are not in the UNTS database).

[824] *See* **R-194** (UNCTAD explanation of methodology), **R-78** (ICSID explanation of methodology).

published work on BIT succession issues.[825] In any event, with respect to the FRY-Russia BIT, the evidence is that the treaty is not listed in the ICSID database of bilateral investment treaties,[826] and for the most part was not listed in UNCTAD reports – except during an unexplained one-year interval from 2016-2017,[827] which departed both from prior UNCTAD listings[828] and from Montenegro's own regular reports to UNCTAD,[829] and which UNCTAD thereafter removed at Montenegro's request.[830] This period appears to be an outlier against the preceding and subsequent years, and as such is not sufficiently probative as to support a finding of mutual consent to succession absent other, stronger evidence to that effect.

340. The same conclusion – that there is insufficient evidence to warrant a finding of a shared understanding regarding the FRY-Russia BIT – is supported by Montenegro's and Russia's unilateral reporting of BITs in force, outside the context of the UNCTAD database. First, Montenegro reported to the European Commission in 2009 that it had 14 BITs in force, including several pre-independence BITs, but not including the FRY-Russia BIT.[831] The Tribunal acknowledges the Claimant's argument that there are certain inconsistencies between the list of BITs notified to the European Commission in 2009 and the list thereafter reported to

[825] Tams, p. 324 n.64 (**RLA-298**) (citing UNCTAD's "International Investment Agreement Navigator").

[826] *See* **R-78** (ICSID list of Russian BITs, as of 27 October 2017), **R-79** (ICSID list of Montenegrin BITs, as of 27 October 2017).

[827] *Compare* **R-198** (archive version of UNCTAD's list of Russian BITs, as of 31 March 2016, not listing any BIT in force with Montenegro) *with* **R-199** (archive version of UNCTAD's list of Russian BITs, as of 17 May 2016, now listing the FRY-Russia BIT as in force for Montenegro); **C-332** (archive version of UNCTAD's list of Russian BITs, as of 30 June 2017, still listing the FRY-Russia BIT as in force for Montenegro); *and* **R-81** (UNCTAD's list of Russian BITs, as of 20 October 2017, once again not listing any BIT in force with Montenegro).

[828] *See* **R-239** (UNCTAD list of Montenegrin BITs as of 1 June 2009, from archive date of 4 July 2010, not listing any BIT in force with Russia); **R-241** (UNCTAD list of Russian BITs as of the same date, not listing any BIT in force with Montenegro); **R-240** (UNCTAD list of Montenegrin BITs as of 1 June 2011, from archive date of 2 December 2011, not listing any BIT in force with Russia); **R-242** (UNCTAD list of Russian BITs as of the same date, not listing any BIT in force with Montenegro); **R-243** (UNCTAD list of Russian BITs as of 1 June 2012, from archive dated 12 May 2013, not listing any BIT in force with Montenegro); **R-196** (archive version of UNCTAD's list of Russian BITs, as of 31 August 2015, not listing any BIT in force with Montenegro); **R-197** (archive version of UNCTAD's list of Montenegrin BITs, as of 9 September 2015, not listing any BIT in force with Russia).

[829] *See* **R-195** (Montenegro's report to UNCTAD of BITs in force, dated 13 March 2015, divided into "those which were taken over by succession," those signed after independence, and those signed but not yet in force); **R-120** (Montenegro's report to UNCTAD of BITs in force, dated 6 July 2016); and **R-148** (Montenegro's report to UNCTAD of investment BITs in force, dated 23 March 2017). The Tribunal acknowledges but denies the Claimant's request for adverse inferences on account of the Respondent's non-production of its 2014 report to UNCTAD (*see* Rejoinder on Jurisdiction, ¶ 146 and Claimant's Post-Hearing Brief, ¶ 7(b)), in the absence either of a Tribunal order of production or of any reason to doubt the veracity of Respondent's explanation that it voluntarily looked for but could not locate the document in question.

[830] **R-200** (Montenegro's correspondence with UNCTAD, from June to September 2017, requesting removal of the listing); **R-80** (UNCTAD's list of Montenegrin BITs, as of 27 October 2017, no longer listing any BIT in force with Russia).

[831] **R-66**.

UNCTAD,[832] but this observation does not materially advance the Claimant's case, given the absence of the FRY-Russia BIT (for the most part) from the UNCTAD reports as well.

341. As for the website listings maintained separately by Montenegro's and Russia's respective Ministries of Foreign Affairs, these likewise do not reveal any consistent shared understanding regarding the FRY-Russia BIT, with Montenegro apparently never including this BIT in its public list and Russia doing so only after its absence was pointed out in these proceedings.[833] Even apart from the general notion (discussed further in Section VI.C.6 below) that conduct after a dispute has arisen may be less probative than pre-dispute conduct, it is notable (as the Respondent points out) that the current listing on the Russian website refers only to the FRY-Russia BIT as remaining in force, but not specifically that it is in force vis-à-vis *Montenegro*, as opposed to vis-à-vis Serbia as the FRY's continuator State.[834] The distinction may be significant given that the FRY-Russia BIT had long been reported by UNCTAD as continuing in force for Russia with Serbia but not for Montenegro as well.[835]

342. In conclusion, while the Tribunal does not exclude the possibility in principle that public reporting of treaties in some cases might be sufficiently official, consistent and mutual as to warrant significant evidentiary weight, this is not such a case. Here, there has been no showing of any consistent shared practice of reporting the FRY-Russia BIT as remaining in effect as between Montenegro and Russia. To the contrary, there have been numerous instances in which neither side apparently reported the FRY-Russia BIT as among those treaties it considered to be in force. In these circumstances, any inference the Tribunal might be inclined to draw from the public reporting factor would be more likely to reinforce, rather than contradict, the findings the Tribunal already has reached above regarding the impact of the State Parties' inconclusive exchange of diplomatic notes regarding treaty succession in general.

6. Relevance of Russian MFA Letters Regarding the BIT

343. The Tribunal turns finally to the several letters from the Russian MFA about the status of the FRY-Russia BIT that have been introduced into the record. At the outset, the Tribunal offers several observations.

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832 *See* Second Tams Report, ¶ 143; Claimant's Post-Hearing Brief, ¶ 68.
833 *See* Statement of Defence, ¶ 296; Counter-Memorial on Jurisdiction, ¶ 117 (citing **C-301**, **C-331**).
834 *See* Respondent's Post-Hearing Brief, ¶ 153; **C-331**.
835 *See* **R-241** (UNCTAD list of Russian BITs as of 1 June 2009, from archive date of 4 July 2010, listing FRY-Russia BIT for Serbia but not Montenegro); **R-242** (UNCTAD list of Russian BITs as of 1 June 2011, from archive date of 2 December 2011, listing FRY-Russia BIT for Serbia but not Montenegro); **R-243** (UNCTAD list of Russian BITs as of 1 June 2012, from archive dated 12 May 2013, listing FRY-Russia BIT for Serbia but not Montenegro).

344. First, by definition such letters reflect the perspective of one State only, and therefore at best may be useful in shedding light on its own understanding of affairs, not on the other State's understanding and therefore not on the ultimate issue of mutual consent.

345. Second, each of the Russian MFA letters (which are dated variously August 2016, September 2017, October 2017 and September 2018) was prepared long after the 2006 events which are said to have resulted in either an express or tacit agreement on succession. Inevitably, therefore, these letters reflect more recent understandings. They are not contemporaneous documents reflecting the MFA's understanding in 2006, at the time of Montenegro's declaration of independence and the subsequent exchange of diplomatic notes between Montenegro and Russia.

346. Third, none of these letters was prepared in the ordinary course of MFA business, which for any such Ministry can be said to be the conduct of foreign affairs and diplomatic relations. Each letter was a response to an inquiry from a private individual or entity, in the context of a hotly disputed case between a prominent Russian national and the State of Montenegro. The degree to which this context may have been known to the Russian MFA when it responded to the various letters may have varied, and the degree to which it may have influenced the content of the MFA's response is unknowable. But in any event, most or all of these letters can be seen as "post-critical date evidence" – to borrow a phrase introduced by Professor Tams[836] – and moreover not evidence generated in the ordinary course of diplomatic activities.

347. The Tribunal also observes that the substance of the MFA's letters was not consistent from one letter to the next. First, although not introduced into the record until the Claimant's Rejoinder on Jurisdiction (even though the Claimant's prior Counter-Memorial on Jurisdiction had already introduced a later MFA letter), it appears that in August 2016 the MFA responded to an inquiry by the Claimant's counsel EPAM, which specifically identified its inquiry as pertaining to its "representation and defence of [a] client."[837] These letters predated by several months the Claimant's formal initiation of proceedings by its Notice of Arbitration in December 2016, but

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[836] *See* First Tams Report, ¶ 67 (stating that "[t]he relevance of evidence adduced depends on the circumstances and the time at which it has emerged," and that "[w]hile the precise identification of the critical date depends on the context, there is agreement that evidence emerging in close proximity to ongoing proceedings needs to be viewed with caution") and ¶ 123 ("consider[ing] the Respondent's statements made in the course of the present proceedings to be of limited relevance" because they "were clearly made after the institution of the present proceedings"); *but see* Second Tams Report, ¶¶ 99-101 (relying on April and September 2018 letters from Russia's MFA as making "clear what Russia meant" in its 2006 diplomatic note to Montenegro, "confirm[ing] its perception of the situation," and "help[ing] understand how Russia intended its Note of 16 August 2006 to be understood"), ¶¶ 110-111 (invoking the MFA's letter of September 2018 to "clarify the seeming contradiction between its earlier statements in September and October 2017), and ¶ 112 ("accept[ing] … that the three Ministry letters looked at so far date from the after the institution of the present proceedings and might thus be characterized as 'post-critical date evidence,'" but considering that they "confirm a position that had been expressed *before* the present dispute was brought," referring to an MFA letter of August 2016).

[837] **C-383**.

post-dated several meetings the Claimant and his representative had with senior Montenegrin officials between February and April 2016, which the Claimant invokes as "duly notif[ying]" the Respondent "as to [his] dispute with Montenegro."[838] However, the August 2016 EPAM letter to Russia's MFA did not itself identify Mr. Deripaska as the client on whose behalf the inquiry was made.[839] Be that as it may, the MFA responded that the FRY-Russia BIT "continues to operate in relations between the Russian Federation and Montenegro," citing Montenegro's 4 August 2006 diplomatic note to Russia, but *not* referencing Russia's 16 August 2006 diplomatic note in response.[840] This first MFA letter therefore did not grapple at all with the consequences of Russia's non-committal response for the effectiveness of any offer of general succession that Montenegro's prior note might be seen to represent. As explained in Section VIII.C.2, however, Russia's non-committal response in fact was highly significant, given the requirement of mutual consent and not simply a unilateral offer by one State.

348. The second MFA letter was issued roughly a year later, in September 2017, this time in response to an inquiry by an individual (Mr. A.M. Borisov), who was not identified as an attorney or as making an inquiry relating to a specific dispute. The inquiry simply asked the MFA "to clarify, whether any agreements on mutual encouragement of investments are currently effective between the Russian Federation and any of the following countries: 1) Bosnia and Herzegovina 2) The FYROM [North Macedonia] [and] 3) Montenegro."[841] The MFA responded that a BIT was in effect with the FYROM but "[w]ith Bosnia and Herzegovina and Montenegro such agreements have not been concluded."[842]

349. Roughly three weeks later, in October 2017, the MFA sent Mr. Borisov an unsolicited follow-up letter, stating that it had "refined some data on your request." The MFA now stated that the FRY-Russia BIT was "in force" for Montenegro, citing Montenegro's 4 August 2006 diplomatic note to Russia but again not referencing Russia's 16 August 2006 diplomatic note in response.[843] The letter did not indicate what prompted the MFA to undertake the additional "refin[ing]" during the three intervening weeks.

350. The fourth MFA letter in the record is from April 2018 and responds to an EPAM letter that explicitly referenced this arbitration by its PCA case number and the inquiry, which consisted of several pages of detailed legal questions, as "for the purpose of preparing a position on the

[838] Rejoinder on Jurisdiction, ¶¶ 166-167 (citing **CWS-1** and **CWS-8**).
[839] **C-383**.
[840] **C-382**.
[841] **R-191**.
[842] **R-192**.
[843] **R-193**.

dispute," and asked a series of detailed legal questions.[844] The MFA's response provided correspondingly detailed answers. Among these answers was the statement that Montenegro's 4 August 2006 diplomatic note was not "an invitation for additional negotiations" but rather an "expression of will," which "along with the behavior that followed it, seems sufficient" to confirm Montenegro's succession to the FRY-Russia BIT. The letter does not identify any specific "behavior that followed" Montenegro's 4 August 2006 note, except to describe its own "takes into consideration" response as a "confirmation of succession."[845]

351. Finally, in September 2018, the MFA wrote another letter to EPAM, in response to questions presented in an August 2018 EPAM letter. The MFA response took the position that Montenegro's "statement on succession" in its 4 August 2006 diplomatic note "is sufficient for the Russian Federation … to consider this state as a successor state" to the FRY, but added that "the actual implementation by the state of the provisions of an international treaty shall be qualified as a confirmation of the state's recognition of the effectiveness of the treaty." The letter did not point to any instances of "actual implementation" of the FRY-Russia BIT by either Russia or Montenegro.[846] The MFA did, however, attempt to explain its earlier September 2017 letter to Mr. Borisov, claiming it initially understood his inquiry to extend only to whether Russia and Montenegro had "concluded directly" a treaty, which they had not.[847] This explanation is not persuasive, given that Mr. Borisov had not asked about any such "direct" conclusion of treaties, but simply inquired "whether any agreements on mutual encouragement of investments *are currently effective* between the Russian Federation and … Montenegro."[848] In any event, the MFA now explained its October 2017 follow-up to Mr. Borisov as having been prompted by its receipt "in parallel [of] requests of other persons on the same topic," although the "other persons" who had corresponded with the MFA during the intervening three weeks were not identified.[849] Given the absence of any other known pending arbitrations involving Russian and Montenegrin parties under the FRY-Russia BIT, the Tribunal assumes that the intervening "requests" that prompted the MFA so quickly to revisit its reply to Mr. Borisov were submitted on behalf of the Claimant in this case.

352. The Tribunal acknowledges the Respondent's contention that the MFA's more recent statements "should accordingly be disregarded as opportunistic" and a reflection of "Mr. Deripaska's influence in Russia."[850] However, in the Tribunal's view, it is not necessary to take a position on

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844 **C-333**.
845 **C-301**, pp. 5-7.
846 **C-389**, ¶¶ 1-2.
847 **C-389**, ¶ 3.
848 **R-191** (emphasis added).
849 **C-389**, ¶ 3.
850 Respondent's Post-Hearing Brief, ¶ 139.

why the MFA's letters were inconsistent over time. The fact is that the letters were indeed inconsistent, which at minimum casts doubt on the clarity of the issue within the MFA's own records, somehow leading it to provide conflicting responses at least until the MFA was reminded of the relevance of the question for this arbitration. Such ambiguity in the MFA's records is itself evidence that the status of the FRY-Russia BIT vis-à-vis Montenegro was hardly an obvious or settled issue for the MFA, a conclusion that is reinforced by its own apparent non-correction, over many proceeding years, of UNCTAD reports that the FRY-Russia BIT was in force for Serbia but not for Montenegro.[851] If the MFA truly had believed all along that the Treaty also was in force for Montenegro, and indeed had been so ever since August 2006, one would expect it to have informed UNCTAD of that fact. Notably, none of the MFA letters submitted in this case attempt to explain why Russia would have permitted UNCTAD repeatedly to omit Montenegro from its list of Russian BITs in force.

353. For these reasons, the Tribunal is unable to accept the MFA's 2016-2018 letters as sufficiently compelling evidence that Russia itself (prior to this dispute) viewed succession as having occurred as a result of the 2006 events. Even if the Tribunal *arguendo* were to assume otherwise, the MFA letters still would provide no evidence at all of Montenegro's contemporary view of the same events, and therefore could have no bearing on any *mutual* understanding that the two State Parties may have shared in the years preceding this arbitration.

D. CONCLUSION

354. For the reasons explained above, the Tribunal accepts the Respondent's principal objection to jurisdiction, namely that the FRY-Russia BIT was not binding in the relations between Montenegro and Russia following Montenegro's secession from the State Union. Because the FRY-Russia BIT is the only basis for jurisdiction that the Claimant invokes, there is no need for the Tribunal to address the Claimant's various other jurisdictional objections, which in one way or the other each depend on particular terms of that BIT, and moreover which would not modify the Tribunal's conclusion that it lacks jurisdiction due to the BIT's invalidity.

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[851] *See* **R-241** (UNCTAD list of Russian BITs as of 1 June 2009, from archive date of 4 July 2010, listing FRY-Russia BIT for Serbia but not Montenegro); **R-242** (UNCTAD list of Russian BITs as of 1 June 2011, from archive date of 2 December 2011, listing FRY-Russia BIT for Serbia but not Montenegro); **R-243** (UNCTAD list of Russian BITs as of 1 June 2012, from archive dated 12 May 2013, listing FRY-Russia BIT for Serbia but not Montenegro).

IX. COSTS

A. THE RESPONDENT'S SECURITY APPLICATION

1. Procedural History

355. As noted in Section II describing the general Procedural History of this case, the Respondent filed its Security Application on 22 September 2018. The Respondent requested that the Tribunal order either that the Claimant deposit €1,800,000.00 into an institution that the Tribunal deemed suitable, or that the Claimant submit an unconditional, irrevocable and payable on first demand guarantee issued by an unaffiliated, reputable international bank in the same amount. The Respondent also requested that the Tribunal suspend the arbitration pending the Claimant's compliance with the proposed orders and order that the Claimant bear all costs associated with the Security Application.[852]

356. At the same time, however, the Respondent proposed a timetable for dealing with the Security Application, which involved *inter alia* the presentation of oral arguments during the Hearing on Jurisdiction already scheduled for November 2018. As a result, it was clear from the Respondent's own proposed timing that it did not envision any suspension of the Hearing on Jurisdiction, or accordingly of the Parties' and the Tribunal's preparations for that Hearing. Rather, the Respondent evidently envisioned that the Tribunal would hear the Parties' oral arguments regarding jurisdictional issues as previously scheduled, and decide only *after* so doing on the substance of its Security Application.

357. Between 28 and 29 September 2018, the Claimant and the Respondent provided comments on the proposed timetable for addressing the Security Application. On 1 October 2018, the PCA wrote to the Parties on behalf of the Presiding Arbitrator to confirm that it accepted the Parties' agreed timetable for written submissions on the Security Application and that it would hear short oral arguments on the Application during the Hearing on Jurisdiction as the Respondent had proposed. Pursuant to this schedule, on 19 October 2018, the Claimant filed his Reply to the Security Application (the "**Security Reply**"), requesting that the Tribunal dismiss the Application and order that the Respondent bear all costs related to it.[853] The Parties thereafter made oral submissions on the Security Application on 20 November 2018 during the Hearing on Jurisdiction, immediately following the conclusion of their respective oral submissions on jurisdictional issues on 19 and 20 November 2018.

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[852] Security Application, ¶ 129.
[853] Security Reply, ¶ 89.

2. The Parties' Positions on the Security Application

358. The Parties agree that the Tribunal has jurisdiction, in principle, to order security for costs.[854] The Respondent bases its application on Articles 26 and 15 of the UNCITRAL Rules or section 25(4) of the Swedish Arbitration Act (the "**SAA**"), and submits that the authority of investment arbitration tribunals to order security for costs "has been, for years, recognized in arbitral practice and academic writings."[855]

359. The Parties' positions differ as to the applicable criteria for ordering security for costs.

The Respondent's Position

360. The Respondent submits that the Tribunal has "considerable flexibility and discretion" in determining whether an order for security for costs is necessary in the circumstances of the case.[856] It submits that Article 26 of the UNCITRAL Rules establishes the following criteria for a security for costs application:[857] (i) a reasonable possibility of obtaining a favorable costs award; (ii) a risk of harm not adequately reparable by an award of damages if security for costs is not posted; and (iii) that such harm substantially outweighs any harm that the Claimant might conceivably suffer from posting security.

361. The Respondent rejects an alternate three-limb test consisting of *prima facie* jurisdiction, possibility of success on the merits and urgency, on the basis that "such requirements are not appropriately deployed in the context of security for costs."[858] In particular, the Respondent argues that the first two limbs are not required because the nature of a security for costs application "presumes the absence of a successful jurisdictional and / or substantive case on the part of the claimant."[859] Instead, the Respondent submits that it is only required to establish a "reasonable prospect of ultimately succeeding in its case as pled."[860] As to urgency, the Respondent first argues that this is not required because the codification of conditions for granting interim measures in the 2010 UNCITRAL Rules "should be taken into account in the

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[854] Security Application, ¶¶ 15-24; Security Reply, ¶ 3.
[855] Security Application, ¶ 15, referring to *South American Silver Limited v. Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, ¶ 52 (**RLA-463**).
[856] Security Application, ¶ 25, referring to *Manuel García Armas et al. v. Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018, ¶ 187 (**RLA-470**).
[857] Security Application, ¶¶ 26, 28, citing C. Sim, "Security for Costs in Investor-State Arbitration", Arbitration International 2017, p. 479 (**RLA-465**); *García Armas v. Venezuela*, ¶ 191 (**RLA-470**); Hearing Transcript, 489:10-24, 506:8-9.
[858] Security Application, ¶¶ 41-42.
[859] Security Application, ¶¶ 47-48, citing Sim, p. 479 (**RLA-465**); *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons, Assenting Reasons of Gavan Griffith, 13 August 2014, ¶¶ 4-6 (**RLA-477**).
[860] Security Application, ¶ 49.

interpretation of the 1976 UNCITRAL Rules."[861] The Respondent argues that, in any event, "urgency will inevitably follow if it is established that there is a risk that a party will not comply with the tribunal's costs award," thereby making the condition of urgency "redundant."[862]

362. In any event, the Respondent contends that under Article 15(1) of the UNCITRAL Rules, the Tribunal may conduct this arbitration as it deems appropriate, provided that it observes the principle of party equality and allows each party an opportunity to present its case. It submits that this permits the Tribunal to formulate the appropriate legal standard for granting security for costs.[863]

1. Reasonable possibility of a costs award

363. In respect of its first proposed criterion, the Respondent clarifies that "the Tribunal should be satisfied that Respondent's position on jurisdiction and admissibility is plausible,"[864] and that, if it is successful, there is a "reasonable possibility that it would be awarded costs under the relevant legal framework."[865] This is supported by, the Respondent contends, the default cost-shifting rule in the UNCITRAL Rules and the Tribunal's discretion to award costs, factoring in the "relative degree of success and the parties' conduct of the case."[866]

364. In the present case, the Respondent submits that "there is at least a reasonable possibility, and in fact a high likelihood, that it will obtain an award of costs of the proceedings."[867] The Respondent describes its case on jurisdiction and admissibility as "not *prima facie* frivolous, but serious and substantial."[868] It argues that this position has been accepted by the Claimant,[869] because the Claimant has "failed to provide sustainable arguments" to address the Respondent's objections on jurisdiction and admissibility.[870] The Respondent denies that its Security

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[861] Security Application, ¶¶ 43-45, citing Report of the Working Group on Arbitration on the work of its thirty-seventh session (Vienna, 7-11 October 2002), A/CN.9/523, 11 November 2002, ¶ 41 (**RLA-475**).
[862] Security Application, ¶ 46.
[863] Security Application, ¶ 27, referring to D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2013, Articles 17, B(1)(a), B(1)(e) (**RLA-345**); G. Born, *International Commercial Arbitration*, 2009, p. 1980 (**RLA-358**).
[864] Security Application, ¶ 30, referring to Sim, p. 480 (**RLA-465**).
[865] Security Application, ¶ 31, referring to A. Tan, G. Seetoh, *Security for Costs in International Arbitration*, International Arbitration Asia, 9 October 2017, p. 3 (**RLA-474**); A. Redfern, S. O'Leary, *Why it is time for international arbitration to embrace security for costs*, Arbitration International, 2016, pp. 410, 411 (**RLA-464**); Hearing Transcript, 493:7-10.
[866] Security Application, ¶ 31; Hearing Transcript, 492:16-17, 492:4-17.
[867] Security Application, ¶¶ 52, 65; Hearing Transcript, 490:10-12, 493:4-10.
[868] Security Application, ¶¶ 53, 55, 58; See also Hearing Transcript, 409:17-23.
[869] Security Application, ¶ 57, referring to Claimant's letter of 30 March 2017; Claimant's email of 19 April 2017; Claimant's email of 25 April 2017; Claimant's letter of 10 May 2017; Claimant's letter of 19 May 2017; Claimant's letter of 14 November 2017.
[870] Security Application, ¶ 54.

Application would require improper prejudgment of the Claimant's case,[871] and submits that the framework of the UNCITRAL Rules and the SAA make it a "real possibility" that the Respondent will be awarded costs.[872]

2. Risk of irreparable harm

365. The Respondent submits that the second criterion requires that irreparable harm should follow if security for costs is not granted.[873] It contends that it is sufficient to establish that the Claimant "is unlikely to comply with an adverse cost award,"[874] and argues that willingness to comply, as distinct from ability to comply, should be the focus of the Tribunal's assessment.[875] In its view, the 2006 Model Law and 2010 UNCITRAL Rules support a flexible interpretation of irreparable harm, and therefore it "need not require that such harm is not at all reparable by an award of damages."[876]

366. In the present case, the Respondent argues that it will suffer irreparable harm due to what it calls the "considerable risk" that it will be prevented from recovering any costs awarded to it.[877] In particular, it submits that the Claimant has demonstrated an unwillingness to respect adverse awards, and points to the history of separate proceedings between the Claimant's subsidiary companies and the Respondent, where it asserts that the "Claimant and his companies have blatantly ignored the tribunal orders and resulting payment obligations."[878] The Respondent argues that previous failures to pay can be imputed to the Claimant personally.[879] The Respondent submits that the burden of disproving an unwillingness to pay an award on costs shifts to the Claimant,[880] and that the Claimant has failed to discharge that burden.[881]

367. Elaborating on the Claimant's alleged "unwillingness," the Respondent argues that the Claimant's "evasiveness and mysteriousness" in providing information about his assets raises "a real risk of unenforceability of any costs award in the present case," which is then compounded

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871 Hearing Transcript, 490:24-492:1.
872 Security Application, ¶¶ 59-64; referring to UNCITRAL Rules, Articles 40(1)-(2); SAA, s. 37(1).
873 Hearing Transcript, 489:18-24.
874 Security Application, ¶¶ 33-34, referring to *García Armas v. Venezuela*, ¶¶ 225-226 (**RLA-470**); *South American Silver v. Bolivia*, ¶¶ 67-68 (**RLA-463**).
875 Security Application, ¶ 37-37, referring to *García Armas v. Venezuela*, ¶¶ 212-213 (**RLA-470**).
876 Security Application, ¶ 32, referring to Sim, pp. 486, 487 (**RLA-465**); Born, pp. 1982-1983 (**RLA-358**); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶¶ 68-69 (**RLA-467**).
877 Security Application, ¶ 66. *See also id.* at ¶¶ 67-70, referring to *García Armas v. Venezuela* (**RLA-470**); Hearing Transcript, 498:21-499:19.
878 Security Application, ¶¶ 71-87; Hearing Transcript, 493:22-494:9.
879 Hearing Transcript, 481:24-483:10.
880 Hearing Transcript, 501:13-502:3.
881 Hearing Transcript, 502:6-12.

by the complexity of the Claimant's assets structure and the US sanctions regime.[882] The Respondent draws attention to possible difficulties it will face in enforcing an award in other States than Russia where the Claimant's assets may conceivably be located,[883] citing its own experience in attempting to enforce the award from a related UNCITRAL Arbitration commenced by CEAC under the New York Convention.[884] The Respondent addresses the Claimant's argument that the Respondent itself has disrespected the award in that same arbitration by defaulting on payment obligations, submitting that no such default has occurred because no payment order was made against the Respondent.[885]

368. Finally, the Respondent submits that the risk of irreparable harm is heightened by the difficulties it considers it might face in attempting to enforce an award in the Russian Federation, and refers to its "deep concerns that any enforcement in Russia against Claimant would be promptly thwarted."[886] In this regard, it cites the Claimant's pursuit of multiple claims to date and "his capacity to influence the enforcement courts in Russia."[887]

3. Balance of harms

369. The Respondent submits that the third criterion requires the Tribunal to "assess which policy concerns prevail under the specific circumstance of the case," such that it consider whether "the risk of the Tribunal's award being frustrated and rendered unenforceable is a greater concern than the potential risk that an order of security for costs would restrict Claimant's access to justice."[888]

370. The Respondent submits that it would "suffer an immediate financial harm of approximately EUR 1.8 million" if it fails to successfully enforce a potential costs award,[889] noting that in another related arbitration, the unpaid costs order in favor of the Respondent totals approximately €1,200,000.00.[890] It argues that this harm should be balanced against its contention that the Claimant "is able to provide the funds for security for costs without jeopardizing the pursuit of his claim in the present case."[891] The Respondent submits that the potential resulting harm to the Claimant from a security for costs order "cannot even remotely, let alone substantially, outweigh the harm that Respondent is almost certain to suffer if this Tribunal does not order security for

[882] Security Application, ¶¶ 88-94; Hearing Transcript, 498:17, 502:13-19, 503:24-504:3.
[883] Security Application, ¶¶ 105-111; Hearing Transcript, 502:22-24.
[884] Hearing Transcript, 494:12-495:11.
[885] Hearing Transcript, 496:1-497:7.
[886] Security Application, ¶ 96.
[887] Security Application, ¶¶ 95-96, 99-102; Hearing Transcript, 503:10-23.
[888] Security Application, ¶¶ 38-40.
[889] Security Application, ¶ 116.
[890] Security Application, ¶ 120, referring to an arbitration initiated on 20 March 2014 by CEAC against Montenegro under the ICSID Convention. See also Hearing Transcript, 505:15-23.
[891] Security Application, ¶¶ 122-123; Hearing Transcript, 510:6-13, 511:21-24.

costs."[892] Finally, the Respondent claims it is suffering reputational damage, adversely affecting its economy and open investment image.[893]

371. In response to the Claimant's argument that the Respondent has effectively secured its own security for costs through its seizure of the KAP aluminium smelting plant, the Respondent submits that there is "no hope of recovery" since "KAP's debts surmount its outdated assets several times over."[894] The Respondent similarly rejects the Claimant's argument that this Security Application was "tactically timed in order to stifle the claim," pointing to a dishonored guarantee for an ICSID award by a related company and payment of annulment proceeding costs in the ICSID Arbitration.[895]

4. Urgency

372. Finally, while maintaining its submission that urgency is not a necessary legal criterion, the Respondent submits that ordering security for costs in this case is nevertheless urgent because, "if security is not posted prior to the time the Tribunal issues its award, then the damage will be done, the same damage that we have been suffering in the last several years in not being able to collect on the other awards."[896]

The Claimant's Position

373. The Claimant maintains that "security for costs is an extraordinary measure, which should only be granted in extreme and exceptional circumstances."[897] He notes that tribunals in only two cases have ordered security for costs,[898] and that those cases "demonstrate that the threshold for such an order is extremely high."[899] He argues that the key circumstances in those cases relevant

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892 Security Application, ¶ 124.
893 Security Application, ¶¶ 119; Hearing Transcript, 506:15-507:10.
894 Hearing Transcript, 508:9-20.
895 Hearing Transcript, 508:21-509:12.
896 Hearing Transcript, 511:25-512:9.
897 Security Reply, ¶¶ 9-17, referring to *Guaracachi America, Inc. and Rurelec Plc. v. Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14, 11 March 2013, ¶ 6 (**CLA-338**); *South American Silver v. Bolivia*, ¶ 59 (**RLA-463**); *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Application for Security for Costs, 14 October 2010, ¶ 5.17 (**CLA-339**); *Sergei Viktorovich Pugachev v. Russian Federation*, UNCITRAL, Interim award, 7 July 2017, ¶ 377 (**RLA-466**); *Burimi SRL & Eagle Games SHA v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), 3 May 2012, ¶ 34 (**CLA-340**); *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶ 10 (**CLA-341**); L. Bohmer, L. E. Peterson, "In latest investment treaty tribunal ruling on security for costs, arbitrators reject a request, refuse to order disclosure of funding details and are silent on power to order security in relation to already-incurred costs", 15 October 2018, p. 2 (**CLA-342**); Hearing Transcript, 513:22.
898 Security Reply, ¶ 9, referring to *RSM v. Saint Lucia* (**RLA-477**); *García Armas v. Venezuela* (**RLA-470**); Hearing Transcript, 513:24-514:2.
899 Security Reply, ¶ 10.

to the decision to order security for costs were: "(a) third party funding was in place; (b) there was either positive evidence or a reasonable inference to be drawn that such funding would not cover a costs award, and (c) the party against which the order was made was insolvent or impecunious."[900]

374. The Claimant lists four criteria to be satisfied before security for costs may be ordered:[901] (i) urgency; (ii) reasonable possibility of obtaining a favorable costs award; (iii) risk of irreparable harm; and (iv) proportionality (the balance of hardships).

1. Urgency

375. The Claimant contends that the Respondent's reliance on the 2010 UNCITRAL Rules to argue against urgency as an applicable criterion is incorrect, and refers to the differences between the 2010 UNCITRAL Rules and those applicable in this case (the 1976 UNCITRAL Rules). He submits that the Respondent's position is inconsistent with and mischaracterizes the relevant caselaw,[902] and that it conflates the requirement of urgency with that of irreparable harm.[903]

376. The Claimant then submits that the Respondent has not satisfied the urgency criterion,[904] arguing that factors which could point to urgency, such as third party funding, a change in circumstances, lack of financial resources or a failure to make payments, are not present in this case.[905]

2. Risk of irreparable harm

377. The Claimant submits that the Respondent has not demonstrated that it will suffer irreparable harm, arguing that "it is well established that harm claimed is not irreparable if it can be compensated by monetary damages."[906] He points to the Claimant's high net worth,[907] and submits that the Respondent has admitted that the Claimant is able to pay in the event of an adverse award.[908]

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[900] Security Reply, ¶ 15.
[901] Security Reply, ¶ 18.
[902] Security Reply, ¶¶ 20, 22, referring to *García Armas v. Venezuela*, ¶¶ 191, 238-241 (**RLA-470**); *Pugachev v. Russian Federation*, ¶ 378 (**RLA-466**); *South American Silver v. Bolivia*, ¶ 46 (**RLA-463**); Hearing Transcript, 515:15-516:20.
[903] Security Reply, ¶ 25; Hearing Transcript, 517:10-23.
[904] Security Reply, ¶ 25; Hearing Transcript, 517:24-25.
[905] Hearing Transcript, 518:25-519:25, 521:9-13.
[906] Security Reply, ¶¶ 26-30, citing *Dawood v. Mauritius*, Order Regarding Claimant's and Respondent's Request for Interim Measures, ¶ 45 (**CLA-337**); *García Armas v. Venezuela* (**RLA-470**).
[907] Security Reply, ¶¶ 31-32, 56-58, referring to *South American Silver v. Bolivia*, ¶¶ 61, 63 (**RLA-463**); *Pugachev v. Russian Federation*, ¶ 381 (**RLA-466**); *RSM v. Grenada*, ¶ 5.19 (**CLA-339**); Hearing Transcript, 520:19-521:8.
[908] Security Reply, ¶ 59, citing Security Application, ¶ 89.

378. Notwithstanding its rejection of the "unwillingness" formulation made by the Respondent,[909] the Claimant nevertheless submits that the Respondent has not established an unwillingness to respect adverse awards,[910] asserting that any such allegation is based on an incomplete account of the relevant factual background or is insufficiently supported by the evidence.[911]

379. As to the Respondent's argument regarding undue influence over Russian courts,[912] the Claimant argues that the circumstances in *Deripaska v. Cherney* were "extraordinarily specific" and therefore not capable of broader inference or application,[913] as subsequently recognized by an English court.[914]

380. The Claimant also rejects the Respondent's argument that it will be unable to enforce an award in other jurisdictions because: (i) "the Respondent cannot impute the alleged conduct of CEAC to the Claimant in this proceeding";[915] (ii) the fact of "resist[ing] enforcement in exercise of its rights under the New York Convention cannot be sufficient justification for an order for security of costs";[916] and (iii) the Claimant's operation in multiple jurisdictions similarly does not justify such an order.[917] Furthermore, the Claimant submits US sanctions are irrelevant in this treaty-based arbitration.[918]

3. Reasonable possibility that Respondent will obtain a favorable costs award

381. The Claimant submits that the Respondent has not demonstrated that it has a reasonable possibility of obtaining a favorable costs award. The Claimant rejects the Respondent's interpretation of the UNCITRAL Rules and the SAA to conclude that neither body of rules establishes a high likelihood of a favorable costs award as necessary.[919] He contends that an "order for security for costs will require the Tribunal to come to at least a preliminary view on the outcome of the case," arguing that such circumstance is best avoided.[920]

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[909] Security Reply, ¶¶ 53-55; Hearing Transcript, 520:4-16.
[910] Security Reply, ¶ 48-52, citing *South American Silver v. Bolivia*, ¶¶ 59, 68 (**RLA-463**); *Pugachev v. Russian Federation*, ¶ 379 (**RLA-466)**.
[911] Security Reply, ¶¶ 35-47; Hearing Transcript, 522:23-524:6.
[912] Security Reply, ¶¶ 60-61, 65.
[913] Security Reply, ¶¶ 61-64, citing *Deripaska v. Cherney*, Supreme Court of Judicature, Court of Appeal (Civil Division), Case No. A3/2008/2277, Judgment, 31 July 2009, ¶ 44 (**R-235**); England and Wales High Court, *Erste Group Bank AG (London) v. JSC (VMZ Red Octobe*r), [2013] EWHC 2926 (Comm), 3 October 2013, ¶ 218 (**CLA-348**).
[914] Hearing Transcript, 525:8-526:7, referring to *Erste Group Bank v. JSC* (**CLA-348**).
[915] Security Reply, ¶¶ 66-67.
[916] Security Reply, ¶ 67.
[917] Security Reply, ¶ 68.
[918] Hearing Transcript, 524:7-19.
[919] Security Reply, ¶ 71.
[920] Security Reply, ¶¶ 72-73; Hearing Transcript, 526:8-22.

4. Balance of harms

382. Regarding proportionality, the Claimant submits that this criterion is not fulfilled because: (i) "the Respondent failed to prove that there is a risk of irreparable harm," failure which "dictates against order of security for costs;"[921] (ii) the Respondent's seizure of the Claimant's asset, KAP, acts as a *de facto* security for costs, such that "ordering security for costs in the present case puts an additional and disproportionate burden on the Claimant;"[922] and (iii) the Respondent has not provided evidence supportive of the quantum of its request.[923]

383. The Claimant questions the "real intention of the Respondent" and the urgency of any security for costs order.[924] The Claimant contends that the timing of the Security Application, "filed so close to the November Hearing is a bright example of 'an attempt to stifle the claim.'" The period of time between the Respondent's admission of the need for security for costs and the Security Application, according to the Claimant, supports this contention and "underline[s] the absence of urgency of the requested order."[925]

3. The Tribunal's Analysis

384. It is axiomatic in arbitration, and in this case expressly confirmed by Article 21(1) of the UNCITRAL Rules, that a tribunal has the power to rule on objections to its jurisdiction. In a case where a party has raised such objections, a tribunal also has the power to render such procedural decisions as are necessary to protect the integrity of proceedings and keep them provisionally moving forward, while it determines the open question of its jurisdiction. However, once a particular tribunal has provisionally *concluded* that jurisdiction is lacking, it is questionable (if not arguably inappropriate) for it nonetheless to issue additional mandates to the parties during the period of time it is preparing its award dismissing the case for lack of jurisdiction, if the sole purpose of such mandates would be to assist one party in that interim period to improve its position vis-à-vis the other, for example by obtaining security for an eventual costs award. Nor should security for costs be granted in circumstances that could complicate or potentially interfere with the disposition of a proceeding that a tribunal already has concluded is without jurisdiction to proceed.

385. This is the situation in which the Tribunal found itself in this proceeding. As noted above, the Respondent filed its Security Application on 22 September 2008, which was roughly seven weeks

[921] Security Reply, ¶ 77; Hearing Transcript, 527:8-12.
[922] Security Reply, ¶¶ 78-81; Hearing Transcript, 527:13-528:3.
[923] Security Reply, ¶ 82; Hearing Transcript, 514:18-23.
[924] Security Reply, ¶ 83.
[925] Security Reply, ¶¶ 84-86; Hearing Transcript, 514:24-515:12.

after it submitted its Reply on Jurisdiction, two weeks before the Claimant's scheduled Rejoinder on Jurisdiction, and less than two months before the scheduled Hearing on Jurisdiction. The Respondent affirmatively did *not* seek a ruling on its Security Application prior to the Hearing on Jurisdiction, but to the contrary specifically proposed that the matter be presented for oral argument during that scheduled Hearing, and decided only afterwards. The Tribunal honored that request.

386. The result however was that by the time the Security Application was ripe for deliberation following the Hearing on Jurisdiction, the Tribunal already had considered extensively the Parties' written and oral submissions on the jurisdictional objections. The Tribunal had also reached the unanimous view that the BIT Validity Objection must be accepted, and the case therefore dismissed. Having reached that view, the Tribunal ultimately did not consider it appropriate to insert a new procedural step in the arbitration prior to communication of the dismissal through this Final Award. The Tribunal does not suggest that it necessarily would have granted a comparable Security Application had one been presented earlier in these proceedings, before the Tribunal reached its conclusion on lack of jurisdiction; the issues are complex and the standards for such relief are demanding. Nonetheless, having *in fact* reached its view that there was no proper jurisdiction to proceed with this arbitration, the Tribunal was not comfortable in these circumstances contemplating a potential order of interim relief, which would have the sole effect of assisting one party to improve its existing position with regard to costs already incurred, while the Tribunal prepared to communicate its detailed conclusions.

387. Moreover, the second part of the Respondent's requested relief – that the arbitration be *suspended* pending the Claimant's actual compliance with any security the Tribunal might order – could have had the effect of prolonging a proceeding that the Tribunal already considered to have no proper jurisdictional footing. In the Tribunal's view, once a tribunal has concluded it has no jurisdiction to proceed, it should not take affirmative steps which would prolong the extant proceedings beyond what is necessary to prepare and communicate its jurisdictional ruling. That would be a particular risk where, as here, (a) the interim relief at issue involves as one element a preliminary assessment of the possibility of success at the end of proceedings, at least to the extent of a favorable costs award, and (b) the fact that the Hearing on Jurisdiction already had concluded inevitably would lead the Parties to speculate, from the Tribunal's decision on the Security Application, about the likely outcome of the jurisdictional objections. Moreover, the Security Application in this case rests largely on the Respondent's contention that the Claimant would be *unwilling* – though clearly financially able – to comply with an adverse costs award, once he knew the case would not be resolved in his favor. If the Respondent *arguendo* were correct in that supposition (which the Tribunal does not decide one way or the other), then the

Claimant equally might resist complying with an adverse security order issued only after the jurisdictional Hearing had concluded. This could have lead, potentially, to an impasse in which proceedings were suspended indefinitely pending compliance with a security order, but compliance was not forthcoming, and the Tribunal would be unable by virtue of the suspension itself to proceed with prompt issuance of its Final Award. That would run counter to a tribunal's duty to efficiently conclude any proceeding in which it has determined that there is no jurisdictional basis to proceed.

388. For these reasons, the Tribunal concludes that the relief requested in the Security Application should not be granted in the particular circumstances of this case, whether or not such relief ultimately might have been warranted had the application been presented for decision prior to the Hearing on Jurisdiction. At the same time, the Tribunal could not articulate the reasons for this decision in advance of the Final Award, without signaling to the Parties the Tribunal's likely conclusions on the issue of jurisdiction. The Tribunal therefore determined to address the Security Application as part of the Final Award, as it hereby does.

B. ALLOCATION OF COSTS

1. Applicable Rules

389. Articles 38 to 40 of the UNCITRAL Rules govern the Tribunal's decision on matters of costs. Article 38 of the UNCITRAL Rules defines the "costs of arbitration" as follows:

> The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

390. The principle governing the awarding of the costs of arbitration, according to Article 40 of the UNCITRAL Rules, is that:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs

> between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

2. The Costs of Arbitration

391. As recorded in the Terms of Appointment, the Parties agreed to establish a deposit to be held by the PCA as Registry to be used in connection with this arbitration.

392. The Parties deposited a total of €500,000.00 (€250,000.00 by the Claimant, €250,000.00 by the Respondent) to cover the costs of arbitration in this matter.

393. The fees and expenses in this arbitration of Professor Zachary Douglas QC, the arbitrator appointed by the Claimant, amount respectively to €73,562.50 and €2,859.33.

394. The fees and expenses in this arbitration of Professor Brigitte Stern, the arbitrator appointed by the Respondent, amount respectively to €89,650.00 and €4,239.09.

395. The fees and expenses in this arbitration of Ms. Jean E. Kalicki, the Presiding Arbitrator, amount respectively to €129,800.00 and €9,640.73.

396. Pursuant to the Terms of Appointment, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services in this arbitration amount to €55,715.00.

397. Other Tribunal costs in this arbitration, including court reporters, hearing room equipment, Tribunal accommodation, bank charges, and all other expenses relating to the arbitration proceedings, amount to €28,533.09.

398. Based on the above figures, the combined Tribunal costs in this arbitration, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Rules, total €393,999.74.

399. The Parties' respective portions of these Tribunal costs, amounting to €196,999.87, shall be deducted from the deposit. Any unexpended balance will be returned to the Parties in an equal share, subject to any associated bank transfer or exchange fees.

3. The Costs of Legal Representation and Assistance

400. The Respondent seeks costs in respect of its legal representation and assistance in the following amounts:

Item	Cost
Schönherr Rechtsanwälte GmbH Fees:	€950,346.77
Schönherr Rechtsanwälte GmbH Disbursements:	€19,039.68
David A. Pawlak LLC Fees:	€332,572.50
David A. Pawlak LLC Disbursements:	€400.00
Expert Fees:	€92,112.59
Expert Disbursements:	€9,259.44
Total:	**€1,403,730.98**

The Respondent clarifies in its submission that €27,339.18 of the counsel fees recorded above relate to the Security Application.[926]

401. The Claimant seeks costs in respect of its legal representation and assistance in the following amounts:

Item	Cost
Legal Fees and Costs:	€1,486,660.88
Disbursements:	€48,378.95
Expert and Witness Costs:	€141,516.54
Expert and Witness Disbursements:	€1,368.15
Total:	**€1,677,924.52**

The Claimant clarifies in its costs schedule that €46,005.83 of the legal fees and costs recorded above relate to the Security Reply.[927]

4. The Parties' Positions on Allocation of Costs

The Respondent's Position

402. The Respondent requests that the Tribunal order that the Claimant: (i) bear all categories of costs in this matter, including the costs of arbitration and the costs of legal representation; (ii) reimburse the Respondent, on a full indemnity basis, for its advance payments to cover the costs of the arbitration and of its legal representation; and (iii) pay interest on any costs at a rate to be determined by the Tribunal.[928] The Respondent argues that in setting the interest rate, the Tribunal could be guided by Swedish law and set it at the Swedish Central Bank reference rate

[926] Respondent's Costs Submission, ¶ 28.
[927] Claimant's Costs Submission, Annex 1.
[928] Respondent's Costs Submission, ¶ 30.

plus 8%, or by prior tribunals' decisions and set it at a rate of 6-month EURIBOR plus an appropriate margin such as 2%.[929]

403. The Respondent contends that the circumstances warrant a full award of costs in its favor, regardless of the outcome of this phase of the case.[930] It submits that all objections to jurisdiction raised were serious and reasonable,[931] and points out that this was accepted by the Claimant through his agreement to bifurcate the proceedings.[932] It submits that it behaved in a "collaborative, efficient and highly accommodating" manner,[933] and that it showed "extreme good faith in the process and trust in the international arbitration system."[934]

404. The Respondent argues that the Claimant's claim in this case was in many respects unreasonable and "should never have been brought."[935] It refers in particular to the Claimant's arguments on succession and his approach to automatic succession,[936] which the Respondent argues was "exotic and wholly unsubstantiated."[937] It also submits that the Claimant's conduct meant that it had to dedicate substantial additional resources to the case,[938] and provides a number of examples of what it terms "disruptive and costly conduct" on the part of the Claimant.[939]

405. With respect to the apportionment of costs, the Respondent submits that where a party is successful only in relation to some of its claims, such "lack of success" should only affect apportionment "where those individual [unsuccessful] claims or objections have contributed to the overall costs in a significant and measurable way."[940] It therefore submits that it should be entitled to a full award of costs.[941]

406. In relation to the quantification of its costs, the Respondent submits that its costs are reasonable and conservative.[942] It points out that its counsel "applied privileged hourly rates and has imposed caps and applied discounts on several occasions," including not charging for *inter alia*

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929 Respondent's Costs Submission, n.49, citing *The East Cement for Investment Co. (Jordan) v. Poland*, ICC 16509/JHN, Partial Award, 26 August 2011, s. 7 (**RLA-487**); *Achmea v. Slovakia*, Jurisdiction and Admissibility, ¶ 291 (**CLA-55**).
930 Respondent's Costs Submission, ¶ 10. *See also id.*, ¶ 15.
931 Respondent's Costs Submission, ¶¶ 9, 17.
932 Respondent's Costs Submission, ¶ 8.
933 Respondent's Costs Submission, ¶ 26.
934 Respondent's Costs Submission, ¶ 27.
935 Respondent's Costs Submission, ¶ 11.
936 Respondent's Costs Submission, ¶¶ 11-15.
937 Respondent's Costs Submission, ¶ 15.
938 Respondent's Costs Submission, ¶¶ 15-16, 18.
939 Respondent's Costs Submission, ¶¶ 18-25.
940 Respondent's Costs Submission, ¶ 6.
941 Respondent's Costs Submission, ¶ 10.
942 Respondent's Costs Submission, ¶ 29.

telephone expenses, paralegal and secretarial work, or printing supplies.[943] It also notes that it has not requested reimbursement for the time spent by any of its officials on the case.[944]

407. As to the Claimant's costs, the Respondent submits that the fees invoiced by Hecate Legal Advisory LLC are "entirely unreasonable," arguing that: (i) while the invoice relates to work for October and November 2018, according to the Claimant's counsel, those lawyers had not yet commenced work on this matter as at 31 October 2018; and (ii) fees of €86,335.93 have been charged without Hecate Legal Advisory LLC "having taken any active part in the case, communicated with the Tribunal or the Respondent, received hearing transcripts or even been copied on certain of EPAM's correspondence to the Tribunal."[945]

408. The Respondent also comments on the Claimant's claim for legal services by Karanović & Nikolić since November 2016, pointing out that the Claimant never notified the Tribunal that Karanović & Nikolić were providing legal assistance to him. Further, the Respondent questions "the necessity and reasonableness of Karanović & Nikolić's alleged involvement in this phase of arbitration," on the basis that the jurisdictional objections have little connection, if any, with the interpretation or application of Montenegrin national law and since no counsel from Karanović & Nikolić attended the Hearing on Jurisdiction.[946]

The Claimant's Position

409. The Claimant requests that the Tribunal order that the Respondent: (i) bear all of the Claimant's costs incurred during these proceedings in the amount of €1,677,924.52; (ii) bear all of the fees and expenses of the Tribunal Members and the PCA incurred in these proceedings; and (iii) pay the Claimant pre-award and post-award interest on any compensatory amounts awarded until the date of full satisfaction of the award at a rate of LIBOR plus 2%.[947]

410. The Claimant submits that the above costs were necessary for the proper conduct of the proceedings, and that the amounts are "reasonable and appropriate given the complexities of the proceeding."[948] He clarifies that, where legal representatives invoiced and were paid in British Pounds, such amounts were converted on the date of the bill payment at an exchange rate designated by the Central Bank of the Russian Federation.[949] While the Claimant states that

[943] Respondent's Costs Submission, ¶ 29.
[944] Respondent's Costs Submission, ¶ 29.
[945] Respondent's Comments, p. 2.
[946] Respondent's Comments, p. 2.
[947] Claimant's Costs Submission, ¶¶ 6-7, 25.
[948] Claimant's Costs Submission, ¶ 8.
[949] Claimant's Costs Submission, ¶ 9.

invoices totaling €212,322.49 remain outstanding as at the date of his costs submission, he undertakes to pay those invoices in due course.[950]

411. The Respondent should bear all of the Claimant's costs of the arbitration, the Claimant submits, because the Respondent's jurisdictional objections were numerous and unjustified,[951] were raised to complicate the proceedings, and thereby led to unnecessary increases in costs.[952] The Claimant notes that the Respondent addressed only three of its surviving eight objections in oral submissions at the Hearing on Jurisdiction, and dedicated only a few lines in its Post-Hearing Brief to other objections, which in the Claimant's view suggests that the Respondent itself did not consider those objections to be plausible.[953] He also contends that the Respondent should not have raised its admissibility objections in this jurisdictional phase but rather deferred them until the merits phase of the proceedings.[954]

412. The Claimant further refers to the Respondent's Security Application, arguing that the application lacked urgency and that the Respondent had "failed to demonstrate existence of other circumstances for such an exceptional measure."[955] He also points to his own motion to produce documents of 30 August 2018, and argues that the documents voluntarily produced by the Respondent were "mostly unresponsive," and that it failed to produce the relevant and material documents requested.[956] The Claimant also describes various requests by the Respondent as unnecessary, irrelevant or immaterial.[957]

5. The Tribunal's Analysis and Conclusions

413. With respect to the costs of arbitration comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Rules, as calculated in Section IX.B.2 above to be a total €393,999.74, Article 40(1) of the UNCITRAL Rules provides that these "shall in principle be borne by the unsuccessful party," subject to Tribunal discretion otherwise based on the circumstances of the case. Bearing in mind the presumption established by the applicable rules, and the fact that the Claimant has proven unsuccessful in establishing the threshold proposition for its claims (namely the validity of the FRY-Russia BIT as between Montenegro and Russia), the Tribunal determines that the Claimant should bear the full costs of arbitration, and accordingly should reimburse the

[950] Claimant's Costs Submission, ¶ 10.
[951] Claimant's Costs Submission, ¶ 24.
[952] Claimant's Costs Submission, ¶¶ 18-19.
[953] Claimant's Costs Submission, ¶ 19.
[954] Claimant's Costs Submission, ¶ 20.
[955] Claimant's Costs Submission, ¶ 21.
[956] Claimant's Costs Submission, ¶ 22.
[957] Claimant's Costs Submission, ¶ 23.

Respondent for €196,999.87, the portion of such costs that the Respondent advanced in the first instance.

414. With respect to the Parties' costs of legal representation and assistance addressed in Article 38(e) of the UNCITRAL Rules, as referenced in Section IX.B.3 above, Article 40(2) of the UNCITRAL Rules establishes no equivalent presumption. It simply provides that the Tribunal "shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable," taking into account "the circumstances of the case." That said, however, a key "circumstance" is that the Respondent has prevailed on its principal "BIT Validity Objection," with the implication that by bringing claims under the FRY-Russia BIT which was not actually binding on Montenegro, the Claimant has imposed on the Respondent significant costs associated with its legal defense. While it is true that the Respondent also pleaded eight other jurisdictional objections to which the Claimant accordingly was compelled to respond,[958] and that those other objections arguably were of varying strengths and viability, the Tribunal does not consider any of them to be have been frivolous, nor presented in an improper fashion that imposed atypical burdens on the proceedings. To the contrary, both Parties cooperated collegially on procedural matters to bring the nine objections to a preliminary hearing, and did so with reasonable (and indeed roughly equivalent) expenditures for legal representation and assistance (the Respondent's calculated as €1,403,730.98, slightly less than the Claimant's at €1,677,924.52). Taking all these circumstances into account, the Tribunal finds it appropriate that the Claimant bear the Respondent's reasonable and reasonably incurred legal costs in defending itself against claims presented under a treaty that was not in fact validly in force.

* * *

[958] These included, as defined in Section IV, the "Failure to Negotiate Objection," the "Investor Status Objection," the "Investment Objection," the "Shareholder Claims Objection," the "Standing Objection," the "Abuse of Process Objection," the "Contract Claims Objection," and the "Time Bar Objection."

X. DISPOSITIF

415. For the reasons set out above, the Tribunal:

A. **GRANTS** the Respondent's first objection to jurisdiction, on the basis that the FRY-Russia BIT is not binding between Montenegro and Russia;

B. **DECLINES** to exercise jurisdiction over the Claimant's claims;

C. **AWARDS** the Respondent the total of €1,600,730.85, representing the sum of: (a) €196,999.87, which was its share of the costs of arbitration, and (b) €1,403,730.98, which was the Respondent's cost of legal representation and assistance, which the Tribunal has determined the Claimant properly should bear in their entirety; and

D. **DENIES** all other requests.

SEAT OF ARBITRATION: Stockholm, Sweden

DATED: 15 October 2019

Prof. Zachary Douglas QC

Prof. Brigitte Stern

Ms. Jean E. Kalicki
(Presiding Arbitrator)

Statutory Notices to the Parties under the Swedish Arbitration Acts 1999 and 2019:

(1) A Party may bring an action to amend the Award within three (3) months from the date when the Party received the Award. This action should be brought before the Svea Court of Appeal.

(2) Pursuant to Section 41 of the Swedish Arbitration Act 1999 as revised on 1 March 2019, any action by a Party against this Award regarding the payment of remuneration of any arbitrator shall be brought before the Stockholm District Court within two (2) months from the date when a Party received the Award.