PCA Case No. 2015-39

IN THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL RULES 1976

BETWEEN

Medusa (Montenegro) Limited

Claimant

and

The State of Montenegro

Respondent

EXPERT REPORT OF PROFESSOR MALCOLM SHAW QC

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1. I have been asked by Vinson & Elkins in a letter dated 14 October 2016 to provide an expert report in order to assist the Tribunal, constituted on 7 August 2015 in the matter of the arbitral claim brought by Medusa (Montenegro) Limited ("Medusa") against the State of Montenegro ("Montenegro"). I have prepared this report in accordance with article 5(2) of the IBA Rules. My CV is attached as Annex 1 and the instructions sent to me are attached as Annex 2. I should point out for the purposes of transparency that I am a member of Essex Court Chambers as is Mr V. V. Veeder of the Arbitral Tribunal. This has not affected the independence of this report in any way and I am happy to confirm that I have had no contact or communication with Mr Veeder on this matter at all. To the best of my recollection, I have never worked on the same case as Mr Veeder (either with or against him) or appeared before him. I do not speak to Mr Veeder on a regular basis, since our paths rarely cross despite being members of the same chambers (I do not, in fact, keep a room in chambers and am based in Leicester). As far as I can recall, I have never spoken to Mr Veeder about any of my cases. I confirm that I do not have any present or past relationship with any of the Parties, their legal advisors or the Arbitral Tribunal (save as described above), and that I am

independent from the Parties, their legal advisors and the Arbitral Tribunal.

2. Specifically I have been asked to address the following issues:

(a) Whether or not the conduct of the Republic of Montenegro (as one constituent half of the State Union of Serbia and Montenegro) vis-à-vis Medusa and its investments prior to June 2006 is attributable to the independent State of Montenegro under the relevant principles of state succession in international law;

(b) Whether or not certain declarations made by Montenegro in the context of (a) its independence; and (b) its application for accession to the European Union are capable of constituting unilateral declarations as a matter of international law, for the purposes of binding Montenegro to obligations arising under the BIT between the UK and the FRY;

(c) The correct definition of the terms 'concluded' and 'treaty' as a matter of international law, i.e. is the definition of the term 'treaty' in the Vienna Convention on the Law of Treaties limited only to those treaties that have entered into force as a matter of international law, and likewise, is a treaty 'concluded' only once it has entered into force;

(d) General comments on the Respondent's Counter-Memorial on Jurisdiction, in particular the sections on: (i) Attribution; (ii) Unilateral declarations; (iii) State succession.

(e) General comments on the Expert Opinion of Professor Kreća.

3. In brief, my conclusions are as follows:

i) In general terms, there is a strong argument to say that there is at the least a presumption of succession

to bilateral treaties with regard to new states emerging from existing independent states;

ii) The UK – Yugoslavia bilateral investment treaty ("UK BIT") only came into force on 3 April 2007, that is just under a year after Montenegro became independent, so that Montenegro did not as such succeed to the treaty;

iii) International practice demonstrates that a state may acknowledge and adopt conduct of its predecessor state (or other relevant entities or persons) so as to demonstrate attribution of that conduct to the former for the purposes of international law;

iv) On the basis of the material before me coupled with my understanding of the relevant principles of international law, the conduct complained of by the Claimant prior to the independence of Montenegro may be attributed to that state in its post-independence expression;

v) As a matter of international law in certain situations a unilateral declaration by a state may be deemed to constitute an assumption of a binding obligation;

vi) Of the three unilateral declarations made by Montenegro and referred to me, I have reached the view that while there are serious doubts as to whether the first unilateral declaration suffices to establish the acceptance of binding obligations with regard to the UK BIT; the second declaration concerning treaties to which the State Union was 'a party or a signatory' does indeed suffice to denote acceptance of such obligations and the third declaration, specifically including the UK BIT in an official

communication as a bilateral treaty in force, is capable of establishing obligations for Montenegro in the circumstances;

vii) According to international law a treaty is 'concluded' when the formalities of reaching an agreed text and signaling consent by the various means allowed have been completed;

viii) The term 'treaty' is defined as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. It is not limited only to those treaties which have entered into force, either generally or for the particular state in question.

4. I shall take each of these questions in turn.

1. The State Succession Issue

5. I begin by describing briefly the process by which Montenegro became a state. The Socialist Federal Republic of Yugoslavia ("SFRY") disintegrated over a series of months as the various constituent republics proclaimed independence. The process was regarded as having been completed in the view of the Arbitration Commission on Yugoslavia by the time of its Opinion No. 8 issued on 4 July 1992. The conclusion was that the SFRY had ceased to exist.[1] Although the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") continued to maintain that it constituted not a new state, but the continuation of the former SFRY, this claim was opposed by the other former republics of the SFRY and by the international community. The

[1] 92 ILR, pp. 199 and 202.

Security Council, for example, in resolution 777 (1992) declared that 'the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist' and that 'the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations'.[2] The position of the FRY changed in 2000 and it requested admission to the UN as a new member.[3] Following internal discussions within that state, in January 2003 the parliaments in the constituent Republics of Serbia and of Montenegro approved the Constitutional Charter of the State Union of Serbia and Montenegro. The name of the state was changed on 4 February 2003 from the FRY to the State Union of Serbia and Montenegro ("the State Union"). This was a rather weak confederal state with the power (article 60) of a member state to withdraw from the State Union after three years following a referendum.[4]

6. Following a referendum held on 21 May 2006, the Montenegrin Parliament adopted the Declaration of Independent Republic of Montenegro on 3 June 2006. On 10 July 2006 Serbia and Montenegro signed an Agreement on Regulating the Membership of International Financial Organizations and the Division of Financial Rights and Obligations of the State Union. On 28 June 2006, Montenegro was admitted as a member state of the United Nations.[5]

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[2] See J. Crawford, *The Creation of States in International Law,* 2nd ed., Oxford, 2006, pp. 707-14 and Lidija B. Fleiner and Vladimir Djeric, 'Serbia', in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (2012), vol. IX, p. 137, [12]-[37], CLA-103.

[3] It was so admitted on 1 November 2000: see General Assembly resolution 55/12. On 4 February 2003, the name of the country was officially changed from the Federal Republic of Yugoslavia to Serbia and Montenegro and thence to Serbia upon the secession of Montenegro on 28 June 2006: see General Assembly resolution 60/264. See also Crawford, *Creation of States*, pp. 707 ff.

[4] See Fleiner and Djeric, 'Serbia', op.cit., , [49]-[50], CLA-103, and H. Tuerk, 'Montenegro', in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (2007), [14]-[18].

[5] Ibid., [19]-[23] and General Assembly resolution 60/264.

7. The first question put to me asks whether the conduct of the Republic of Montenegro (this is, Montenegro prior to independence) with regard to the claimant is attributable to the independent State of Montenegro under the relevant principles of state succession in international law. This requires brief consideration of two lines of argument, succession to treaties and succession to responsibility.

8. The initial question is whether Montenegro succeeds to the treaties to which the FRY or the State Union was a party. The key treaty here would at first sight appear to be the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of the FRY for the Reciprocal Promotion and Protection of Investments, signed on 6 November 2002 ("UK BIT").[6] This agreement would of itself resolve the jurisdictional and merits issues in contention between the parties.

i) *Succession to Bilateral Treaties: A General Comment*

9. Leaving other issues to one side for a moment, a comment will first be made on succession to bilateral treaties in general for it is useful background. With regard to the newly created state or states emerging from the continuing, but territorially revised, predecessor state, the traditional rule has appeared to be that insofar as bilateral treaties were concerned there was a presumption of non-application absent consent to keep such treaties in force by the states concerned.[7] However, more recent practice has shown a tendency to question or to reverse this rule or presumption. In an influential article, Judge Keith (a recently retired judge at the International Court of Justice) concluded that new states in fact continued the application of bilateral treaties (apart from political treaties, such as treaties of alliance and

[6] CLA-10.
[7] See D.P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 1967, vol. II, p. 88 and following.

possibly military base arrangements and those dealing with strategic materials) and that such practice reflected international law. He noted in particular that there was:

> "on the evidence collected to date a consistent pattern of continued compliance with certain categories of treaties; trade, air transport, tax, postal matters, technical and economic assistance, *investment guarantee*, visa abolition". [8]

10. This view was taken a step further in the Vienna Convention on the Succession of States in Respect of Treaties 1978 ("VCSST'), which came into force in 1996. Article 34 (1) (a) noted that:

> "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".

11. This did not apply where the states concerned otherwise agreed or if it appeared from the treaty or was otherwise established that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. This provision was adopted in the light of the draft proposed by the International Law Commission ("ILC"), whose deliberations led to the convention. The ILC concluded that:

> "in modern international law having regard to the need for the maintenance of the system of multilateral treaties and of the stability of treaty relationships, as a general rule the principle of *de jure* continuity should apply",[9]

[8] "Succession to Bilateral Treaties by Seceding States", 61 *American Journal of International Law*, 1967, pp. 521, 544-6 (emphasis added).
[9] *Yearbook of the ILC*, 1974, vol. II, part 1, p. 169.

12. This evolving practice receives support from relatively recent relevant events. Article 12 of the Agreement Establishing the Commonwealth of Independent States ("CIS Agreement"), for example, declares that:

> "The High Contracting Parties undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics".

13. The United States in particular adopted the policy position that:

> "In sum, while we recognize that the law in this area is somewhat unsettled, we have decided that the better legal position is to presume continuity in treaty relations between the United States and the former republics. In other words, as a general principle, agreements between the United States and the USSR that were in force at the time of the dissolution of the union will be presumed to continue in force as to the former republics".[10]

14. Similarly, the United Kingdom informed all the former republics of the USSR that it regarded all bilateral treaties to which the UK and the USSR were parties immediately before the independence of the new states as remaining in force.[11] The US approach to the former USSR was essentially replicated with regard to Yugoslavia (with the distinction that Serbia was seen as a new state and not as the continuation of the Former Yugoslavia). For example, a 1902 extradition treaty with "Servia" [sic] continued through a number of historic manifestations of that state to the Socialist Federal Republic of Yugoslavia (the Former Yugoslavia) and was accepted as binding the

[10] In a statement made by the Legal Adviser to the State Department on 1 April 1992, *Digest of US Practice in International Law, 1991-9*, Washington, pp. 742, 745.
[11] See A. Aust, *Modern Treaty Law and Practice*, 3rd ed., Cambridge, 2013, p. 328.

new state of Bosnia-Herzegovina as a successor state to the Former Yugoslavia.[12] It was particularly underlined that:

> "Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, as well as Slovenia, have either enacted national legislation or made declarations which indicate that they are willing to abide by the rules of customary law which in their view seem to be largely enshrined in the Vienna Convention on Succession of States in Respect of Treaties and in particular its Art. 34".[13]

15. Even those writers who are sympathetic towards the view that new states are not automatically bound by bilateral treaties of the predecessor state, qualify this by noting that such treaties may be binding where the new state and the other state to the treaty in question have expressly or *implicitly* accepted such continuation.[14] An example provided of this is the France - Serbia and Montenegro Treaty on Succession to Bilateral Treaties, 2003, the sole article of which declares that:

> "Les accords qui liaient la France et la République socialiste fédérative de Yougoslavie dont la liste figure en annexe au présent accord *continuent* de lier les Parties".[15]

16. Accordingly, it seems to me that international law today, following particularly from accepted international practice concerning the former USSR and Yugoslavia, takes, or is moving towards, the position that there is a presumption of continuity. The implication of this is

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[12] *Digest of US Practice in International Law, 2003,* Washington, p. 245 and following.
[13] *Ibid.,* p. 247.
[14] See eg. P. Daillier, M. Forteau and A. Pellet, *Droit International Public,* Paris, 2009, p. 615.
[15] Ibid. The article may be translated as: "The treaties which bound France and the Socialist Federal Republic of Yugoslavia [ie. the Former Yugoslavia] annexed to the present agreement *continue* to bind the Parties [to this treaty, ie. France and Serbia and Montenegro]", my translation, emphasis added.

that absent an expression or behaviour to the contrary, states emerging as a result of the dissolution of a state or of separation from an existing state will *prima facie* be bound by existing bilateral treaties of the predecessor state. However, and this is the critical point, it is the actual conduct of the states in question which will determine the question of succession one way or the other.

17. The key feature in the matter under consideration is, however, that the UK BIT did not come into force until 3 April 2007, that is just less than a year after Montenegro's independence. It cannot, therefore, as such be regarded as binding upon the State Union (as the successor to the FRY) prior to Montenegro's departure so as to raise the issue of automatic or presumptive succession following Montenegro's independence. Had Montenegro become independent after 3 April 2007, then it would have been possible to argue, with a good prospect of success I believe, that it was bound by process of succession to the UK BIT. It is to be noted that the Exchange of Notes between the UK and Serbia dated 18 and 29 December 2006 respectively amended the 2002 UK BIT so as to refer only to these two states as being bound by it.[16] Accordingly, this instrument could only become binding as a result of consensual conduct, a deliberate acceptance of the obligatory nature of the terms in a mandatory fashion whether by both sides or unilaterally. Whether that has happened here is the subject of the following sections.

ii) *Attribution*

18. The second issue in this part concerns, as pleaded, the question of state responsibility. I refer here to the Claimant's Memorial on Jurisdiction, paragraphs 81-90 and the Respondent's Counter-Memorial on Jurisdiction, paragraphs 584-9. The argument made is

[16] Attached to the published version of the UK BIT, Treaty Series No.9 (2007) CLA-010.

essentially that the pre-independence acts of Montenegro are attributable to Montenegro. It is my understanding that Medusa acquired an initial interest in the relevant Prevlaka Joint Venture in December 2003 and that Medusa became a party to the venture with a 40% interest on 29 July 2004.17 It is also my understanding that Medusa's difficulties with Montenegro basically commenced with severe delays between 2004 and 2006 and the complete failure from 2007 onwards to approve work programmes under the Concession entered into by Montenegro with JP Jugopetrol Kotor originally in 1995 and with regard to which Medusa became involved in 2004.[18]

19. The international law principles of state responsibility rest upon the proposition that an internationally wrongful act of a state entails the international responsibility of that state. The rules are most conveniently laid out in the ILC Articles on State Responsibility ("ASR") adopted on 9 August 2001[19] and commended to states by the UN General Assembly on a number of occasions.[20] While the ASR deal with the composite picture, which is the combination of two elements, attribution of conduct to the state in question together with the establishment of that conduct as an internationally wrongful act, it seems to me that the matter in hand focuses upon the former element Accordingly, the concern is with the principles that establish that the breaches of the law with regard to the Concession are to be imputed to Montenegro and, thus, the test for attribution.

20. Article 11 of the ASR provides as follows:

> 'Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the

[17] Claimant's Memorial on Jurisdiction at [52]-[54].
[1a] Ibid., [5]-[7].
[19] A/56/10, 2001.
[20] See resolutions 56/83, 2001; 59/35. Assembly resolution 62/61, 2008, and 68/104, 2013.

State acknowledges and adopts the conduct in question as its own'.

21. As the ILC Commentary notes, this article provides 'for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own'.[21] While the general principle in international law is clearly that the behaviour of individuals or groups not acting on behalf of the state is not considered to be an act of that state, that will not apply where it is established that the state has acknowledged and adopted the conduct in question as its own. What is important for present purposes is the general principle that a state may in its sovereign competence espouse certain acts or activities and thereby convert such conduct into its own. This is not controversial as a concept The key is the clarity of the adoption.

22. Crawford, who was the fifth and final Special Rapporteur of the ILC on this topic (and is now a Judge at the International Court of Justice), has subsequently written that there are some 'clear examples' in case law and state practice of the adoption of conduct by states in this situation. He also notes that article 11 'is framed in terms of *any* conduct .... and is not limited to the conduct of private individuals or actors but also covers that of states or former states or territories'.[22] He cites the following cases: the *Lighthouses* Arbitration, the *Eichmann* incident, the *Tehran Hostages* case and the *Gabcfkovo Nagymaros* case. These will be briefly examined.

23. The *Lighthouses* Arbitration concerned the responsibility of Greece for the breach of a 1903 concession agreement entered into by Crete (at the time an autonomous territory of the Ottoman Empire). The breach by Crete was attributed to Greece, which subsequently extended its

[21] A/56/10, p. 52; RLA-112.
[22] *State Responsibility: The General Part,* Cambridge, 2013, pp. 182 and 183, CLA-104.

sovereignty over the former in 1913-4, and which was deemed to have endorsed and continued the breach. The Tribunal noted that 'Greece ... kept in force and thus sanctioned the illegal practice under its own direct responsibility after the acquisition of territorial sovereignty'[23] and concluded that 'Greece, having adopted the illegal conduct of Crete in its recent past as autonomous state, is bound, as successor state, to take upon its charge the financial consequences of the breach of the concession contract'.[24] The Respondent's Counter-Memorial points out that Greece had recognised its own responsibility,[25] but this was, as the Tribunal underlined 'with good reason'.[26] The necessary implication of this is that Greece's responsibility did not flow from its acceptance of responsibility for the breach but rather evidenced a result that was already manifest. It merely underlined the wrongdoing and did not constitute a condition precedent. This case is also authority for the principle that the necessary adoption may be implied and need not be express.27

24. In the *Eichmann* case, the person in question, who played a major role in the Holocaust, was apprehended in Argentina by a group of Israelis in 1960 and flown to Israel for trial. Israel initially claimed that the group was separate from the state. The matter came before the UN Security Council, following Argentina's accusation that Israel had been involved and the Security Council adopted a resolution calling upon Israel to make 'appropriate reparation'.[28] Crawford concludes by saying that,

> 'In the unlikely event that the group that captured Eichmann were non-state actors of whose plans Israel was genuinely unaware, its conduct in accepting custody of Eichmann, and in

[23] 23 ILR 81, p. 90.
[24] Ibid., p. 92.
[25] At [587].
[26] 23 ILR 81, p. 92.
[27] Crawford, op.cit., p. 187.
[28] Security Council resolution 138 (1960).

> subsequently trying and executing him, may be taken as adoption of the abduction, giving rise to attribution under ... Article 11'.[29]

25. The Respondent's Counter-Memorial points out that the ILC Commentary states that,

> 'Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness ... a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity'.[30]

26. This, therefore, raises the question as to whether Montenegro's conduct was lawful under its own international obligations. Since the claim concerns that state's violations of international obligations flowing from a number of bilateral investment treaties argued to constitute international obligations by way of either declaratory acceptance (the UK BIT) or legislative action (its Foreign Investment laws of 2000 and 2011 and its most favoured nation provision with regard to the Austrian and Finnish bilateral investment treaties), the issue becomes circular.

27. It should also be noted that the ILC Commentary concludes that 'if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it'.[31] This would also cover composite and instantaneous acts.

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[29] Op.cit., p. 183.
[30] At [585].
[31] At p. 52.

28. There is also the additional point and that is that attribution and internationally wrongful acts are two distinct concepts and that in present circumstances it is the accepted test for attribution that is the key. Whether the acts complained of are internationally unlawful form part of a chronologically separate examination.

29. *A* further example of attribution by way of subsequent adoption of particular conduct is provided by the *Tehran Hostages* case before the International Court of Justice. This case is described by Crawford as the 'archetype of how Article 11 works'.[32] In this case, the initial illegal act by militants in taking over the US diplomatic premises was followed by the Iranian official actions maintaining the occupation of the Embassy and the detention of its inmates as hostages, which 'translated continuing occupation of the Embassy and detention of the hostages into acts of that State'.[33] As the ILC Commentary notes in its consideration of this case:

> 'Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration. This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act'.[34]

30. The acknowledgment and adoption of the conduct in question goes beyond 'cases of mere support or endorsement'. What is required is 'something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own'.[35] It is clear to me from the information supplied that Montenegro's activities fall into the latter category. It has continued the pattern of behaviour from its pre-independence to its

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[32] Op.cit., p. 183.
[33] ICJ Reports, 1980, pp. 3, 35.
[34] At p. 53. Footnote reference omitted. See also Crawford, op.cit., p. 186.
[35] ILC Commentary at p. 53.

post-independence manifestation, behaviour that marks a breach of rights and obligations accepted in a variety of instruments.

31. An additional example of retroactive attribution is the *Gabcfkovo Nagymaros* case, where the International Court of Justice interpreted a preambular provision in the Slovakia-Hungary Special Agreement to submit the Danube dam dispute to the court stating that Slovakia was the 'sole successor state [from Czechoslovakia] in respect of the rights and obligations relating to the Gabcfkovo Nagymaros Project', as meaning that 'Slovakia may thus be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia'.[36]

32. With regard to the matter under review, it is important to underline the theme of continuity that characterized and characterizes Montenegro's approach with regard to its pre-independence identity. For example, the Montenegrin Parliament's Decision on the Proclamation of Independence of the Republic of Montenegro contains the following provisions:[37]

> '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' (para. 2)
>
> '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 public policy' (para. 3).
>
> 'The laws and regulations which, on the day of entry into force

[36] ICJ Reports, 1995, pp. 7, 81.
[37] Official Gazette of the Republic of Montenegro No. 36/2006, 5 June 2006, entry into force on 3 June 2006, CLA-1, [26]-[28].

> 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 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' (para. 4).

33. Further, article 11 of the Constitutional Law for the Application of the Constitution of Montenegro of 25 October 2007 provided that,

> 'The laws and regulations of the State Union of Serbia and Montenegro shall continue to apply accordingly pending enactment of corresponding laws and regulations of Montenegro, insofar as they are not contrary to the legal order and interests of Montenegro'. [38]

34. I also understand that in August 2008, Montenegro published a policy statement acknowledging and recognizing the Concession's rights.[39]

35. My conclusion, therefore, on the basis of the information provided to me and my understanding of the relevant principles of international law, is that the conduct complained of by the Claimant prior to the independence of Montenegro may be attributed to that state in its post-independence expression.

2. The Unilateral Declarations Issue

36. I have been asked to address the question as to whether certain declarations made by Montenegro in the context of (a) its independence; and (b) its application for accession to the European Union are capable of constituting unilateral declarations as a matter of international law, for the purposes of binding Montenegro to obligations arising under the UK BIT. I will first look at the relevant

[38] Official Gazette of Montenegro No. 1/2007 of 25 October 2007, CLA-1 [43]
[39] Claimant's Memorial on Jurisdiction, [69], C-20, p. 104.

international law, then examine the evidence at hand.

37. It is the case that bilateral treaties will continue to bind the new state where the parties have implicitly accepted this, that is, where the parties have not expressly or by clear conduct repudiated continuation. It is a matter of the relevant state practice. However, I have no evidence that the UK has recognised that the UK BIT continues to apply after the dissolution of the State Union with regard to independent Montenegro (as distinct from Serbia, the continuation state of the State Union).

38. This leaves open the question as to whether the obligations and responsibilities contained in the UK BIT may be seen to have become binding upon Montenegro as a consequence of the unilateral conduct of that state.

39. In certain situations, the unilateral acts of states, including legislative provisions and statements made by relevant state officials, may give rise to international legal obligations. Such acts might include recognition and protests, which are intended to have legal consequences. Unilateral acts, while not sources of international law as understood in article 38(1) of the Statute of the ICJ, may constitute, according to the International Court of Justice, sources of obligation. The ultimate source of this principle is that of good faith. The International Court of Justice stated in the *Nuclear Tests* cases[40] that:

> 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral obligation.'

[40] ICJ Reports, 1974, pp. 253, 267. CLA-20

40. The Court in this the leading case on unilateral acts stated as follows:

> 'It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made'.

41. Accordingly, in order for an obligation to be recognised by way of unilateral declaration or act, the intention to be bound by the state making the declaration in question is crucial, as will be the element of publicity or notoriety. Not all unilateral acts will imply obligation, it is a question of interpretation as to whether the required intention can be ascertained. No special form is needed.[41] What is decisive for the evaluation of the legal consequences are the 'general nature and characteristics' of the statements made.[42] In the case itself, the Court held that the relevant French statements were made publicly and the objects of the statements in question (that the 1974 series of atmospheric nuclear tests would be the last) were clear. The Court thus held that they constituted an undertaking possessing legal effect and that 'the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance

[41] Ibid.
[42] Ibid., p. 269.

with the actual terms in which they have been publicly expressed'.[43]

42. The question of unilateral declarations was further discussed by the International Court in *Burkina Faso v Mali,*[44] where it was reaffirmed that such declarations concerning legal or factual situations may indeed have the effect of creating legal obligations for the state on whose behalf they are made, but the key was the intention of the state making the declaration to be bound. Further, in order to assess the intention 'account must be taken of all the factual circumstances in which the act occurred'. The Court, in addition, in *Democratic Republic of the Congo v Rwanda,*[45] reiterated that in order to determine the legal effect of the statement in question, its actual content as well as the circumstances in which it is made need to be examined. In particular, it was stressed that unilateral statements could only create legal obligations if made 'in clear and specific terms' (citing the *Nuclear Tests* case at p. 269). The Court noted 'the indeterminate character' of the treaties to which the Rwandan Minister of Justice had referred ('past reservations not yet withdrawn' to 'international human rights instruments' would be withdrawn) as well as the lack of any precise time-frame for such withdrawals, and concluded that statement made by the Rwandan Minister was 'not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations'. In view of the 'general nature of its wording' the statement could not be regarded as any sort of unilateral commitment.[46]

43. These principles have been essentially reaffirmed by the UN International Law Commission, which adopted in 2006 a set of *Guiding Principles Applicable to Unilateral Declarations of States Capable of*

[43] Ibid., pp. 269-70.
[44] ICJ Reports, 1986, pp. 554, 573–4.
[45] ICJ Reports, 2006, pp. 6, 28.
[46] Ibid., p. 29.

Creating Legal Obligations.[47] Guiding Principle 1 provides as follows:

> 'Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected'.

44. Guiding Principle 2 reaffirms that states possess the capacity to undertake legal obligations through unilateral declarations. It is, thus, inherent in the competence of sovereignty. Guiding Principle 3 notes that, 'To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise', while Guiding Principle 4 establishes that such a declaration may bind the state internationally only if made by an authority vested with the power to do so,[48]

45. Guiding Principle 6 states that such declarations may be addressed to the international community as a whole or to one or several states or to other entities and Guiding Principle 7 requires that such declaration be stated in clear and specific terms.[49] Thus, the framework for unilateral statements as creative of obligation is essentially clear.

46. I turn now to the facts of this matter as I have them.[50] There have been, I understand, three unilateral declarations made by Montenegro of relevance. The first was made on 3 June 2006, in which the Montenegrin Parliament declared that 'the Republic of Montenegro shall apply and take over international treaties and agreements

[47] A/61/10, pp. 369, 370. CLA-91.
[48] Ibid, pp. 371-2.
[49] Ibid.
[50] See Claimant's Notice of Arbitration, [51]-[53], [56]-[58] and [64]-[69] and Claimant's Memorial on Jurisdiction, [117]-[173]. See also Respondent's Counter-Memorial on Jurisdiction, [303]-[400].

concluded by and acceded to by the State Union of Serbia and Montenegro which relate to Montenegro and which are in conformity with its public policy'.[51] This was coupled with the statement that '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'.[52]

47. This is, of itself, in my view insufficient to meet the necessary criteria. It is too indeterminate. As explained below, in international law 'concluded' refers to agreements finalised but not yet in force, however the addition of the phrase 'and acceded to' here suggests a dual requirement. The term 'existing arrangement' while appearing to be very flexible does not appear to me to be sufficient since until either the treaty was in force or in practice it was actually being implemented *pro tem*, it would have been difficult to argue that there was indeed an existing arrangement. I am aware of the argument that the UK BIT was in force as a matter of domestic Montenegrin law, and that this may demonstrate that it was an "existing arrangement". While this is a credible argument, I am not convinced that it is sufficiently strong as a matter of international law. Further, it is to be noted that the declaration is made by Parliament, which may not qualify as a requisite source of authority for present purposes, as distinct from a qualified and high executive source.

48. The second unilateral declaration is a statement by the Minister of Foreign Affairs of Montenegro, who wrote to the UN Secretary-General on 10 October 2006 stating that 'the Government of the Republic of Montenegro decided to succeed to the treaties to which the State

[51] Decision on the Proclamation of Independence of the Republic of Montenegro, [3], CLA-1 [27].
[52] Ibid., [3], CLA-1 [32].

Union of Serbia and Montenegro was a party *or signatory'.*[53] The interesting feature here in this public and specific declaration by an authoritative source is that Montenegro proclaims its intention to succeed not just to treaties to which the State Union was a party but also to treaties which had been signed by the State Union. While being a party refers to a state that 'has consented to be bound by the treaty and for which the treaty is in force',54 being a signatory merely means that the state concerned has approved the text of the proposed treaty as authentic.55 It signals approval of the agreed text and does not constitute an obligation thereafter to ratify. Signature may be withdrawn. Until the agreement is ratified, a signatory is under the obligation to refrain from acts which would defeat the object and purpose of the treaty in question.56

49. Thus, the UK BIT would clearly be included within the terms of this declaration since it had been signed on 6 November 2002. While this phrase indicating succession to treaties to which the predecessor state is a party 'or a signatory' is an unusual provision, there is nothing in the law of treaties that I am aware ofto preclude its application.57

50. I note that the statement proceeds to say that Montenegro 'succeeds to the treaties listed in the attached Annex ..'. The Annex does not list the UK BIT. However, this does not preclude the view that the statement is binding with regard to Montenegro's clear intention to abide by the terms of the signed but as yet not in force treaty since the wording in the initial paragraph is so clear and the reference to treaties annexed in the second paragraph may be seen as a non-exclusive example of the general statement and not a comprehensive

53C-36. Emphasis added.
54Article 2(1)(g) of the VCLT.
55Article 10, VCLT.
56Article 18, VCLT.
57I note that the Respondent's Counter-Memorial while discussing the point made in my subsequent paragraph, does not appear to allude to the argument concerning the term 'or signatory', [370]-[373].

description of it. The fact that the Annex seems to consist solely of multilateral treaties would seem to support this.

51. The third unilateral declaration came by way of Montenegro's official response to a European Union Questionnaire as part of the application process. This response, dated 9 December 2009 and from the Ministry of Foreign Affairs, to a question concerning the country's treaty obligations, listed the bilateral treaty obligations of Montenegro applied in accordance with Point 3 of the Decision on Proclamation of Independence. This specifically included the 'Agreement Between the Federal Government of the Federal Republic of Yugoslavia and the Government of the United Kingdom of Great Britain the Reciprocal Promotion and Protection of Investments, 6 November 2002, in Belgrade', ie. the UK BIT. This appeared as one of 14 bilateral treaties between Montenegro and the UK.[58] This is a powerful and official and specific statement as to the operability of the treaty. Of course, since the agreement was not actually in force, this statement could not as such bring the agreement into force nor could it affect the position of the UK, but it can properly be regarded as a binding unilateral declaration, which Montenegro cannot subsequently deny. The Respondent argues that this inclusion 'plainly was a mere error',[59] nevertheless it appears clearly in the relevant section and cannot be wished away.

52. I would, in addition, refer here to the Diplomatic Note addressed by the Foreign Affairs Ministry of Montenegro to the UK Embassy in Podgorica, dated 5 March 2008, in which Montenegro proposed an Exchange of Notes on the regulation of bilateral treaties. The Note states that the treaties specifically attached 'remain in force between Montenegro and the United Kingdom, in accordance with the Decision on Proclamation of Independence of the Republic of Montenegro, as of

[58] C-39, pp. 13 and Annex 258 *A*, p. 7.
[59] Respondent's Counter-Memorial, [391].

June 3, 2006, which prescribes that Montenegro shall apply and adhere to International Treaties and Agreements that the State Union of Serbia and Montenegro was party to and that relate to Montenegro and are in conformity with its legal order'.60 This list includes as number 13 out of fifteen specified treaties, the UK BIT. While this cannot as such bind the UK, it is a very clear indication as to Montenegro's belief at the requisite official level that the BIT is in force. Since the agreement was in fact not in force between the two states due to the lack of UK action, it can be interpreted as a holding-out by Montenegro of its belief that the rights and obligations contained in the UK BIT were binding upon it. It also demonstrates, taken with December 2009 statement to the EU referred to in the preceding paragraph, consistency of practice.

53. Although I have not been asked to address the issue of estoppel, I should add by way of completeness, that it seems to me that this constitutes a good example of the operations of such doctrine. Montenegro cannot publicly and officially proclaim that the UK BIT is in force and then deny that it has acknowledged and adopted the rights and obligations therein contained.

54. There is an additional point to be emphasised. The binding nature of unilateral declarations (assuming the necessary requirements are in place) means that the rights and obligations referred to in the declaration in question themselves become binding irrespective of their status prior to the declaration. Accordingly, the fact that the UK BIT was not in force as between Montenegro and the UK at the relevant times does not preclude the consequence that the rights and duties therein contained may become binding upon one of these states as a result of an obligatory and unilateral act. It is the declaration (once it fulfills the relevant conditions) that transforms putative rights and obligations into concrete ones as far as the declarant state is

60 R-67.

concerned.[61]

55. My conclusions on this question put to me are that (i) I have doubts that the first unilateral declaration suffices to establish the acceptance of binding obligations with regard to the UK BIT; (ii) it is possible to argue that the second declaration with regard to treaties to which the State Union was a party or a signatory does indeed suffice to denote acceptance of such obligations and (iii) the third declaration, specifically including the UK BIT as a bilateral treaty in force, is capable of establishing obligations for Montenegro in the circumstances.

3. Definition of Particular Treaty Terms

56. I have been asked to discuss as a matter of international law, the correct definition of the terms 'concluded' and 'treaty' and specifically whether the definition of 'treaty' in the Vienna Convention on the Law of Treaties 1969 ("VCLT") is limited only to those treaties which have entered into force and whether a treaty is 'concluded' only once it has entered into force.

57. These matters are referred to in the context of Serbian case law in the Respondent's Counter-Memorial on Jurisdiction (at paragraphs 245 to 272) and in Professor Kreca's Expert Opinion at paragraph 4. I am unable, of course, deal with questions of the domestic law of the FRY, the State Union, Serbia or Montenegro. More generally, and as a matter of international law, the Respondent's Counter-Memorial addresses this question in paragraphs 228, 335 to 337 and 342, and Professor Kreca considers it in paragraphs 26, 39 to 41, 43, 64 and 68 to 70.

[61] See *Libya/Chad,* ICJ Reports, 1994, pp. 6, 23.

i) 'Concluded'

58. There is no precise definition as such of 'concluded' in international law. Essentially it means 'made' or 'entered into'. The term does not appear in the definitions section (article 2(1)) of the VCLT. However, a guide to its meaning appears from its use within the Convention. The heading for Part II of the VCLT is 'Conclusion and Entry into Force of Treaties' and Part II is divided into section 1 entitled 'Conclusion of Treaties', section 2 on 'Reservations' and section 3 on 'Entry into Force and Provisional Application of Treaties'. Section 1 on 'Conclusion of Treaties' is comprised of the following matters: the capacity of states to conclude treaties (article 6), full powers of representation (article 7), subsequent confirmation of an act relating to the conclusion of a treaty performed by a person without authorisation (article 8), adoption of the text (article 9), authentication of the text (article 10), means of expressing consent to be bound by a treaty (by signature, exchange of instruments, ratification, acceptance or approval, and accession: articles 11-15), exchange or deposit of instruments of ratification, acceptance, approval or accession (article 16), consent to be bound by part of a treaty and choice of differing provisions (article 17) and the obligation not to defeat the object and purpose of a treaty prior to its entry into force (article 18).

59. The topic of entry into force is thus clearly differentiated from that of conclusion of treaties, which can only be understood to mean that the two matters are separate and distinct. Aust, for example, discusses the conclusion of a treaty in the context of the different entities that may make such an agreement,[62] while Korontzis has a chapter entitled 'Making the Treaty', the first sentence of which notes that, 'From time immemorial, states have concluded treaties on all possible matters

[62] *Modern Treaty Law and Practice,* 3rd ed., Cambridge, 2013, p. 15.

under the sun'. He uses the term 'treaty-making' as encompassing four stages, being negotiations, 'the conclusion of the treaty text', expressions of consent to be bound and entry into force.[63] He notes that the conclusion of a treaty has various stages, beginning with the establishment of the text and usually ending with its signature.[64]

60. I note that in the Respondent's Counter-Memorial, it is stated that 'a treaty is concluded only after the act of exchange'.[65] The authority given is article 13 of the VCLT which provides that, 'The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: (a) the instruments provide that their exchange shall have that effect; or (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect'. This, however, simply indicates one method of signaling consent, such consent being a necessary part in concluding a treaty. It is accurate but unexceptional. Nevertheless, the Counter-Memorial proceeds to comment that 'at the time Montenegro adopted its Decision on Independence, the only meaning that could have been accorded to the term *"concluded"* treaties is *"treaties in force'.*[66] As a matter of international law, this cannot be the case. The two concepts as shown above are distinct. I note in passing that it is Professor Kreca's view that 'the VCLT, as governing law as regards all questions of validity, binding force, effects, application and termination of international treaties, is *in toto* a part of the internal legal order of Montenegro'.[67]

61. It is, thus, my view that according to international law a treaty is concluded when the formalities of reaching an agreed text and signaling consent to that text by the various means allowed, primarily

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[63] In *Oxford Guide to Treaties* (ed. D.8. Hollis), Oxford, 2012, p. 177.
[64] Ibid., p. 184.
[65] At [335].
[66] At [337]. Emphasis in original.
[67] Expert Opinion, [97], RER-1.

by signature, have been completed. In this case, the UK BIT was therefore concluded when the two parties signed the treaty. The questions as to reservations and actual entry into force follow chronologically from this stage and are not part of it. Conclusion and entry into force are separate and distinct legal categories.

ii) *'Treaty'*

62. The Respondent's Counter-Memorial deals with this in paragraphs 341 to 345, where the view is taken that, 'An international treaty does not become a treaty until it enters into force in line with its own terms, or the general rules of international law'.[68]

63. With regard to the definition of 'treaty', international law is specific. The term is defined in article 2(1)(a) of the VCLT as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. The Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations 1986 slightly varies this: 'an international agreement governed by international law and concluded in written form: (i) between one or more states and one or more international organisations; or (ii) between international organisations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

64. The definition of treaty, therefore, deals with question of capacity (states; international organisations or more widely any subject of international law),[69] form (embodied in one or more related

[68] At [342]. See also Professor Kreca's Expert Opinion at paragraphs 40, 41 and 43.
[69] See Aust, op.cit., pp. 15-6.

instruments and in writing), and governance by international law.[70] Aust regards the definition in article 2(1)(a) as representing customary international law and thus not limited to the confines of the VCLT and its practice.[71] To this definition Lauterpacht would add the intention to create legal rights and obligations.[72]

65. It is thus my view that the term 'treaty' is not limited only to those treaties which have entered into force, either generally or for the particular state in question. Indeed, this is the only logical explanation of the provisions of article 24(1) of the VCLT which provides that, 'A treaty enters into force in such manner and upon such date as soon as consent to be bound by the treaty has been established for all the negotiating states' and of article 25 which provides that 'A treaty or part of a treaty is applied provisionally pending its entry into force' if the treaty so provides or where the negotiating states have in some other manner so agreed. In other words, an agreement which has not yet entered into force or which may be wholly or partly applied pending entry into force is still termed a 'treaty'.

4. General Comments on the Counter-Memorial

66. I have been asked for general comments on the Respondent's Counter-Memorial on Jurisdiction and in particular the sections on attribution, unilateral declarations and state succession. However, it should be noted that the previous sections of this report have referred on a number of occasions to the arguments of the Respondent as contained in the Counter-Memorial.

i) Attribution

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[70] See *The Vienna Conventions on the Law of Treaties* (eds. 0. Corten and P. Klein), Oxford, 2011, pp. 34-45.
n Op.cit., p.14.
n Ibid., p. 43.

67. This topic is covered in paragraphs 584-9 of the Counter-Memorial. It is dealt with rather cursorily. I have addressed the key issues in paragraphs 18 to 32 above. I would only comment at this stage to say that this part of the Counter-Memorial fails to address the issue that what is in question is attribution, that is whether particular conduct may be imputed to Montenegro, and not the comprehensive question as to whether Montenegro has committed an internationally unlawful act for which it is responsible in international law. The aim is to show that Montenegro has by its own behaviour adopted the conduct of the Republic of Montenegro as a constituent of the State Union so as to render it subject to the terms of the UK BIT.

ii) Unilateral Declarations

68. This is covered in paragraphs 303-400 of the Counter-Memorial. I have addressed the key issues in paragraphs 36-55 above. However, I make the following additional comments.

69. First, the Respondent argues that the doctrine of unilateral acts does not apply with regard to acts associated with treaty obligations which should be assessed therefore in the light of the treaty and pursuant to treaty law. [73] The implication is that the international legal principles concerning unilateral acts have no place here. However, the examples given either fall within the technical elements of treaties (signature, ratification, reservations, declarations) which are by their very nature unilateral and are part of the mechanics of treaty law and thus governed by that law, or constitute acceptance of an obligation not in conformity with requirements of third instruments,[74] or sought to contradict the terms of the treaty in question.[75] The current matter concerns rather the question of the unilateral assumption of rights

[73] Respondent's Counter-Memorial, [307]-[317].
[74] Ibid., [310].
[75] Ibid., [311]-[313].

and obligations referenced in a treaty rather than the procedural requirements of treaties or an attempt to negate or gainsay or contradict the provisions in the treaty in question.

70. Thus, by saying that the Claimant is seeking to 'side-step the treaty analysis by relying on the general principles concerning unilateral declarations',[76] the Respondent appears to have missed the point. The key question before the Tribunal on the jurisdictional issue is not an analysis of the treaty, it is rather the argument that by unilateral declaration the Respondent has assumed in a binding form the rights and obligations that are laid out in an international instrument.

71. Secondly, the Respondent refers to article 9 of the Vienna Convention on the Succession of States in Respect of Treaties, which provides (in paragraph one) that,

> 'Obligations 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'.[77]

72. However, the Commentary to the ILC draft article 9 (which was in substantially similar terms)[78] makes it clear that the context for this provision was the unilateral declaration by a number of newly

[76] Ibid., [318].
[77] Ibid., [314].
[78] 'The obligations or rights of a predecessor State 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 States or of other States parties to those treaties in consequence 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', *Yearbook of the International Law Commission, 1974*, vol. II, Part One, p. 187.

independent states[79] dealing with succession of treaties binding on the territory of the colonial territory, rather than by way of a devolution agreement, and as the Commentary provides, article 9 deals with the legal effects of 'these unilateral declarations'.[80] The extensive state practice discussed in the Commentary deals solely with such colonial independence situations and not at all with secessions from already independent states,[81] even though the principle is stated to be of general application. Further, the focus of concern in the Commentary on this article is the effect of such declarations on third states. As is noted,

> 'the declarations are *unilateral acts* the legal effects of which for the other parties to the treaties cannot depend on the will of the declarant State alone… the legal effect of the declarations seems to be that they furnish bases for a *collateral* agreement in simplified form between the newly independent State and the individual parties to its predecessor's treaties for the provisional application of the treaties after independence…. There is, of course, nothing to prevent a newly independent State from making a unilateral declaration in which it announces definitively that it considers itself, or desires to have itself considered, as a party to treaties, or certain treaties, of its predecessor applied to its territory prior to independence. Even then, since the declaration would not, as such, be binding on other States, its legal effect would be governed simply by the provisions of the present articles relating to notifying succession to multilateral treaties and the continuation in force of treaties by agreement. In other words, in relation to the third States parties to the predecessor State's treaties the legal effect of such a unilateral declaration would be analogous to that of a devolution agreement'.[82]

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[79] This term relates to newly decolonised states and not to states appearing as a result of secession from an already independent state, see article 2(1)(f) of the VCSST.

[80] *Yearbook of the International Law Commission, 1974*, vol. II, Part One, pp. 187-8.

[81] Ibid., pp. 187-93.

[82] Ibid., pp. 192-3.

73. The important point here, however, is that article 9 has no application in the current matter since the UK BIT was not in force at the date of the succession as between the State Union and Montenegro. In addition, there is no argument that the rights and duties of that treaty have by the unilateral declaration of Montenegro become binding as such upon the UK in respect of Montenegro.

iii) State Succession

74. This, I am instructed, is covered in paragraphs 282-395 of the Counter-Memorial. To the extent that the Respondent argues that the UK BIT did not come into force until 3 April 2007 and then only with regard to Serbia and not Montenegro,[83] I am in agreement and have addressed the key issues in paragraphs 8-17 above. It follows that the UK BIT cannot be subject as such of succession. Indeed, the discussion of succession is sparse and the rest of the paragraphs referred to me deal with the question of unilateral declarations, which I have dealt with in the preceding section.

5. General Comments on the Expert Opinion of Professor Kreća

75. I am unable to offer any comments concerning Professor Kreća's views on the domestic laws of the FRY, the State Union, Serbia or Montenegro as these are not within my knowledge or expertise. The vast majority of his report concerns such law (for example Part I on the Domestic application of treaties in the FRY, State Union and Montenegro and Part II on the Hierarchy of norms in Montenegrin law). I note that his report is entitled 'Montenegrin Law Expert Opinion'. My comments are restricted to the area of public international law.

[83] Respondent's Counter-Memorial on Jurisdiction, [282]-[295].

76. First, Professor Kreca refers briefly to the meaning of a number of international law terms used in the law of treaties, such as 'ratification' and 'treaty'.[84] I have addressed the international law meaning of the term 'treaty' above and therefore disagree with Professor Kreca's view that this term covers only treaties that are in force internationally. The primary purpose of Professor Kreca's discussion of these terms is to explain the relevant domestic procedures. The point is made that legislatures do not ratify only executives do this.[85] This is correct to the extent that ratification is an international act whereby a state establishes on the international plane its consent to be bound,[86] but there is a domestic dimension and internal law may require certain domestic approvals before ratification may proceed.[87] Professor Kreca correctly notes that ratification and parliamentary approval are 'two separate procedural acts, with separate legal effects'.[88]

77. Secondly, there is a very brief, general, discussion of the monist and dualist approaches to international law,[89] which is fine. However, I make no comment as to whether Montenegro is in fact a monist or dualist state.

78. Thirdly, Professor Kreca turns to the law of state succession.[90] He refers to article 34 of the VCSST but states that this rule has been modified by 'the successor states' so that the rules contained in article 24 of this convention now apply 'by analogy and in practice, to all successor states'.[91] Article 24 reverses the general rule of succession

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[84] At [28]-[43]. RER-1,
[85] At [42].
[86] Article 2(1)(b), VCLT.
[87] See Aust, op.cit, p. 95.
[88] At [106].
[89] At [50]-[54].
[90] Ibid., [82]-[88].
[91] At [83] and [131]-[135].

and provides that in the case of newly independent states (in the sense of newly decolonised states):[92]

> '1.A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates 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.
> 2.A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established'.

79. This broad assertion is difficult to maintain, in my view. As I have noted earlier, there is some controversy as to whether the dominant rule in cases of succession involving already independent states is that of automatic or presumptive succession or not.[93] In any event, it is not my view that there is an automatic non-succession to bilateral treaties. The correct position, it is believed, is that there is, at the least, a presumption of succession in these circumstances, but that it would all depend upon the practice adopted by the relevant states. I have no information as to the UK approach to the UK BIT, but for present purposes what matters is that Montenegro has signalled its intention to be bound by the rights and obligations contained in the UK BIT.

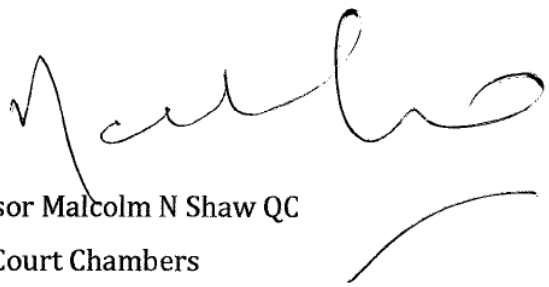
80. Fourthly, Professor Kreća addresses the question of the meaning of the Montenegrin Diplomatic Note to the UK of 5 March 2008. I have referred to this above in paragraph 52. Professor Kreća notes that such a communication would constitute notification of succession within the meaning of the VCSST, but could not *per se* be capable of

[92] See above, [71].
[93] See above, [9]-[16].

automatically leading to succession to the UK BIT.[94] This is essentially correct, but it would, however, constitute good evidence of such succession, depending upon all the circumstances of the case. It also supports the view that Montenegro saw itself as bound by the rights and obligations therein contained. Professor Kreća continues by noting that even if the UK BIT had been in force at the relevant time, it would not be capable of producing *per se* a succession.[95] This is doubtful. It is certainly arguable that the absence of any reaction by the UK (as far as is known to me) to this Note coupled by the presumption of succession would indeed have constituted acceptance of succession to the UK BIT.

81. My conclusions may be found in paragraph 3 above.

82. I confirm that insofar as the facts stated in the opinion are within my knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.



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28 October 2016

[94] At [125]. Notification under the VCSST as defined in article 2(1)(g), referred to by Professor Kreća in fact concerns multilateral treaties.
[95] At [140].

List of Footnote References

Footnote	Reference	Description
1	CLA-190	Conference on Yugoslavia, Arbitration Commission, 4 July 1992, 92 ILR, pp. 199 and 202.
2, 3	CLA-178	J. Crawford, The Creation of States in International Law, 2nd ed., Oxford, 2006, pp. 707-14.
3	CLA-145	UN General Assembly Resolution 55/12.
3, 5	CLA-149	UN General Assembly Resolution 60/264.
4	CLA-179	H. Tuerk, 'Montenegro', in R Wolfrum (ed), Max Planck Encyclopaedia of Public International Law (2007).
7	CLA-170	Chapter 7 "The Effect of Secession on Treaties", D.P. O'Connell, State Succession in Municipal Law and International Law, Cambridge, 1967, vol. II.
8	CLA-171	Succession to Bilateral Treaties by Seceding States", 61 American Journal of International Law, 1967, pp. 521, 544-6.
9, 78, 80, 81, 82	CLA-172	Yearbook of the International Law Commission, 1974, vol. II, part 1, various extracts.
10	CLA-173	Digest of US Practice in International Law, 1991-9, Washington, pp. 742, 745.
11, 62, 69, 71, 72	CLA-188	A. Aust, Modern Treaty Law and Practice, 3rd ed., Cambridge, 2013, various extracts.
12	CLA-175	Digest of US Practice in International Law, 2003, Washington, p. 245 and following.
14	CLA-183	P. Daillier, M. Forteau and A. Pellet, Droit International Public, Paris, 2009, p. 615.
19, 21	RLA-112	ILC Articles on State Responsibility A/56/10, 2001.
20	CLA-147	UN General Assembly Resolution 56/83, 2001.
20	CLA-148	UN General Assembly Resolution 59/35, 2004.
20	CLA-150	UN General Assembly Resolution 62/61, 2008.
20	CLA-151	UN General Assembly Resolution 68/104, 2013.
23, 26	CLA-16	Lighthouses Arbitration (France v Greece) 23 ILR 81, p. 90.
28	CLA-144	UN Security Council resolution 138 (1960).
33	CLA-21	Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v Iran), 1980 I.C.J.
36	CLA-30	Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) 1997 Judgment, ICJ Reports.
44	CLA-152	Case Concerning the Frontier Dispute (Burkina Faso v Mali) 1986 I.C.J. 554
45	CLA-44	Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Rwanda), Judgment of 3 February 2006, Jurisdiction of the Court and Admissibility of

		the Application, ICJ Reports, 2006.
61	CLA-153	Case Concerning the Territorial Dispute (Libya v Chad), ICJ Reports, 1994, pp. 6, 23.
63, 64	CLA-186	Oxford Guide to Treaties (ed. D.B. Hollis), Oxford, 2012, p. 177 - 185.

Annex 1

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Academic Appointments

After a period at the Liverpool Polytechnic, I moved to be a Senior Lecture at the University of Essex, where I was head of the Law School (1983-6) and was Founder-Director of the Human Rights Centre (1983-9).

I was appointed Ironsides Ray and Vials Professor of Law at the University of Leicester in 189 and Sir Robert Jennings Professor of International Law in 1994 until my retirement from the Chair in 2011. I was then appointed part-time Research Professor of International Law until 2013

I have been a visiting professor at the Hebrew University of Jerusalem, Israel, and at the Université de Paris Ouest, Nanterre-La Défense, France. I have also been visiting fellow at the Lauterpacht Centre for International Law.

I have an LLB from Liverpool University, an LLM (with Distinction) from the Hebrew University and a PhD from Keele University.

I was Founder and Chair of the European Consortium of Law (which linked together the law faculties of the universities of Leicester, Strasbourg, Lausanne, Aarhus, Bonn, Utrecht, Liège, Helsinki, Trinity College Dublin, Thessaloniki, Seville and Florence).

Professional Experience

I am a practising barrister at Essex Court Chambers, London and was appointed QC in 2002.

Clients have included the Governments of Chad (Chad v Libya, International Court of Justice, 1990-3); Cameroons (Cameroons v Nigeria, International Court of Justice, 1994-2002); Cyprus (European Court of Human Rights 1995-2001; European Commission of Human Rights, 1995-9; European Court of Human Rights, 1999-2002); Quebec, 1992, 1995, 1997-8 and 2001-2; Treasury Solicitor 1995, 1998 and 1999; Westland Helicopters Ltd (Westland v AOI, 1994); Crown Prosecution Service/Government of Spain, (Re Pinochet,1998); Crown Prosecution Service (Re Operation January, 2001); Crown Prosecution Service (R v Jones, 2004-6); Treasury Solicitors (Noor Khan, 2012); Government of Ireland (Horgan v An Taoiseach, 2003); Government of Singapore (2003 - 6);

Government of Azerbaijan (Strasbourg cases and various legal opinions); Government of Serbia (Kosovo advisory opinion, International Court of Justice); Indonesia and other governments covered by confidentiality; international organisations and private clients

Issues covered include territorial disputes; law of the sea; state succession; state immunity; recognition of foreign governments and states; human rights; war crimes; self-determination; international organisations; treaties; international humanitarian law.

Other Information

Associé of the Institut de Droit International, elected September 2013

Trustee of the British Institute of International and Comparative Law, 2010 – 6

Member of the Advisory Council of the British Institute of International and Comparative Law, 2006 – 10

Founding Member of Curatorium, Xiamen Academy of International Law, 2005 -

Awarded the decoration of "Officier de l'Ordre de la Valeur" by the Republic of Cameroon, Spring 2003

Member of the Higher Education Funding Councils' Law Assessment Panel for the 2001 Research Assessment Exercise for British Universities

Member of the Higher Education Funding Councils' Law Assessment Panel for the 1996 Research Assessment Exercise for British Universities

Co-Rapporteur of the International Law Association's Committee on Accountability of International Organisations

Membership of Committees

Member of the Editorial Committee of the British Year Book of International Law

Member of the International Advisory Board of Editors of the International Journal on Group Rights

Member of the Editorial Board of Global Society

Member of the Advisory Board of Israel Law Review 2013-6

Member of the Comité Scientifique of the Revue Générale des Sciences Juridiques [Cameroon]

Member of the Advisory Board of the International Community Law Review, 2006

Member of the Advisory Board of Non-State Actors and International Law

Publications

(1) **Books**

Rosenne's Law and Practice of the International Court of Justice, 5th ed., 2016, Brill/Nijhoff

International Law, 7th ed., 2014, Cambridge University Press. Translated into Polish, Hungarian, Portuguese and Chinese. (8th ed. pending, publication spring 2017)

Common Values in International Law: Essays in Honour of Christian Tomuschat (as co-editor with Sommermann, Fassbender and Dupuy), 2006, N.P. Engel Verlag, Kehl,

Title to Territory (as editor), 2005, Library of Essays in International Law, Ashgate Publishing

External Debt (as co-editor with D. Carreau), 1995, Hague Academy of International Law, Nijhoff Publications

Title to Territory in Africa: International Legal Issues, 1986, Oxford University Press,

(2) **Contributions to Books**

"Territory" chapter for *Oppenheim's International Law* (10th edition) for Oxford University Press (publication 2017)

"Self-Determination, Uti Possidetis and Boundary Conflicts in Africa" in Chia-Jui Chen, *The International Legal Order: Essays Commemorating the 10th Anniversary of the Xiamen Academy of International Law,* The Hague, Brill, 2016, chapter 5

"The International Court of Justice and the Law of Territory", in C.J. Tams and J. Sloan, *The Development of International Law by the International Court of Justice*, Oxford, OUP, 2013, pp. 151-76

"Article 21 of the Statute of the International Court of Justice" in A. Zimmermann, C. Tomuschat and K. Oellers-Frohm, *Commentary on the Statute of the International Court of Justice*, 2nd ed., Oxford: OUP, 2012

"Articles 22 of the Statute of the International Court of Justice" in A. Zimmermann, C. Tomuschat and K. Oellers-Frohm, *Commentary on the Statute of the International Court of Justice*, 2nd ed., Oxford: OUP, 2012

"Boundary Treaties and Their Interpretation" in *Evolving Principles of International Law: Studies In Honour of Karel Wellens*, (ed. E. Rieter and H. de Waele), Martinus Nijhoff, 2012

"Article 62", *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford, OUP, 2011, (with C. Fournet);

"Self-Determination, Human Rights and the Attribution of Territory" in *Essays in Honour of Bruno Simma*, (ed D. Khan), Oxford, OUP, 2011

"Settling Territorial Disputes" in *Liber Amicorum Jean-Pierre Cot*, Bruylant, 2009, pp. 255-81.

"Territorial Administration by Non-Territorial Sovereigns" in *The Allocation of Authority in International Law* (eds. Broude and Shany), Hart Publications, 2008, pp. 369-415.

"Acquisition of Teritory in Nineteenth Century Africa: Some Thoughts" in Dupuy, Fassbender, Shaw and Sommermann (eds), *Essays in Honour of Christian Tomuschat*, Kehl, NP Engel Verlag, 2006, pp. 1029 – 1049.

"Article 21 of the Statute of the International Court of Justice" in A. Zimmermann, C. Tomuschat and K. Oellers-Frohm, *Commentary on the Statute of the International Court of Justice*, Oxford: OUP, 2006, pp. 375 – 89.

"Articles 22 of the Statute of the International Court of Justice" in A. Zimmermann, C. Tomuschat and K. Oellers-Frohm, *Commentary on the Statute of the International Court of Justice*, Oxford: OUP, 2006, pp. 391 - 98

"Self-Determination and the Use of Force" in N. Ghanea and A. Xanthaki (eds), *Minorities, Peoples and Self-Determination*, Martinus Nijhoff, Leiden, 2004, pp. 35-

"The International Law of Territory: An Overview" in Shaw (Ed.), *Title to Territory*, Library of Essays in International Law, Ashgate Publishing, 2005, pp. xi- xxxv

"The International Court, Responsibility and Remedies" in Fitzmaurice, M and Sarooshi, D. *Issues of State responsibility before International Judicial Institutions*, Oxford: Hart Publications, 2004, pp. 19 – 34

"Article 62" in Olivier Corten et Pierre Klein (Eds.), *Les Conventions de Vienne de 1969 et de 1986 sur le droit des traités: Commentaire article par article*, Bruxelles, Bruylant, 3 vols, 2006, (with C. Fournet) pp. 2229-2261.

"The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues" in Dahlitz (ed.), *Secession and International Law: Regional Appraisals*, UN Publications, New York, 2003, pp. 269-84

"Protecting Minorities: The Precarious Balance" in Torremans (ed.), *Legal Convergence in the Enlarged Europe of the New Millennium*, Kluwer, The Hague, 2000, pp. 225-253.

"Peaceful Resolution of 'Political Disputes': The Desirable Parameters of Jurisdiction of the ICJ" in Dahlitz (ed.), *Peaceful Resolution of Major International Disputes*, UN publications, New York/Geneva, 1999, pp. 49 - 75

"A Practical Look at the International Court of Justice" in Evans (ed.), *International Law Remedies*, Hart Publishing, 1998, p. 11

"The Security Council and the International Court of Justice: Judicial Drift and Judicial Function" in Muller, Raic and Thuranszky (eds.), *The International Court of Justice: Its Role After 50 Years*, 1997, Kluwer, p. 219

"Freedom of Thought, Conscience and Religion" in Macdonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights*, 1993, Nijhoff, p. 445

"The Definition of Minorities in International Law" in Dinstein and Tabory (eds.), *The Protection of Minorities and Human Rights*, 1992, Nijhoff, p. 1

"Protecting Human Rights in Europe" in Vijapur (ed.), *Essays on International Human Rights* , 1991, South Asian Publishers, p. 50

"International Law and Minority Rights" in *Papers From the UIA Conference, Strasbourg*, 1990, Butterworths, p. 257

"Genocide" in Dinstein (ed.), *International Law at a Time of Perplexity*, 1989, Nijhoff, p. 797

"The International Status of National Liberation Movements" in Snyder and Sathirathai (eds.), *Third World Attitudes toward International Law*, 1987, Nijhoff, pp. 141- 158

"Nuclear Weapons and International Law" in Pogany (ed.), *Nuclear Weapons and International Law*, 1987, Gower, p. 1

"Transnational Protection of Human Rights" in Banakas (ed.), *UK Law in the 80s*, 1987, Butterworths, p. 230

"Micro-states and International Law" in Harden (ed.), *Small is Dangerous - Micro-States in a Macro World*, 1986, Frances Pinter, p. 51

(3) **Articles**

"The League of Nations Mandates System and the Palestine Mandate", 49 Israel Law Review, 2016, p. 1

"The Article 12 (3) Declaration of the Palestinian National Authority, the International Criminal Court and International Law", 9 Journal of International Criminal Justice, 2011, pp. 301-24

"International Law: A System of Relationships", 3 Collected Courses of the Xiamen Academy of International Law, 2011, pp. 237 - 340

"Sliding Towards Universalism", 48 Justice, 2011, pp. 10-14 and 41

"Title, Control and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission", International and Comparative Law Quarterly, 2007, pp. 755-796

"Application for Revision of the Judgment of 11 September 1992", International and Comparative Law Quarterly, October 2005, pp. 999-1008

.

"The *Yerodia* Case and Remedies" in Revue Belge de Droit International Public, 2002, numbers 1 and 2, p. 554

“The Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), 49 International and Comparative Law Quarterly, October 2000, p. 964.

"The International Criminal Court - Some Procedural and Evidential Issues", 3 Journal of Armed Conflict Law, 1998, p. 65

"The International Court of Justice: A Practical Perspective", 46 International and Comparative Law Quarterly, 1997, p. 831

"Peoples, Territorialism and Boundaries", 8 (3) European Journal of International Law, 1997, p. 478

"The Heritage of States: The Principle of Uti Possidetis Today", 67 British Year Book of International Law 1996, 1997, p. 75

“State Succession Revisited”, 5 Finnish Yearbook of International Law, 1994, p. 34

"The El Salvador/ Honduras Case", 42 International and Comparative Law Quarterly, 1993, p. 929

"The Definition of Minorities in International Law", 20 Israel Yearbook on Human Rights, 1990, p. 99 [reprinted in *The Protection of Minorities and Human Rights* supra and in Dinstein and Domb (eds.), *`The Progression of International Law*, Nijhoff, 2011, pp. 45-72]

"Avis sur la conformité au droit international de la succession d'États d'une méthode de répartition des actifs et des passifs entre le Canada et le Québec", 7 Revue Québécoise de Droit International, 1991-2, p. 88

"Authorised Force in the Gulf", Law Society Gazette, 19 September 1990, p. 2

"The Western Sahara Case", 49 British Year Book of International Law, p. 119

"The Beagle Channel Arbitration Award", 6 International Relations, p. 415

"Dispute Settlement in Africa", Yearbook of World Affairs, 1983, p. 149

"Territory in International Law", 13 Netherlands Yearbook of International Law, p. 61

"The United Nations Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons, 1981" 9 Review of International Studies, p. 109

"The International Status of National Liberation Movements", 5 Liverpool Law Review, p. 1 [reprinted in *Third World Attitudes to International Law* supra]

"International Law and Intervention in Africa", 8 International Relations, p. 341

"The Principle of Non-Discrimination in International Law", Dokkyo University Forum, p. 122

"Legal Acts of an Unrecognised Entity", 94 Law Quarterly Review, p. 500

"Bridging that Beneficial Gap", 126 New Law Journal, p. 547

"Sovereign Immunity and the English Courts", 126 New Law Journal, p. 632

"The US Sovereign Immunities Act", 128 New Law Journal, p. 368

"Sovereign Immunity Revisited", 128 New Law Journal, p. 983

"The State Immunity Act 1978", 128 New Law Journal, p. 1136

"Some Legal Aspects of the Entebbe Incident", 1 Jewish Law Annual, p. 232

"Certainty of Trusts and the Definition of a Jew", 2 Jewish Law Annual, p. 208

"International Law and the West Bank", 3 Jewish Law Annual, p. 87

"The Egyptian- Israeli Peace Treaty 1979", 3 Jewish Law Annual, p. 180

"The UK Report on International Law, 1979", 11 International Practitioners' Notebook, p. 1

"UK Report on International Law, 1980", 12 International Practitioner' Notebook, p. 7

"UK Report on International Law, 1981-2", 21 International Practitioners' Notebook, p. 3

"International Law Issues in the Falkland Islands Dispute", 21 International Practitioners' Notebook, p. 15

(4) **Other Publications**

Titles on “Territory” and on “States” for the New Oxford Companion to Law, eds. P. Crane and J. Conaghan, OUP, 2008, ISBN 978-0-19-929054-3pp. 1123-5 and 1161-2.

Titles on “International Law” for 2004 edition of Encyclopaedia Britannica, approx. 12,000 words; “Treaty”, approx. 1,000 words; “Geneva Conventions”, approx. 1500 words, available Summer 2004 online and on the 2005 and 2006 editions on DVD and CD respectively

“Combating Holocaust Denial Through Law in the United Kingdom” (with others), Institute for Jewish Policy Research, 2000.

"Self-Determination and Quebec", two Expert Opinions presented to the Canadian Supreme Court, in the context of the Quebec Secession Reference case, 1998 have been published in Bayefsky (ed.) Self-Determination in International Law: Quebec and Lessons Learned, Kluwer, 2000, pp. 125-150 and 213-222.

"Accountability of International Organisations”, varous reports to International Law Association Conference, 1998, 2000, 2002 and 2002

"L'Integrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" (with Professors Franck, Higgins, Pellet and Tomuschat), Commission D'Étude des Questions Afférentes à l'Acession du Québec à la Souveraineté, Assemblée Nationale, Exposés et Études, Volume 1, 1992, pp. 377- 461. Published (in English) in Bayefsky (ed.) Self-Determination in International Law: Quebec and Lessons Learned, Kluwer, 2000, pp. 241-304

"Succession d'États aux biens et aux dettes", ibid., Volume 4, pp. 783-99 (extract appeared in 7 Revue Québécoise de Droit International, 1991-2, p. 88 *supra*)

Papers Delivered (Selection)

Large number of papers delivered in the UK, US, China, France, Israel, Cyprus, Italy, Finland, Greece

Including:

"Genocide", Current Problems of International Law Series, University College, London, May 1985

"State Succession Revisited", series of 8 lectures, Faculty of Law, University of Helsinki, August 1993

"General Course on International Law", series of 15 lectures, Academy of International Law, Xiamen, China, August – September 2006

Three lectures at the United Nations, New York, for the UN Audiovisual Library on International Law (on territorial and maritime disputes), September 2008

"Peaceful Settlement of International Economic Law Disputes", Law Faculty, University of Paris Ouest, Nanterre-La Défense, February and March 2009;

"International Disputes", Seminar for lawyers from the Iraqi Ministry of Foreign Affairs, Cambridge, March 2009;

The Hersch Lauterpacht Memorial Lectures, University of Cambridge, March 2010

"The Peaceful Settlement of Disputes, Conflict Prevention and Resolution: Mediation, Judicial Settlement and Justice", Security Council Arria Formula meeting, United Nations, New York, 30 May 2012

"The International Court of Justice and Territorial Disputes", the Josephine Onuh Lecture, University of Hull, 14 November 2012

Annex 2

Vinson&Elkins

Alexander Slade aslade@velaw.com
Tel +44.20.7065.6050 **Fax** +44.20.7065.6001

14 October 2016

By email only

Professor Malcolm Shaw QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG

Dear Professor Shaw

PCA Case No. 2015-39: Medusa (Montenegro) Limited v The State of Montenegro

We act for Medusa (Montenegro) Limited ("Medusa") in an arbitration against The State of Montenegro ("Montenegro") under the UNCITRAL Rules.

You are instructed to produce an independent expert opinion in the form of an expert report based upon your expertise for submission to the Tribunal in this arbitration. We set out below details of the parties to the dispute, the background facts, the issues between the parties and the matters to be addressed by you.

1. **Parties and Submissions**

1.1 Medusa is the Claimant in this arbitration and Montenegro is the Respondent.

1.2 Medusa is a national of the UK and at all relevant times was in the business of the exploration and production of oil and gas.

1.3 Medusa notified Montenegro of this dispute on 8 May 2015 by way of letter and draft notice of arbitration. Montenegro did not respond to follow up correspondence from Medusa and so on 7 August 2015 Medusa served its Notice of Arbitration.

1.4 Montenegro submitted its Response to the Notice of Arbitration on 7 September 2015 denying any liability to Medusa, dismissing Medusa's claims in their entirety and disputing the jurisdiction of any arbitral tribunal over the claims made by Medusa.

1.5 Pursuant to Article 3(2) of the UNCITRAL Rules, these arbitration proceedings are deemed to have commenced on 7 August 2015, the date on which Montenegro received the Notice of Arbitration.

1.6 A Tribunal was constituted, on 7 August 2015, Medusa appointed the Honourable Judge Charles N. Brower, on 7 September 2015, Montenegro appointed Mr. J. Christopher Thomas QC and on 1 December 2015, Mr V. V. Veeder QC was

appointed as the presiding arbitrator by the two co-arbitrators. The parties and the Tribunal agreed the Terms of Appointment on 16 March 2016.

1.7 The Tribunal made its first procedural order on 16 March 2016 setting out various procedures regarding matters ("Procedural Order No. 1").

1.8 Medusa submitted its Memorial on Jurisdiction on 17 May 2016, accompanied by a witness statement from Stephen Remp, factual exhibits and legal authorities.

1.9 Montenegro responded with its Counter-Memorial on Jurisdiction on 8 August 2016, accompanied by a Montenegrin Law Expert Opinion, factual exhibits and legal authorities.

2. Background

2.1 Medusa claims that a dispute has arisen between it and Montenegro regarding Medusa's interest in a joint venture for the exploration and exploitation of oil and gas in Montenegro. On 7 August 2015, Medusa submitted its claim to arbitration pursuant to the UNCITRAL Rules and under the following legal instruments (see paragraphs 7 to 17 of the Notice of Arbitration and paragraphs 91 to 116, and Annex 1 of the Claimant's Memorial on Jurisdiction):

(a) the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, signed on 6 November 2002 (the "UK BIT"); and further or alternatively,

(b) the Law on Foreign Investments of Montenegro (Official Gazette of Montenegro No. 52/00 of 3 November 2000 and No. 36/07 of 15 June 2007 (the "FIL 2000"); and further, or alternatively,

(c) the Foreign Investment Law of Montenegro (Official Gazette of Montenegro No. 18/11 of 1 April 2011 (the "FIL 2011"); and further, or alternatively,

(d) the Agreement between the Government of the Republic of Austria and the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, signed on 12 October 2001 (the "Austrian BIT"); and further, or alternatively,

(e) the Agreement between the Republic of Finland and Montenegro on the Promotion and Protection of Investments, signed on 14 November 2008 (the "Finnish BIT").

2.2 In 1995 Montenegro entered into a concession with JP Jugopetrol Kotor ("JPK"), then a state-owned company, for the exploration and exploitation of oil and gas in Montenegro ("the Concession"). The Concession anticipated that JPK would enter into joint ventures to further the purpose of the Concession. In 2000, JPK entered into a joint venture Star Petroleum Holdings Ltd ("Star Petroleum") ("the Joint Venture"). On 29 July 2004, Medusa obtained a 40% interest in the Joint Venture. Montenegro, in breach of its obligations owed to Medusa under Montenegrin law, the treaties referred to below, and international law, took a series of actions, which prevented Medusa from exercising its rights under the Joint Venture, and as a result, Medusa has suffered loss. Those actions were severe delay (between 2004 and 2006), and the complete failure (from 2007 onwards), to approve work programmes under the Concession. They also failed on two occasions to extend the exploration phase (in 2006 and 2007). The prompt approval of the work programmes was essential, as was the reasonable and justified extension of the exploration phase, not only for the Concession, but also for the Joint Venture (see paragraphs 4 and 5 of the Notice of Arbitration and paragraphs 5 to 7 of the Claimant's Memorial on Jurisdiction for further details).

2.3 Paragraphs 18 to 74 of the Notice of Arbitration and paragraphs 43 to 80 of the Claimant's Memorial on Jurisdiction provide further details on the facts in relevant to the dispute.

2.4 Medusa has claimed the following relief:

(a) A declaration that the UK, Austrian and Finnish BIT's were at all relevant times part of the laws of the Union and Montenegro and applicable to Medusa and its investments;

(b) A declaration that through its unilateral declarations Montenegro was bound by the text of the UK BIT at all relevant times in regard to its actions toward Medusa and its investments;

(c) A declaration that Montenegro has breached the Articles 29 (expropriation) and 30, paragraph 2 (fair and equitable treatment) of the FIL 2000:

(d) A declaration that Montenegro has breached Article 20 (due process) of the Constitution;

(e) A declaration that Montenegro has breached international law by expropriating Medusa's investments without the observance of the principles that expropriation under customary international law must be achieved by due process of law, and be accompanied by payment of prompt, adequate and effective compensation;

(f) A declaration that Montenegro has breached the following provisions:

(i) Article 5 of the UK BIT, Article 4 of the Austrian BIT and Article 5 of the Finnish BIT (expropriation);

(ii) Article 2(2) of the UK BIT, Article 2(2) of the Austrian BIT and Article 2(2) of the Finnish BIT (fair and equitable treatment);

(iii) Article 2(2) of the UK BIT, and Article 2(3) of the Finnish BIT (non-impairment);

(g) A declaration that Montenegro's breaches of the FIL 2000, the Constitution, the BIT's and international law have caused loss to Medusa Given the fact that the Respondent denied Medusa the opportunity to fully explore Blocks 1 and 2, at this early stage in the proceeding, it is not possible to provide a precise quantification of Medusa's loss. However, for the reasons stated in paras 23 and 28 above, Medusa's preliminary estimate of its loss is not less than US$100 million.

(h) A Order that Montenegro to pay Medusa:

(i) full compensation and damages, in accordance with the FIL 2000, the Constitution, the BIT's and customary international law (whichever is the more favourable), for the breaches pleaded above, in an amount to be established in the proceeding, plus pre-and post-award compound interest on any damages until the date of payment in accordance with the applicable law; and

(ii) all of its costs of the arbitration, including costs of the Tribunal (whether advanced by Medusa or Montenegro), and its legal and other costs, plus interest thereon.

(i) Further or additional relief as may be appropriate under the applicable law.

3. Medusa's case on jurisdiction

3.1 Medusa claims that the Tribunal has jurisdiction over Medusa's claims. Please see the Claimant's Memorial on Jurisdiction for further details.

4. Montenegro's case on jurisdiction

4.1 Montenegro denies that the Tribunal has jurisdiction over Medusa's claims. Montenegro outs forward six categories of jurisdictional objections:

(a) Under Montenegrin municipal law, there is no consent to arbitrate this dispute for Medusa to accept. This precludes a finding of jurisdiction with regard to all of the Medusa's claims brought under the FIL 2000;

(b) Treaties are not applicable merely as a matter of Montenegrin domestic law, given, among other things, that Montenegro does not apply the mechanism of "transformation" of treaties into national law. Treaties only apply once they have become binding on Montenegro in line with international law. This applies to deny jurisdiction over the UK BIT claims;

(c) None of the BIT's invoked by Medusa is temporally applicable. The UK BIT never entered into force for Montenegro, the Austrian BIT does not apply to conduct prior to 3 June 200, The Finnish BIT only became applicable after the bulk of events giving rise to the breaches claimed and it does not provide for retrospective application of its provisions;

(d) The Austrian and Finnish BIT's are inapplicable *ratione personae* denying access to the dispute resolution provisions;

(e) Medusa has failed to prove its ownership, at relevant times, of a qualified investment under any of the Legal Instruments; and

(f) Medusa has failed to state a *prima facie* case under any of the Legal Instruments.

4.2 Please see the Respondent's Counter-Memorial on Jurisdiction for further details.

5. Scope of Work/Issues

5.1 The parties have agreed to vary the procedural timetable set by the Tribunal, which means that Medusa's Reply on Jurisdiction, accompanied with your expert report, will be submitted on **31 October 2016**. Therefore, we will need completed expert reports by **28 October 2016**.

5.2 You are requested to provide the first draft of your expert report for review and comments on **24 October 2016**.

6. Instructions

6.1 You are instructed to provide analysis and an expert report in relation to the following issues:

(a) Whether or not the conduct of the Republic of Montenegro (as one constituent half of the State Union of Serbia and Montenegro) vis-à-vis Medusa and its

investments prior to June 2006 is attributable to the independent State of Montenegro under the relevant principles of state succession in international law (See Claimant's Memorial on Jurisdiction, paragraphs 88 to 89 and as addressed by Montenegro in its Counter Memorial on Jurisdiction, paragraphs 584 to 589);

(b) Whether or not certain declarations made by Montenegro in the context of (a) its independence; and (b) its application for accession to the European Union are capable of constituting unilateral declarations as a matter of international law, for the purposes of binding Montenegro to obligations arising under the BIT between the UK and the FRY (See the Notice of Arbitration, para 51-53, 56-58, and 64-69, Claimant's Memorial on Jurisdiction, paragraphs 117 to 173 and as addressed by Montenegro in its Counter Memorial on Jurisdiction, paragraphs 303 to 400);

(c) The correct definition of the terms "concluded" and "treaty" as a matter of international law, i.e. is the definition of the term "treaty" in the Vienna Convention on the Law of Treaties limited only to those treaties that have entered into force as a matter of international law, and likewise, is a treaty "concluded" only once it has entered into force. (Montenegro's Counter Memorial on Jurisdiction, paragraphs 245 to 272, Expert Opinion of Professor Kreća).

(d) Your general comments on the Respondent's Counter-Memorial on Jurisdiction, in particular the sections on:

(i) Attribution – paragraphs 584 to 589;

(ii) Unilateral declarations – paragraphs 303 to 400;

(iii) State succession – paragraphs 282 to 395.

(e) Your general comments on the Expert Opinion of Professor Kreća.

6.2 You will only receive instructions from Vinson & Elkins RLLP ("**V&E**"). You will not contact either the client or any other witnesses or experts instructed by us or any other parties to the arbitration unless authorised to do so by us.

7. **Documents**

7.1 We have provided you with the documents listed in Appendix 3:

(a) The Claimant's Memorial on Jurisdiction;

(b) Witness Statement of Steven E Remp;

(c) The Respondent's Counter-Memorial on Jurisdiction;

(d) Expert Opinion of Professor Kreća;

(e) The exhibits and legal authorities from those sections pertaining to:

(i) attribution

(ii) unilateral declarations

(iii) state succession

(iv) provisional application of treaties

7.2 If there are any other documents that you require please let us know.

8. **Your Duties**

8.1 All of the mentioned steps and actions in relation to this matter are to be coordinated with us.

8.2 You will carry out your instructions with reasonable care and skill.

8.3 The arbitration proceedings in this matter were commenced pursuant to the UNCITRAL Rules (a copy of which are attached at Appendix 1). The procedural aspects of the arbitration are governed by those Rules and by the laws of Sweden.

8.4 A copy of the IBA Rules is attached at Appendix 2. We draw your attention in particular to Article 5(2), which provides useful guidance as to the structure and content of your opinion:

"The Expert Report shall contain:

(a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and the description of his or her background, qualifications, training and experience;

(b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;

(d) an affirmation of the truth of the Expert Report; and

(e) the signature of the Party-Appointed Expert and its date and place."

8.5 You will devote sufficient time to carry out your instructions and use your best endeavours to meet any deadlines notified to you (in this letter or otherwise).

8.6 If at any stage you have reasonable grounds to consider that you may not be able to meet any agreed deadline, including for a reason outside your control, you will notify us as soon as practicable.

8.7 We request that in accepting these instructions you act as an independent expert witness, and that you adhere to the following guidelines:

(a) The expert evidence you present to the Tribunal should be, and be seen to be, the independent product of your work and opinions, uninfluenced by those instructing you in these proceedings.

(b) Your aim should be to provide independent assistance to the Tribunal by way of objective unbiased opinion in relation to matters within your expertise. We request that you do not, at any point, assume the role of an advocate on behalf of either party.

(c) Please state in your report the facts or assumptions upon which your opinion is based. Material facts which detract from your concluded opinion should not be omitted.

(d) Please make it clear in the report when a particular question or issue falls outside your expertise.

(e) If you feel unable to provide a definitive opinion because insufficient data is available, please inform us of this as soon as possible. If we are unable to provide you with the required information, then this must be stated with an indication that the opinion is no more than a provisional one. Should you feel that, having prepared the report, you could not state that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.

(f) If you change your view on a material matter for any reason, such change of view should be communicated to us without delay.

8.8 If you have any questions or concerns about any of these points, please do not hesitate to contact us.

9. **Guidance on the format of your opinion**

9.1 In preparing your opinion we would be grateful if you would adhere to the following format/style guidelines:

(a) Print on one side of the page only.

(b) All pages should be paginated (preferably in the bottom centre of the page).

(c) All paragraphs should be appropriately numbered.

(d) 1.5 or double line spacing should be employed.

(e) Include sub-headings where appropriate.

(f) Employ plain English as much as possible, where technical terms are used, please include a glossary.

9.2 It is helpful to divide the opinion into separate sections with clear headings when setting out your analysis for each of the issues on which you have been asked to express an opinion.

9.3 Consider whether it would be helpful to include visual aids, such as computer graphics, to help the Tribunal to understand the opinion.

9.4 Provide a summary of your understanding of your instructions.

9.5 Provide a clear summary of the conclusions you reach.

9.6 Conclude your report with an affirmation in the form of the following:

> "I confirm that insofar as the facts stated in the opinion are within my knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

9.7 Include as an appendix to your report an appropriate CV indicating the details of the particular training and/or experience that qualifies you to provide your opinion.

9.8 Sign and date your finalised opinion – please do not sign or date any drafts.

10. **Conflicts of Interest**

10.1 By accepting these instructions, you are confirming that to the best of your knowledge and belief you do not have any actual or possible conflict of interest with any aspect

of this case, whether financial, personal or professional. You further confirm to us that you will not take any steps which lead or may lead to a conflict arising during the currency of this dispute.

10.2 If you become aware of a possible conflict, you must immediately inform us of the circumstances giving rise to the possible conflict and provide such further particulars as we may request. We reserve the right in those circumstances to withdraw your instructions and to refuse payment for the services provided after the date on which we consider you should have been aware of such possible conflict up to the time of withdrawal. If we decide not to withdraw your instructions, please be aware that if the conflict is not obviously immaterial it will need to be disclosed to the other side and the Tribunal.

10.3 You acknowledge in that in this matter you are instructed by V&E and Medusa and you will not accept any further appointment by any party arising out of or in relation to the arbitration

Yours faithfully

Vinson & Elkins RLLP