

Alexander Slade [aslade@velaw.com](mailto: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

**Vinson & Elkins RLLP International Lawyers**  
Abu Dhabi Austin Beijing Dallas Dubai Hong Kong Houston London  
Moscow New York Palo Alto Riyadh San Francisco Tokyo Washington

CityPoint, 33rd Floor, One Ropemaker Street  
London EC2Y 9UE  
Tel +44.20.7065.6000 Fax +44.20.7065.6001 [www.velaw.com](http://www.velaw.com)

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 puts 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

A handwritten signature in black ink that reads "VINSON & ELKINS". The signature is written in a cursive, slightly stylized font.

**Vinson & Elkins RLLP**