SVEA COURT
Section 02
Rotel 020114

DOM
2022-11-10
Stockholm

Target no.
T 731-20

PARTIES

Plaintiff
Oleg Deripaska
30 Rochdelskaya Ulitsa
123022
Moscow Russia

Represented by: Maria Fogdestam Agius and Jesper Tiberg
Westerberg & Partners Advokatbyrå AB
Box 3101
103 62 Stockholm

Defendant
Montenegro
Karađorđeva bb
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Montenegro

Represented by Martin Wallin, lawyer, and Martin Wallin, LL. Johanna Österlund and Lukas Kanter Advokatbyrån Wallin & Partners AB
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MATTER
Action for modification of an arbitral award under Section 36 of the Arbitration Act (1999:116)

JUDGMENT

1. The Court of Appeal dismisses the action.

2. Orders Mr Oleg Deripaska to pay to Montenegro the costs of the proceedings before the Court of Appeal in the sums of EUR 628 456 and USD 86 075, of which EUR 592 372 relates to the fees of an ombudsman, together with interest on the first two sums in accordance with Paragraph 6 of the Law on Interest (1975:635) from the date of the judgment of the Court of Appeal until payment is made.

Postal address	Visiting address	Phone	Fax	Shipping time
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1 BACKGROUND

Oleg Deripaska is a Russian citizen and a shareholder of the international *joint stock company* En+ Group Limited, a holding company registered in the administrative district of the Kaliningrad region of Russia. The company exercises controlled ownership over OK Rusal, an international joint stock company registered in the Administrative District of Kaliningrad Region. At the time of the arbitration, En+ owned 100% of the shares of CEAC Holdings Limited, a company registered in Cyprus.

The action before the Arbitration Panel concerned a dispute over certain measures taken by Montenegro, according to Oleg Deripaska, which deprived him of the value of his investment through the above-mentioned companies in the aluminium smelter Kombinat Aluminijuma Podgorica A. D. and the Rudnici Boksita A.D. bauxite mine. Nikšić and certain related infrastructure. The measures allegedly taken by Oleg Deripaska against Montenegro consisted mainly in creating unfavourable conditions for the aluminium smelter and the bauxite mine after their privatisation.

Relying on the Bilateral Treaty between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on the Promotion of Investment Protection of 11 October 1995, which entered into force on 19 July 1996, (the FRY-Russia BIT), Mr Oleg Deripaska invoked arbitration and claimed that Monte-Negro should be ordered to pay him damages. The basis of his claim was that Montenegro had breached its obligations under Articles 3(1) and 4 of the FRY-Russia BIT to grant him fair and equitable treatment for his investments and to compensate him for expropriation.

On 15 October 2019, the Arbitration Panel issued a final award in the case (PCA Case No. 201707). The arbitration panel dismissed Oleg Deripaska's claim for lack of jurisdiction. The arbitral tribunal found that the FRY-Russia BIT was not binding between Montenegro and Russia, that the arbitral tribunal thus lacked jurisdiction over the claimant's claim, awarded Montenegro costs in the arbitration, and rejected certain other claims by Oleg Deripaska.

2 CLAIMS

Mr Oleg Deripaska has requested the Court of Appeal to amend the arbitral award by setting it aside in its entirety.

Montenegro contests the action.

Both parties have applied for reimbursement of the costs.

3 THE PARTIES' ACTION

3.1 Oleg Deripaska

Article 8 of the FRY-Russia BIT provides that Contracting States undertake to resolve disputes with investors from the other State through arbitration under the UNCITRAL rules.

Montenegro is bound by the FRY-Russia BIT in relation to Russia. The Arbitration Board is therefore competent to hear the claim of Russian citizen Oleg Deripaska regarding an investment in Montenegro in 2005.

The Federal Republic of Yugoslavia (FRY) consisted of the republics of Serbia and Montenegro since April 1992. The bilateral investment protection treaty between the FRY government and the Russian government of 11 October 1995 entered into force on 19 July 1996. On 14 March 2003, Montenegro and Serbia concluded the so-called Belgrade Agreement which created the basis for the State Union of Serbia and Montenegro (State Union). The starting point of the State Union Constitution, adopted on 4 February 2003, was that both Serbia and Montenegro were separate and independent states. The State Union was still bound by the FRY-Russia BIT with Russia when Oleg Deripaska made his investment in Montenegro in 2005. After Montenegro declared independence

and the dissolution of the State Union in 2006, Montenegro has succeeded to the FRY-Russia BIT in force between Montenegro and Russia on the following grounds.

3.1.1 A presumption of treaty continuity prevailed in relations between Montenegro and Russia after Montenegro's independence

In the relationship between Montenegro and Russia, there was a presumption of treaty continuity after Montenegro's independence. This presumption means that the FRY-Russia BIT has remained in force after independence and thus binds Montenegro.

In practice, independence did not make a significant difference to bilateral economic relations between Montenegro and Russia. Montenegro enjoyed significant autonomy within the State Union and already before independence maintained special relations with Russia in bilateral trade, economic and investment relations. Russia anticipated and participated in bilateral cross-border investment relations with Montenegro before independence. Furthermore, after independence, Montenegro maintained the same basic attributes of a state as during the State Union period. Montenegro retained the same territorial boundaries, permanent population and even the same parliament and government as in the State Union. These circumstances make a presumption of treaty continuity likely as a starting point. This is further supported by the fact that Montenegro applied treaty continuity with most states after independence. Given Montenegro's close relationship with Russia before and after independence, it is unlikely that Russia would not have been one of the states with which Montenegro was willing to apply treaty continuity.

In addition, Montenegro expressed its clear desire for treaty continuity at independence. At the time of independence, Montenegro was bound by the Vienna Convention on State Succession in respect of Treaties of 23 August 1978, a multilateral convention which, inter alia, expresses a principle of treaty continuity in respect of bilateral treaties. Montenegro confirmed after independence that it continued to consider itself bound by the Convention by acceding to it, thereby also expressing the view that treaty continuity with regard to bilateral treaty relations was an appropriate norm at independence.

At the time of independence, Montenegro made a clear and public commitment to the principle of treaty continuity through its statements in the Independence Decision and the Declaration of Independence. In the Declaration of Independence, Montenegro stated that it would take over and continue to apply all international treaties and agreements in force vis-à-vis the State Union:

> 3) The Republic of Montenegro shall apply and take over international treaties and agreements con- cluded by and acceded to by the State Union of Serbia and Montenegro which relate to Montenegro, and which are in conformity with its legal order.

Similarly, the Declaration of Independence expressed Montenegro's acceptance of the rights and obligations arising from existing intergovernmental agreements during the period of the State Union:

> The Republic of Montenegro shall establish and develop bilateral relations with other countries on the basis of principles of the international law, accepting the rights and obligations stemming from the existing arrangements and shall continue with active policy of good-nighbourly relations and regional cooperation.

Montenegro expressed in regular diplomatic correspondence with Russia a willingness and commitment to apply treaty continuity in relation to Russia.
This was expressed in diplomatic notes from Montenegro to Russia on 4 June 2006, 4 August 2006, 9 January 2007 and 4 May 2007.

In its note of 16 August 2006, Russia noted Montenegro's position on success- ion without objection. Subsequent communications and statements confirm that Russia considered individual treaties to be in force as a result of Montenegro's commitment to a presumption of general treaty continuity, without any specific agreement necessarily having been reached in respect of individual treaties.

The notes express the desire of both states for continuity. There was a common agreement and willingness to continue the validity and application of the State Union's bilateral treaties with Russia which had a bearing on Montenegro. This includes the FRY-Russia BIT, although this agreement was not explicitly mentioned.

Montenegrin and Russian authorities and courts also expressed, internally and externally, the view that there was treaty continuity with reference to the Montenegrin Notes, the Independence Decision and/or the Declaration of Independence. Both the Montenegrin and Russian sides confirmed in instructions to their authorities and in diplomatic correspondence between themselves the continued validity of bilateral treaties with reference to Montenegro's unilateral declarations and without any specific succession agreement having been reached on these treaties. This also suggests that a presumption of treaty continuity existed between the states since 2006.

Montenegro has admitted that states continued to apply a number of treaties by implication. For example, in the case of the Free Trade Agreement concluded by the FRY with Russia in 2000, Montenegro and Russia have assumed the continuity of the agreement. No specific new agreement has been concluded between the countries, either through the exchange of diplomatic notes or otherwise, but the countries have simply continued to apply the agreement. The same applies to the double taxation agreement, which Montenegro admits has continued to apply. The States have also continued to apply a number of other treaties in various fields. This, combined with the other circumstances, suggests that there was a general presumption of treaty continuity between Montenegro and Russia.

States have also concluded new bilateral treaties after Montenegro's independence with explicit reference to existing treaties with the FRY and the State Union in termination clauses, as being in force after independence. This supports the view that these treaties were considered valid by both States without any specific act of succession being undertaken. This also suggests that States generally applied treaty continuity in their bilateral relationship and/or implicitly agreed on Montenegro's general treaty succession.

Montenegro is therefore bound by the FRY-Russia BIT as a result of this presumption of continuity, which means that after independence the treaty has remained in force. Such a presumption should also apply to investment protection agreements. An investment protection agreement may be deemed to have been applied even without recourse to its dispute settlement mechanism

during the relevant period or that a foreign investor has invoked arbitration under its provisions.

3.1.2 Succession by agreement

3.1.2.1 Montenegro's unilateral declarations

The Declaration of Independence and the Decision on Independence, taken separately or together with Montenegro's June and August 2006 Notes, as well as Montenegro's 2007 Notes, are unilateral declarations that are binding because

1. They were clear, sufficiently detailed and addressed to a specific recipient.
2. The statements were made by competent state bodies (the Parliament of Montenegro or the Ministry of Foreign Affairs).
3. Russia relied on them and conveyed its consent to continued attachment partly through diplomatic notes and partly through its actions at the time of independence and thereafter. Russia has accepted Montenegro's declaration and loyally complied with it.
4. Both states and their competent authorities have continued to apply most treaties with explicit reference to Montenegro's unilateral declarations.

Unilateral statements and confirmation by subsequent act are sufficient for succession and no explicit agreement is needed. Russia has also confirmed Montenegro's declarations and commitments and informed its state authorities of succession with explicit reference to Montenegro's Declaration of Independence and/or Note of 4 August 2006. In any case, this confirms Russia's understanding of the meaning of the exchange of notes in 2006.

Both Montenegrin and Russian authorities have understood Montenegro's commitment as binding. This has been reflected, for example, in the attitude of the states towards the bilateral double taxation agreement between them. Prior to the arbitration, the Montenegrin Ministry of Finance considered that a mere reference to the independence decision

was sufficient for the double taxation agreement concluded by the FRY with Russia to continue to apply against Montenegro. This is clear from statements made by the Ministry of Finance of Montenegro on 4 October 2006. Similarly, the Russian Federal Tax Service made statements on 8 August 2007 referring to the unilateral declarations and stating that the double taxation agreement continues to apply.

In addition, the Supreme Court of Montenegro ruled on 2 October 2012 that Montenegro had succeeded to a bilateral treaty on legal aid through the independence treaty. Other Montenegrin courts, as well as Russian courts, have also applied the legal aid treaty, even before the exchange of notes between states on the status of that treaty.

3.1.2.2 Exchange of diplomatic notes with Russia

Montenegro is bound by the FRY-Russia BIT as a result of an agreement on general treaty succession between Montenegro and Russia, which agreement also includes the FRY-Russia BIT. The agreement on succession has been reached/arising out of any of the following circumstances, either considered separately or considered together.

On 4 June 2006, the Montenegrin Ministry of Foreign Affairs sent a diplomatic note to the Ministry of Foreign Affairs of Russia. In it, Montenegro reiterated its intention to continue to abide by all principles of international law and all treaties and provisions of international agreements signed by the State Union and requested Russia's recognition of Montenegro as a sovereign and independent state.

On 10 June 2006, Russia recognised Montenegro's independence. Subsequently, the Russian Foreign Ministry responded in a diplomatic note on 26 June 2006, declaring its readiness to establish diplomatic relations with Montenegro.

On 4 August 2006, the Ministry of Foreign Affairs of Montenegro sent another diplomatic note to Russia, expressing its view that Montenegro

was the successor state in relation to the State Union and that the treaties concluded by the State Union therefore succeeded to Montenegro. The Montenegrin Foreign Minister further confirmed that Montenegro was ready to comply with all treaties and agreements in force between Russia and the State Union.

In response, the Russian Ministry of Foreign Affairs issued a diplomatic note on 16 August 2006, in which Russia took into account Montenegro's declaration of succession to the State Union and Montenegro's intention to comply with the international agreements binding Russia and the State Union. The drafting of Russia's August note followed an established practice of diplomatic communication in the event of state succession whereby the successor state informs the other state of its new status and confirms its intention to continue to apply existing treaties.

In a note dated 9 January 2007, Montenegro confirmed to Russia that Monte- negro would apply and take over international treaties and agreements concluded by the State Union. The States reportedly started a consultation process on the revision of bilateral treaties in March 2007, which did not result in a comprehensive agreement. Instead, Montenegro reconfirmed its succession to all existing treaties in a note on 4 May 2007. From these two 2007 notes, it is clear that Montenegro had no doubts about the meaning of the 2006 note exchange and considered itself bound by all treaties that had been in force between the State Union and Russia, notwithstanding the fact that the two states had considered and/or initiated a treaty review. The 2007 notes also make clear that Montenegro had understood Russia's August note as an acceptance, and that states approached the issues of bilateral treaties with Russia with a presumption of treaty continuity.

The exchange of notes in the summer of 2006 should also be seen in the light of a meeting between the Minister of Foreign Affairs of Montenegro and the Ambassador of Russia which took place on the same day as the note of 4 August 2006 was drafted. The Government of Montenegro later published a statement about the meeting on its website. The statement indicates that the Minister of Foreign Affairs of Montenegro particularly stressed the need for further strengthening of the countries' economic cooperation and the importance of Russian

investment for the country. The Russian

For his part, the Ambassador underlined the Russian side's intention to continue to apply existing bilateral agreements. Russia thus clearly confirmed its position that all treaties in force between Russia and the State Union would continue to apply also between Russia and Montenegro. Russia clearly expressed its agreement both in the notes and through its actions. It is clear from the 2007 Notes that Montenegro was in full agreement with Russia's position.

3.1.2.3 Succession by implicit action and tacit agreement

Both Russian and Montenegrin authorities have acted as if Montenegro had generally succeeded to bilateral treaties with Russia and applied bilateral treaties without specific agreement to do so and/or with reference to Montenegro's declarations and commitments towards Russia.

In June and July 2006, the Russian Federal Customs Service sent a number of letters to the Russian Ministry of Foreign Affairs asking whether the free trade agreement with the State Union remained in force in relation to Montenegro. On 3 August 2006, the day before Montenegro's August Note, the Russian Federal Customs Service announced that it had ceased to apply the FTA vis-à-vis Montenegro due to the absence of confirmation from Montenegro that the State assumed the rights and obligations in force between Russia and the State Union. The Russian Ministry of Foreign Affairs informed the Customs Service of Montenegro's note of 4 August 2006 and the Russian side's reply of 16 August 2006 which, according to the Ministry of Foreign Affairs, had confirmed Russia's acceptance of Montenegro's succession with all its obligations. With reference to the information provided by the Ministry of Foreign Affairs, the Customs Service reported on 25 September 2006 that it had changed its previous position and was now applying the FTA towards Montenegro. These circumstances indicate that the Russian authorities understood the Montenegrin statements as an offer of succession and the Russian reply as an acceptance. In any event, Russia has accepted the offer by implication in that, on the basis of Montenegro's commitment, the Russian authorities

applied agreements that were beneficial to Montenegro. The same applies to the double taxation agreement, which also continued to be applied with reference to Montenegro's August note.

The Prime Minister of Montenegro, in a meeting with the Speaker of the State Duma of Russia on 19 July 2007, has also confirmed that Montenegro has entered into the agreements signed by the FRY.

The behaviour of states with regard to other bilateral treaties, i.e. the use of parties, also shows that all treaties from the State Union continued to apply between Russia and Monte- negro. There is a tacit agreement in accordance with the Parties' practice and a common understanding of the Parties on the validity of the FRY-Russia BIT.

In the context of the process of Montenegro's application to join the WTO, Montenegro has made a clear statement in the final report prepared on 5 December 2011 that the starting point is that all intergovernmental treaties that were in force for the State Union continue to apply to Montenegro. An annex to the report contains a list of investment protection treaties, where the FRY-Russia BIT is listed as being in force between Montenegro and Russia. Russia has also confirmed to the WTO that the FRY-Russia BIT is in force. This is reflected in a 24 August 2016 report on Russian trade policy following Russia's accession to the WTO, which states, inter alia, that Russia has signed investment protection agreements with various countries which are reproduced in a footnote. One of the countries listed is Monte- negro. Montenegro's statements in a report to the European Commission in December 2009 also confirm that the FRY-Russia BIT is in force.

In addition, the work of the Russian-Montenegrin Intergovernmental Committee for Trade, Economic and Scientific-Technological Cooperation reflects a common understanding of the parties. From April 2007 to October 2011, the Intergovernmental Committee held annual meetings. The agenda included topical issues of bilateral development. The Intergovernmental Committee noted on several occasions that the existing

The treaty would be improved to provide better conditions for bi-lateral cooperation. Russia and Montenegro thus agreed that the existing treaties should be reviewed and adapted. There was no question of concluding new intergovernmental agreements.

The document referred to as the Plan of Consultations of March 2007, which was invoked by Montenegro in the arbitration proceedings to support the claim that the intention of the countries was to arrive at an inventory of treaties that would remain in force, should rightly be seen in the light of Montenegro's January 2007 note, in which Montenegro confirmed that all treaties between the countries remained in force, and in the light of the work of the Governmental Committee, in which the starting point was also that all treaties were still in force.

Other treaties also remain in force after independence and there are a number of bilateral treaties which both Montenegro and Russia have considered applicable without any specific succession agreement having been concluded through the exchange of diplomatic notes or otherwise.

In addition, Russia and Montenegro have referred to a number of bilateral treaties as being in force in the context of the conclusion of new intergovernmental agreements in the same area. This clearly shows that States have explicitly or implicitly agreed on general succession, at least pending treaty review in accordance with the pre-sumption of treaty continuity that has prevailed between the parties. It is not reasonable that Montenegro should be considered to have succeeded to such agreements by terminating them when a new agreement was negotiated. The reference to such treaties must be understood to mean that succession has taken place previously by an explicit or implicit agreement on succession and treaty continuity.

3.1.2.4 Russia's position on the issue is important

The Ministry of Foreign Affairs of Russia considers the FRY-Russia BIT to be valid. This has been made clear, inter alia, in the letter of the Ministry of Foreign Affairs dated 16 August 2016. In a subsequent letter dated 27 April 2018, Russia has confirmed that it considers itself bound by both tacit understanding and consent expressed in a confirmatory diplomatic note.

The exchange of notes between Montenegro and Russia in 2018 and 2019, led by Montenegro's note of 24 October 2018 offering Russia to consider the possibility of opening consultations with a view to consolidating the legal basis for agreements, highlights Russia's position on the matter. In its note of 1 March 2019, Russia reiterated its view that all treaties between Russia and the State Union remain in force in accordance with Montenegro's August note and Russia's response thereto.

3.1.3 Montenegro has lost the right to invoke the invalidity of the Treaty

Through the Independence Decision and Declaration, the June and August 2006 Notes and subsequently in the 2007 Notes, Montenegro has declared that all treaties shall remain in force. Montenegro's actions have thus given Russia the impression that all agreements and treaties concluded with Russia would remain valid. Russia has accepted and loyally established itself accordingly. Montenegro should therefore be precluded from raising an objection to the invalidity of the FRY-Russia BIT. This is according to the principle of estoppel, which prevents Montenegro from denying the applicability of the Treaty in the present circumstances.

3.2. Montenegro

FRY-Russia The BIT is not valid between Montenegro and Russia because Montenegro has not succeeded to the treaty. The Arbitral Tribunal's ruling on jurisdiction is therefore correct.

It followed from the Constitution of the State Union that the State Union was to be considered as a single legal personality under international law, and that the treaties concluded by the FRY would be applicable to Serbia, not Montenegro, in the event of Montenegro's withdrawal (see Article 60 of the Constitution of the State Union). Serbia was thus the "continuator state" after the FRY and would automatically succeed to the State Union treaties. Montenegro, on the other hand, would have to establish international relations on an independent basis in the event of withdrawal from the State Union. This was done, inter alia, by Montenegro entering into a large number of succession agreements with various countries. Through the succession agreements, Monte- negro and the other state identified the treaties that would remain in force between them. Russia's succession practice during the relevant period was similar.
Russia concluded succession agreements using a completely different methodology and unambiguously binding language, compared to what occurred between Russia and Montenegro after Montenegro's independence. Russia concluded clear succession agreements with all the other succession states that had previously been part of Yugoslavia, apart from Serbia, which was the continuation state of the State Union and therefore not subject to any succession agreement at all. No such succession agreement was ever concluded between Montenegro and Russia.

The grounds for succession and bonding put forward by Oleg Deripaska are contested as follows.

3.2.1 No automatic succession according to a principle of continuity has occurred

There is no basis for applying a rule of automatic succession or a principle of continuity, in particular with regard to bilateral investment treaties. Instead, the law in force implies a principle of *tabula rasa* for the new State, which presupposes a

new agreement between both the new state and the other contracting state in order for binding to occur. Montenegro has thus not automatically succeeded to the FRY-Russia BIT, nor has it become applicable as a result of a principle of continuity. Montenegro has succeeded to a few selected treaties in various ways, including through mutually agreed action, but without Montenegro and Russia thereby agreeing on succession to or continuity of the FRY-Russia BIT or the other treaties. Succession could not have occurred without the agreement of States through clearly manifested and reciprocal declarations of intent to undertake such a commitment.

3.2.2 Succession has not taken place by agreement

Montenegro has neither unilaterally nor in intergovernmental communication with Russia made a bid to succeed to the FRY-Russia BIT. Furthermore, should Montenegro be considered to have made an offer to succeed, Russia has not provided the acceptance required for succession to take place. Montenegro has also not succeeded to the FRY-Russia BIT as a result of the implied actions of Montenegro and Russia or by tacit agreement.

3.2.2.1 Montenegro's unilateral declarations

Montenegro, through its unilateral statements in the independence decision and the declaration of independence - without or with the passive consent of Russia - has not succeeded to the FRY-Russia BIT. The Independence Decision and the Declaration of Independence are broad statements of political will by the parliament of a newly formed, independent state. Neither the Independence Decision nor the Declaration of Independence was addressed to any specific recipient, they did not refer to any specific treaties and did not distinguish between bilateral and multilateral treaties. Political declarations are not sufficient to create legally binding commitments in treaty law. The fact that the declarations were issued by the Parliament itself underlines that they were neither intended nor designed to create legally binding commitments for Montenegro. Nor have they been interpreted in this way by Montenegro or other states and

organizations, as evidenced by the international relations and treaty negotiations that Montenegro in the time after the statements established. Thus, on 10 October 2006, Montenegro informed the UN Secretary General, in a formal letter sent by the Ministry of Foreign Affairs of Montenegro, of the multilateral treaties to which Montenegro intended to accede. Montenegro's practice of acceding to other bilateral treaties through explicit agreements is extensive. Montenegro's behaviour after the independence decision and the declaration of independence shows that Montenegro had no intention to legally bind itself by its statements in the independence decision and the declaration of independence. Instead, Montenegro decided the question of treaty commitment in each intergovernmental relationship separately, without being bound to accept succession to any particular treaty until an agreement on succession had been concluded.

3.2.2.2 Exchange of diplomatic notes with Russia

The exchange of notes between Montenegro and Russia has not resulted in an agreement on the succession to the FRY-Russia BIT. A Montenegrin general statement of intent regarding a settlement of existing treaties, followed by Russian responses refraining from expressing themselves positively or negatively, does not constitute an agreement on succession to a specific bilateral investment treaty.

Montenegro's note of 4 June 2006 is a two-page document explaining how the Montenegrin state intends to conduct its policy in a number of areas. It does not address the question of how succession to treaties will be implemented. The only intention in relation to Russia that emerges from the wording of the note is Montenegro's hope to develop bilateral relations with Russia in the future, and a desire to obtain Russian recognition of Montenegro as an independent state. The note was replied to by Russia on 26 June 2006. Russia's note does not in any way address the issue of treaties or succession.

Montenegro's note of 4 August 2006 informs about Montenegro's generally held vision, as expressed in the Independence Decision and the Declaration of Independence,

to succeed to the treaties of the State Union. It contains no commitment, nor does it concern any specific relationship with Russia or any designated treaty. In the last part of the note, Montenegro "confirms" its "readiness" to take into account all treaties and agreements that have been in force between the State Union and Russia.
The wording of the note does not allow the conclusion that Montenegro undertakes, without further steps or negotiations, to accede to all the treaties of the State Union. The content of the Note is not a binding offer, but at most an invitation to start a process to achieve succession. Nor, in Russia's note of 16 August 2006, has Russia responded as if the correspondence concerned potentially binding legal acts. There was thus no acceptance from Russia. Thus, in the August notes, both States refrained from proposing an agreement on succession to one, several or all of the treaties. Neither State made clear its view of the status of the treaties at the time or what was required for succession to take place.

In its two notes of 9 January 2007 and 4 May 2007 respectively, Montenegro informs Russia that it intends to apply and take over the State Union treaties in general, i.e. not specifically in relation to Russia. The first paragraph of the notes is clearly forward-looking, which supports that succession had not taken place, either automatically, through Montenegro's unilateral statements or through the exchange of notes in 2006. As regards the January note, it is clear from the wording of the note that Montenegro did not consider itself to have succeeded to the treaties.
The purpose of transmitting the note may have been only to try to reopen the question of succession between states. The wording of the note of 4 May 2007 confirms this.

In the note of 4 May 2007, Montenegro also makes a specific commitment to the succession to a certain treaty (the Consular Convention between the State Union of Serbia and Montenegro and the Russian Federation signed on November 7th , 2005). This also shows that Montenegro's approach to succession, visible also to Russia, was to explicitly commit to succession to specific treaties. Furthermore, the fact that Russia requested the status of this treaty indicates that Russia also did not consider that

Montenegro succeeded to the State Union Treaty at this time. The 2007 notes reinforce the picture that Russia had not previously contributed to a general succession agreement with Montenegro, either through the formulation of the notes or through its silence.

In addition, in 2008, the States expressed their willingness to be bound by the Treaty by exchanging instruments of ratification. Furthermore, according to the Plan of Consultations of the Ministries of Foreign Affairs of Montenegro and Russia for 2007 and 2008, drawn up in Moscow in March 2007, the States planned to hold consultations in the first quarter of 2008 in order to take stock of the international legal basis of relations between Montenegro and Russia. In line with the succession practice of both states, such consultations could be organised to negotiate the treaties that would be included in a future succession agreement. Between Montenegro and Russia, however, the envisaged consultation or any subsequent succession agreement never materialised. In view of these and other circumstances, it can be excluded that the States considered themselves to have concluded a binding agreement on universal succession through the Exchange of Notes in 2006 and Montenegro's Notes in 2007.

3.2.2.3 Succession by implicit action and tacit agreement has not taken place

Both Russia's and Montenegro's state practice has required clear agreements for succession to bilateral treaties. Given Montenegro's documented approach to succession, and Montenegro's repeatedly expressed view that a "legal vacuum" arose if a succession agreement was not reached, it is clear that Montenegro was not, and did not consider itself, bound by the FRY-Russia BIT. In the information form submitted by Montenegro to the European Commission in 2009, Montenegro describes, as far as is relevant now, its state practice regarding succession to bilateral investment treaties. Monte- negro stated that Montenegro had informed certain states of commitments under earlier BITs and that Montenegro had received feedback

from five of the states. As far as is known, Russia was not one of the States informed by Montenegro of a commitment to apply the FRY-Russia BIT and it is explicitly stated that Montenegro did not consider Russia as one of the States that had communicated back on the issue. Montenegro also presented a list of applicable bilateral investment treaties confirmed by exchange of diplomatic notes or negotiated and signed after Montenegro's independence. The FRY-Russia BIT was not included in the list.

The succession practice of Montenegro and Russia's other treaties also does not support that succession has taken place by implied act or by tacit agreement. A review of a number of treaties shows that Montenegro has not succeeded to all or even a majority of the treaties that were in force between the State Union and Russia. For the few treaties which States have chosen to continue to apply, succession has occurred for practical reasons, for example through a concrete mutually agreed act or through explicit mentions or clarifications by exchange of notes, which have always referred to the specific treaty in question. The need for States to clarify the status of certain treaties by exchange of notes several years after Montenegro's independence, as was the case with the Legal Aid Treaty, is a further example of circumstances which show that a universal succession agreement did not exist.

Montenegro's and Russia's reporting of current investment agreements to various organisations and databases shows that there was no perception by either state, let alone a consistent perception by both states, that a tacit agreement on succession had been concluded. On the contrary, both states have repeatedly stated that the FRY-Russia BIT has not been valid. The lack of consistent reporting is a strong indication that there has not been a mutual understanding that the FRY-Russia BIT has been valid. This is also true of the report prepared by the WTO Secretariat on 24 August 2016, i.e. a few months prior to the invocation of the Arbitration. In particular, with regard to the WTO report prepared for Montenegro's accession to the WTO in 2011 and the Addendum annexed to the report, which allegedly contains Montenegro's bilateral

investment agreement, it can be noted that it is dated 8 March 2005 and was thus drawn up before Montenegro's withdrawal from the State Union.

As for the so-called Intergovernmental Committee (Russian-Montenegrin Intergovernmental Committee for Trade, Economic and Scientific-Technological Cooperation), it was set up under the FRY-Russia Free Trade Agreement. The work of the Intergovernmental Committee did not in any way presuppose or involve the application of the FRY-Russia BIT. Nor do the statements made by the then Prime Minister of Montenegro at a meeting with the Russian State Duma in July 2007 support that succession has taken place. This is a general political statement which has no real legal relevance to the question of succession to the FRY-Russia BIT.

3.2.2.4 Russia's view on the matter does not show that Montenegro has succeeded to the treaty

The view expressed in letters from the Russian Ministry of Foreign Affairs in 2016 to 2018 cannot be attributed evidential value with regard to the States' understanding of the succession to the FRY-Russia BIT after Montenegro's independence in 2006. The letters only report the Russian Foreign Ministry's view a decade later and its content is contradictory. Several of the letters were sent in response to questions from, among others, Oleg Deripaska's representative. The only time the question of the validity of the FRY-Russia BIT was raised by someone other than Oleg Deripaskas' representative, the Russian Foreign Ministry answered in the negative.

Nor can the 2018 and 2019 notes have any bearing on the question of whether succession took place in 2006. The will of one side, expressed some twelve years after the succession agreement allegedly took place, cannot result in any kind of retroactive succession. The Russian Foreign Ministry's view in 2018 and 2019 that succession agreement on all treaties in force between the State Union and Russia was reached through the Exchange of Notes in 2006 and finally through Russia's reply in the Note of 16 August 2006 is not correct. The view

Russian Foreign Ministry at the same time excludes that succession could have come about by any other method, since a succession commitment under a bilateral treaty could not have occurred without Russia's conscious participation.

3.2.3 Montenegro has not lost the right to invoke the invalidity of the Treaty

What Oleg Deripaska has argued about estoppel cannot lead to the conclusion that Montenegro has succeeded to the FRY-Russia BIT. Montenegro's actions have not given Russia reason to rely on the validity of the Treaty. On the contrary, Montenegro, like Russia, has consistently stated that the FRY-Russia BIT is not valid in reporting to the accepted and widely known institutions that provide records of valid bilateral investment treaties. There is also no concrete evidence that Russia has relied on any concrete action by Montenegro in relation to the FRY-Russia BIT and neither Montenegro nor Russia has treated the FRY-Russia BIT as valid between them. Therefore, there can be no question of applying the principle of estoppel and good faith.

4 THE INVESTIGATION IN COURT OF APPEAL

The parties have submitted extensive documentary evidence. They have also referred to a large body of legal material in the form of international case law and doctrine, as well as a number of legal opinions issued in relation to the dispute before the Arbitral Tribunal and the Court of Appeal. Mr Oleg Deripaska has relied on legal opinions by Professor Christian
J. Tams and Professor Malcolm Shaw. Montenegro has relied on legal opinions of Professor Duncan B. Hollis and Professor Patrick Dumberry.

The case has been decided after a main hearing.

5 JUDGMENT

5.1 Legal basis for the Court of Appeal's examination

5.1.1 Action under Section 36 of the Arbitration Act

According to Section 36 of the Arbitration Act (1999:116), an arbitral award which provides that the arbitrators have terminated the proceedings without considering the issues submitted for their decision may be modified in whole or in part on the application of a party. A review under
Section 36 LSF of an arbitral award by which the arbitrators terminated the proceedings on the ground that they considered that they lacked jurisdiction to hear the merits of the issues referred means that the question of jurisdiction is re-examined by the Court of Appeal. If the Court of Appeal finds that the arbitrators have erred in their assessment, the award must be set aside (see prop.
1998/99:35 p. 238 and Kvart et al., Dispute Resolution through Arbitration, A Guide to the Arbitration Act, 3rd ed., 2012, p. 147). The Court of Appeal hears cases in accordance with the provisions of the Code of Judicial Procedure concerning the procedure in civil cases before the district court (Chapter 53, Section 1 of the Code of Judicial Procedure). It is the parties who control the proceedings by introducing the relevant facts and evidence. There is no obstacle to the parties introducing other facts or adducing other evidence in the Court of Appeal compared with what was done in the arbitration proceedings (see Lindskog, Arbitration, A Commentary, third edition, 2020, commentary on Article 36 LSF, point 4.2.2).

A first question is how comprehensive the Court of Appeal's review of the jurisdiction issue should be. In NJA 2019 p. 171, Belgor, which concerned a challenge to an arbitral award, the Supreme Court considered the question of the court's starting point for the review of the arbitral tribunal's jurisdiction. The Supreme Court stated that when a court in a challenge proceeding is to review the arbitral tribunal's assessment on the question of jurisdiction, it should be taken into account that it is normally the arbitral tribunal that is best placed to review the question of its own jurisdiction and that this suggests that the starting point for the court's assessment should be that the arbitral tribunal's interpretation and evaluation of the evidence is correct. The Supreme Court further stated that, on this basis, the challenge procedure should examine

whether

the claimant has shown that the arbitral tribunal erred in its assessment of the scope of the arbitration agreement (see Belgor, paragraphs 19 and 20).

Montenegro has argued that the Supreme Court's statements in Belgor mean that even in an action under Section 36 of the LSF, the court should conduct a more limited examination of the question of jurisdiction, where the starting point for the court's assessment should be that the arbitral tribunal's interpretation and evaluation of the evidence is correct and that the claimant has to show that the arbitral tribunal has made an erroneous assessment. Oleg Deripaska, for his part, submits that the Court of Appeal must carry out a full examination of the facts and evidence relied on by the parties on the question of jurisdiction.

The Court of Appeal notes that the Supreme Court's decision in Belgor concerning the court's starting point in reviewing the arbitral tribunal's jurisdiction has been the subject of discussion in the literature. Accordingly, Stefan Lindskog has argued that the Court of Appeal should review the case and that the court's review should be entirely independent of the arbitral tribunal's assessment (see ibid., commentary to § 36 LSF, point 4.2.2 and footnote 4092).
Mr Lindskog emphasises that it cannot be the case that the arbitral tribunal is always in the best position to examine the question of jurisdiction and that it follows from the right to a fair hearing that a party claiming that the arbitral tribunal lacks jurisdiction is entitled to a full examination of its claim. Mr Lindskog further states that if Belgor were nevertheless to be understood to mean that an award of jurisdiction by the arbitral tribunal has some kind of presumption effect, then it may be questioned how indicative the case law should be considered to be in a review under section 2 or section 36 of the LSF. For the arbitral tribunal's own position on jurisdiction to have any bearing on the court's review would, according to Lindskog, be contrary to the fundamental principle that the arbitral tribunal cannot confer jurisdiction on itself without a specific mandate from the parties (see Lindskog, op. cit.), Commentary to Section 2 LSF, point 5.2.3.) Other authors have also pointed to similar and related aspects of the scope of the Supreme Court's pronouncements in Belgor (see here, for example, Patrik Schöldström in JT 2019/20 p. 243 and Lars Heuman, SvJT 2019 p. 534).

Although the legal position cannot be considered to be entirely clear as to the scope of the

Supreme Court's statements in Belgor, the Court of Appeal considers that the interpretation closest to

at hand is that the Supreme Court's statements in Belgor are intended to provide guidance for the situation at issue in that case. In that case, which concerned a construction dispute, it was undisputed between the parties that the bulk of the dispute was covered by an arbitration agreement. On the other hand, it was disputed whether certain additional works were covered by the arbitration agreement. In this context, the Supreme Court stated that there is reason to assume that the parties to a commercial contractual relationship seek to have disputes within the context of their relationship resolved in a single forum, as any other arrangement would risk time-wasting, increased costs and conflicting decisions on related issues (see Belgor, para. 18).

In the Court of Appeal's view, the Supreme Court's statements in Belgor should be applied in this particular context and the decision should not be interpreted in such a way that the starting point for the Court of Appeal's review of the arbitral tribunal's jurisdiction should always be that the arbitral tribunal's interpretation and assessment of the evidence is correct. Nor, according to the Court of Appeal, can it have any intrinsic significance for the scope of the Court of Appeal's review whether the question of the arbitral tribunal's jurisdiction arises in the context of an action for damages or in the context of a review under Paragraph 2 or Paragraph 36 of the LSF.

By the arbitral award now being challenged by Mr Oleg Deripaska, the Arbitral Tribunal found that it had no jurisdiction to hear the dispute as a result of its finding that Montenegro was not bound by the bilateral agreement concluded between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on the promotion of investment protection of 11 October 1995. The decisive question for the jurisdiction of the Arbitral Tribunal is therefore whether there is any valid agreement at all between Montenegro and the Russian Federation on investment protection with accompanying standing offer with the possibility to invoke arbitration.

Neither the preparatory works to Section 36 LSF nor the case-law support that the starting point for the Court of Appeal's review - in a situation such as the one at issue in this case - should be that the arbitral tribunal's interpretation and assessment of the evidence is correct and that the Court of Appeal's review of the arbitral tribunal's jurisdiction would thus be less extensive. The Court of Appeal's assessment is therefore that the Court of Appeal must carry out a new and complete examination of

the question of the arbitral tribunal's jurisdiction.

Oleg Deripaska invoked arbitration against Montenegro under the FRY-Russia BIT and the UNCITRAL Arbitration Rules. Oleg Deripaska bears the burden of proving the facts constituting the jurisdiction of the arbitral tribunal. In the Court of Appeal's review of jurisdiction under the LSF, it is for Oleg Deripaska to demonstrate the arbitral tribunal's jurisdiction. The Court of Appeal will return below to the standard of proof that may be considered to apply under international law to the question whether the FRY-Russia BIT is effective between Russia and Montenegro. If Mr Deripaska has satisfied the international law requirement for proof of the existence of a treaty between Russia and Montenegro, he has thereby also demonstrated that the Arbitral Tribunal has jurisdiction in the respect now under consideration by the Court of Appeal.

5.1.2 State succession and treaty succession

The decisive question for the competence of the arbitral tribunal to deal with the dispute at all is whether the FRY-Russia BIT is binding between Montenegro and Russia. As the Arbitral Tribunal found, it is undisputed between the Parties that there is no bilateral investment treaty negotiated, signed and ratified between Russia and Montenegro following Montenegro's declaration of independence from the State Union in June 2006 (see paragraph 269 of the Award). The Parties also agree that the FRY-Russia BIT - following the transformation of the FRY into the State Union in 2003 - was binding in its own right between the State Union and Russia. The question that arises in the case is whether the FRY-Russia BIT remained, or alternatively became, binding on Montenegro at the time of or after Montenegro's withdrawal from the State Union by the Decision on Self-Government and the Declaration of Independence. In order to answer this question, it is necessary to establish some general legal principles regarding state succession and treaty law.

State succession occurs when a state - in accordance with international law - replaces another state with respect to sovereignty over a given territory. Issues of state succession are often politically controversial and the circumstances of the emergence of new states are often complex and one case is rarely the same as another. Questions of state succession are therefore often said to be an area of law that is surrounded by uncertainty and

different views (see James Crawford, Brownlie's principles of public international law, 9th ed., 2019, p. 409 f.).

Territorial changes can occur and new states can emerge in different ways. When considering whether questions of state succession arise, it is therefore important to distinguish between continuity and succession. While a case of continuity refers to a situation where the same state continues to exist, a case of state succession refers to a situation where one state is replaced by another state with respect to a given territory. In this context, the terms "continuator state" and "successor state" are used. In the case of a state continuing to exist, questions of succession in terms of rights and obligations simply do not arise (see Crawford, op. cit., pp. 411 et seq.). However, when there are territorial changes and when new states are formed, the question arises what happens to treaties concluded by the successor state in relation to the new state.

Both Russia and Montenegro are parties to the Vienna Convention on the Law of Treaties of 23 May 1969. Article 1 states that the Convention applies to treaties between States. Part II of the Convention deals with matters relating to the conclusion and entry into force of treaties. At the same time, Article 73 states that the provisions of the Convention shall be without prejudice to any question arising, inter alia, from the accession of a State. This means that questions relating to treaties in the event of State succession are governed by their own legal regime, which is thus considered to be *lex specialis* in relation to the general law of treaties. At the same time, it should be pointed out that the provisions of the Vienna Convention on the Law of Treaties are to a large extent considered to be a codification of customary international law (see Crawford, op. cit., p. 354). This in turn means that situations may arise even in cases of state succession where the content of the provisions may have a bearing on treaty issues.

With regard to the Vienna Convention on Succession of States in respect of treaties of the 23 August 1978, it can be noted that Montenegro has acceded to the Convention while Russia has not. It is also undisputed between the parties that this Convention is not binding between the two States. Unlike the Vienna Convention

the Vienna Convention on the Law of Treaties, the Vienna Convention on State Succession, as far as treaties are concerned, has not gained the same acceptance in the international community and the treaty has been ratified by a limited number of states. Although in some limited respects the Treaty can be said to reflect customary international law, it has been criticised for departing in key respects from what can be said to be established customary international law (see Crawford, op. cit, However, in the light of the parties' arguments in the case, the Court of Appeal, like the Arbitral Tribunal, finds it appropriate to refer to the content of Article 34 of the Convention, which, in the event of State succession, lays down a rule of automatic succession for the contracts which, at the time of State succession, are in force in respect of the whole of the previous State. As pointed out by the Arbitral Tribunal, there seems to be a consensus of doctrine that there is no presumption of automatic succession in customary international law and that Article 34 of the Vienna Convention on Succession of States does not, so far as treaties are concerned, constitute a codification of a general principle of customary international law (see arbitral award, paragraph 272, with references).

Instead, the general principle - often referred to in international literature as the *tabula rasa* principle - seems to be that a new state is not bound by a treaty concluded by its predecessor state and that other parties to the treaty are not obliged to accept a new party. However, the literature highlights that there are exceptions to the principle with regard to certain types of treaties (see Crawford, op. cit.), p. 423 et seq.) Some authors have also pointed to a trend in international practice towards a principle of continuity (see legal opinion delivered in the case by Professor Malcolm Shaw on 14 May 2020, paragraph 16). More specifically, as regards State succession in relation to bilateral investment treaties, the Court of Appeal will address this issue in more detail in its examination of the merits. In conclusion, it is clear that the issue of State succession in relation to treaties can be complex in many cases and that the question of whether the principle of tabula rasa or the principle of continuity should apply can be controversial and subject to different views (see on this point Patrick Dumberry, A guide to State succession in international investment law, 2018, p. 33 et seq.).

On the basis of these legal considerations, the Court of Appeal now turns to the merits of the case.

5.2 The question of the competence of the arbitral tribunal to hear the dispute

Oleg Deripaska has put forward three main pleas in support of the jurisdiction of the Arbitral Tribunal. First, he argued that there is a presumption of treaty continuity in the relationship between Montenegro and Russia, which meant that the FRY-Russia BIT is binding between the States. Secondly, he submits that the FRY-Russia BIT has been succeeded by an agreement between Montenegro and Russia. Thirdly, he pleads in support of his action that, as a result of its conduct, Montenegro has lost the right to object that the FRY-Russia BIT is not valid between Montenegro and Russia. The Court of Appeal chooses to examine the grounds in the order in which they have been put forward by Oleg Deripaska.

5.2.1 The question of a presumption of treaty continuity prevailed in the relationship between Montenegro and Russia after Montenegro's independence

In the case, it is undisputed that the FRY-Russia BIT was in force between the State Union and Russia. The question before the Court of Appeal here is whether there is any customary rule of international law or any rule of presumption in force between Montenegro and Russia which means that, after Montenegro's independence, the Treaty is *ipso jure in* force between Montenegro and Russia.

Before the arbitration panel, the issue of automatic succession to bilateral investment treaties was a preliminary and central issue for the panel's consideration. The panel was able to conclude - and the parties also agreed - that there is no general rule of customary international law on automatic succession to treaties (see Arbitral Award, para. 272), but that at the same time there is a broad consensus in the doctrine that at least in certain areas, such as treaties establishing borders between States, there is a rule of continuity in State succession (see Arbitral Award, para. 275).

Oleg Deripaska argued before the Arbitral Tribunal, mainly on the basis of an analogous application of the practice of automatic succession for multilateral treaties

human rights, that the Council should also recognise a similar automatic succession clause in bilateral investment agreements. The Arbitral Tribunal, which did not find it necessary to rule on the existence of a customary rule of automatic succession for human rights treaties, held that there was no support in case law or *opinio juris* for a principle of automatic succession for bilateral investment treaties (see Arbitral Award, para. 277).
The panel also noted that no international court had so far accepted such a principle of automatic succession to bilateral investment treaties; on the contrary, the starting point had been that evidence of consent was required for the binding effect of a bilateral investment treaty to exist (see arbitral award, paragraph 281).

In conclusion, the Board found that there was no support in case law or *opinio juris* for bilateral investment treaties to fall into the special category of treaties which, like treaties on, for example, national boundaries, automatically continue in force unless a specific agreement is reached to terminate the treaty. The panel concluded that there was insufficient support for a customary international law principle of automatic succession to bilateral investment treaties (see arbitral award, paragraph 286).

Oleg Deripaska has not explicitly maintained and argued before the Court of Appeal that there is a customary international law principle of automatic succession to bilateral investment treaties that the Court of Appeal has to apply. Instead, he has argued that the circumstances at the time of Montenegro's independence, the conduct of Montenegro at and after independence, and the conduct of Montenegro and Russia in various contexts support a presumption of treaty continuity in the relationship between the States. Montenegro, for its part, has objected that to accept such a presumption of treaty continuity would in practice be to apply a principle of automatic succession.

In support of the presumption of treaty continuity, Oleg Deripaska has pointed to a number of concrete circumstances. He has pointed out that Montenegro's independence did not in practice make any decisive difference to bilateral economic relations with Russia and that Montenegro enjoyed considerable autonomy within the State Union

and even before independence maintained separate relations with Russia in bilateral trade, economic and investment relations. Furthermore, he has pointed out that Montenegro has applied treaty continuity with most states after independence and that therefore - given Montenegro's close relationship with Russia before and after independence - it is unlikely that Russia would not have been one of the states with which Montenegro was willing to apply treaty continuity.

In this context, Oleg Deripaska has also pointed out that at the time of independence, Montenegro expressed in various ways its clear desire for treaty continuity. This was done, inter alia, through the statements in the independence decision and the declaration of independence and by confirming that it continued to consider itself bound by the Vienna Convention on State Succession as far as treaties were concerned by acceding to that Convention and thereby also expressing the view that treaty continuity with regard to bilateral treaty relations was an appropriate norm at independence.

Oleg Deripaska has also highlighted the diplomatic correspondence between Montenegro and Russia, which in his view expresses the desire of both states for continuity, i.e. that there was a common consent and willingness to continue the validity of the treaties that had been in force between the State Union and Russia. In this context, he has pointed out that both Montenegrin and Russian authorities and courts have expressed, internally and externally, the view that there was treaty continuity. According to Mr Deripaska, the fact that states continued to apply a number of treaties by implication also indicates that there was a general perception of treaty continuity between Montenegro and Russia.

The Court of Appeal notes that most of the circumstances invoked by Mr Deripaska in support of the presumption of treaty continuity are the same as those invoked by him in support of the conclusion of an agreement between Montenegro and Russia on succession to the FRY-Russia BIT. However, in order to be able to speak of a presumption in the present case, his action presupposes, according to the Court of Appeal, that the FRY-Russia BIT, after Montenegro's independence, was based on

is in force between Montenegro and Russia without there being any agreement on general treaty accession or treaty continuity and without the need for any specific evidence of such an agreement.

The Court of Appeal, in line with the considerations of the Arbitral Tribunal, finds that there is insufficient support for a customary international law principle of automatic succession to bilateral investment treaties. In this regard, it is particularly noteworthy that even Professor Malcolm Shaw - who in his legal opinions delivered before the Court of Appeal sought to nuance the picture of the application of the *tabula rasa* principle to bilateral treaties in the context of State succession - has concluded that there is currently no clear international common law rule on automatic succession to bilateral treaties, although he notes that a change may be underway (see Professor Malcolm Shaw's first legal opinion of 14 May 2020, paragraphs 9 and 102 and his opinion of 7 May 2020, paragraphs 9 and 102).
October 2021, point 7).

With regard to the presumption of treaty continuity that Mr Deripaska has claimed existed in the relationship between Montenegro and Russia, he has highlighted in particular what Professor Malcolm Shaw stated in paragraph 16 of his first legal opinion of 14 May 2020. It may first be noted that Professor Malcolm Shaw's statement in this regard was made in the context of an analysis of the issue of automatic succession to bilateral investment treaties. In this context, Professor Malcolm Shaw, referring to international practice concerning the former Soviet Union and Yugoslavia, has pointed out that even authors who are of the view that new States do not become automatically bound by bilateral treaties of the predecessor State, seem to accept binding when the new State and another State party to the treaty have either expressly or tacitly accepted treaty continuity.

According to Professor Malcolm Shaw, this can be seen as a move towards a presumption of treaty continuity, the meaning of which - at least *prima facie* - would be binding unless the state expresses the opposite. Professor Malcolm Shaw further states that this could form the basis for a rule of automatic succession to

bilateral treaties, while noting that the Arbitral Tribunal's conclusion - that there is currently no clear rule of customary international law on automatic succession to bilateral treaties - is "credible" (see Professor Malcolm Shaw's First Legal Opinion of 14 May 2020, paragraphs 14-16).

If the presumption of continuity which Oleg Deripaska claims should apply constitutes a form of legal rule entailing treaty continuity in the case of State succession, it is difficult to see, even on the basis of the statements made by Professor Malcolm Shaw in his first legal opinion, that such a rule could be anything other than a rule of automatic succession. The fact that, as Professor Malcolm Shaw points out in his first legal opinion, there has been a trend for successor States to the former Soviet Union and Yugoslavia to conclude agreements on treaty continuity with other States to a large extent cannot, in the Court of Appeal's view, support the existence of a customary international law rule on a presumption of treaty continuity. In the Court of Appeal's view, the evidence and examples presented by Professor Malcolm Shaw in his legal opinion do not support that either.

The Court of Appeal therefore concludes that there is insufficient support for the existence of an international customary law presumption of treaty continuity, nor is there any other support for the existence of a similar presumption between Montenegro and Russia. Accordingly, Mr Deripaska's application cannot be upheld on the basis that the FRY-Russia BIT is valid between Montenegro and Russia as a result of such a presumption. The facts put forward by Mr Deripaska in support of a presumption of treaty continuity are examined below in the context of his claim that an agreement has been reached between Montenegro and Russia.

5.2.2 The question of succession occurred to the FRY-Russia BIT through agreement

As the Court of Appeal stated at the outset, the burden of proving that the arbitrators are competent to hear the dispute lies with Oleg Deripaska. It is therefore incumbent on him to prove the specific facts which he has claimed give rise to jurisdiction; in

in this case that an agreement has been reached whereby the FRY-Russia BIT is effective between Montenegro and Russia.

The Parties agree that such an agreement may be reached between States, either expressly or by tacit agreement or by implication. Such an approach, i.e. that there are no formal requirements as to how States may enter into agreements with each other, is also consistent with customary international law practice (see Crawford, op. cit., p. 356) and Article 11 of the Vienna Convention on the Law of Treaties provides that the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other agreed means. This approach also applies to bilateral investment treaties (see Dumberry, op. cit., p. 72 et seq.).

On the other hand, the parties have different views on the question of the standard of proof to be applied in determining whether there is an agreement on succession between States. The Arbitral Tribunal has ruled that "the FRY-Russia BIT would bind Montenegro and Russia only if there is convincing evidence of agreement on succession" (see Arbitral Award, paragraph 287). In this regard, Mr Oleg Deripaska submits that the Arbitral Tribunal has applied too high a standard of proof in requiring that there be convincing evidence of agreement on treaty succession.

The Court of Appeal notes that international law is applied by international organisations and courts, national courts and arbitral tribunals around the world, among others. Finding and establishing a uniform and common understanding of the different standards of proof that exist and can be applied in a judicial review, as well as the standard of proof to be applied in a given situation, should therefore be a difficult task. The Arbitral Tribunal has, as has been shown, applied the "convincing evidence" requirement. In the Anglo-Saxon legal tradition, three main standards of proof are usually mentioned, which are, in descending order, "proof beyond reasonable doubt", "clear and convincing evidence" and "the preponderance of evidence", the first of which is mainly used in the determination of guilt in criminal law. The other two are mainly used in civil law, where "the preponderance of evidence" implies a lower standard of proof than "clear and convincing

evidence". In Swedish criminal law, the term "beyond reasonable doubt" is used. In civil law, the concept of proven or proved is mainly used, but in some situations a lower standard of proof is applied.

In order to establish whether an agreement under international law has been concluded between two States, the Court of Appeal considers that no lower standard of proof can be accepted than that the person claiming that an agreement has been concluded has to prove this fact. Both the sovereignty of each individual State and the need for clear and unambiguous conditions for international interaction require that the standard of proof that an agreement binding under international law has been concluded between States should not be set too low. Even in assessing the standard of proof to be applied in determining whether an agreement on treaty succession has been reached, it may be recalled that, after all, the most common situation is for States to enter into an express written agreement regarding the treaty in question (see Christian J. Tams, State Succession to Investment Treaties: Mapping the Issues, ICSID Review, Vol. 31, No. 2 (2016), p. 328 and Dumberry, op. cit. p. 73).

In conclusion, the Court of Appeal finds that, in order to succeed in his action, Oleg Deripaska must show that a treaty accession agreement has been concluded between Montenegro and Russia.

5.2.2.1 The question of whether an agreement on succession has been reached through Montenegro's unilateral declarations

Oleg Deripaska has argued that Montenegro's Declaration of Independence and the Decision on Independence of 3 June 2006, taken separately or together with Montenegro's June and August Notes of 2006, together with Montenegro's Notes of 2007, are unilateral declarations entailing a general treaty succession and thus also binding on the FRY-Russia BIT. According to Oleg Deripaska, there are a number of circumstances that lead to the unilateral declarations of Montenegro entailing binding effect (see Oleg Deripaska's reasons under section 3.1.2.1).

In considering whether an agreement on succession had been reached through Montenegro's unilateral declarations, the Arbitral Tribunal noted at the outset that Montenegro's declarations at the time of independence were not directed specifically at Russia. The question, therefore, according to the Panel, was whether broad unilateral statements - having the character of expressions of political will - could be sufficient from a legally binding perspective for the FRY-Russia BIT to be in force with respect to the relationship between Montenegro and Russia after Montenegro's withdrawal from the State Union.

The Board stressed that while there may be certain forms of unilateral action that could be sufficient to confirm a State's succession to a multilateral treaty, there is a broad consensus in international law that the situation is different in the case of succession to bilateral treaties. Drawing, inter alia, on Article 9(1) of the Vienna Convention on Succession of States in respect of Treaties - which the Board noted reflected the content of customary international law - the Board stated that it is generally accepted that unilateral statements by a State cannot create binding obligations unless the other State in some way confirms an agreement with corresponding content. The Arbitral Tribunal therefore concluded that Montenegro's unilateral declarations alone could not create a binding obligation under the FRY-Russia BIT, but required the expression of a mutual intention between the parties (see Arbitral Award, paragraphs 289, 290, 293, 295 and 296).

In light of the above-mentioned legal principles set out by the Arbitral Tribunal in its Award, which the Court of Appeal endorses, the Court of Appeal finds that there is no support in customary international law for a finding that succession to the FRY-Russia BIT occurred through unilateral declarations and statements by Montenegro in the manner alleged by Mr Deripaska. Accordingly, Mr Deripaska's application cannot be upheld on the basis that the FRY-Russia BIT is effective between Montenegro and Russia as a result of unilateral declarations by Montenegro.

5.2.2.2 The question of whether an agreement on succession was reached through the exchange of diplomatic notes with Russia

In this regard, Mr Oleg Deripaska has argued that Montenegro is bound by the FRY-Russia BIT as a result of an agreement on general treaty succession between Montenegro and Russia, which agreement - which also includes the FRY-Russia BIT - was reached through an exchange of diplomatic notes. According to Oleg Deripaska, the agreement on succession was reached or came into being through the exchange of diplomatic notes that took place between Montenegro and Russia in the summer of 2006 after Montenegro's independence, whereby Montenegro's note of 4 August 2006 constituted an offer of general treaty succession and Russia's note of 16 August 2006 constituted an acceptance of this offer.

Montenegro's Note of 4 August 2006 reads in relevant parts as follows in the Russian translation:

> The Ministry of Foreign Affairs of the Republic of Montenegro presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to inform that the Republic of Montenegro, in accordance with paragraph 3 of the Decision of the Parliament of the Republic of Montenegro on the Declaration of Independence of the Republic of Montenegro of 3 June 2006, is the successor state of the State Union of Serbia and Montenegro with regard to international treaties and agreements concluded and acceded to by the State Union of Serbia and Montenegro, and in this context the Republic of Montenegro confirms its readiness to abide by all treaties and agreements which have entered into force between the State Union of Serbia and Montenegro and the Russian Federation.

Russia's reply in a note dated 16 August 2006 reads in relevant parts as follows:

> The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Ministry of Foreign Affairs of the Republic of Montenegro and, in connection with the Ministry's Note No. 03/04-1414 of
> 4 August 2006 the honour to inform that the Russian side takes into account the readiness of the Republic of Montenegro, as the successor state of the State Union of Serbia and Montenegro, to exercise the rights and fulfil the obligations arising from all international agreements in force between the Russian Federation and the State Union of Serbia and Montenegro.

In the Court of Appeal, Oleg Deripaska has invoked two additional notes from Montenegro to Russia which were not available at the time of the hearing before the arbitration panel. Of these two notes, one dated 9 January 2007 and the other dated 4 May

2007, according to Oleg Deripaska, it appears that Montenegro had no doubts about the content of the 2006 Exchange of Notes and that Montenegro considered itself bound by all treaties that had been in force between the State Union and Russia. The two 2007 notes also make it clear, according to Oleg Deripaska, that Montenegro had understood Russia's August note as an acceptance.

In its examination of whether the FRY-Russia BIT was bound by the exchange of notes between Montenegro and Russia in the summer of 2006, the Arbitral Tribunal found, with respect to the initial notes of June 2006, that Montenegro's statement in the note of 4 June 2006 made no distinction between multilateral or bilateral treaties and that the note did not contain a request for a response from the Russian side that would confirm Russia's willingness to maintain, in relation to Montenegro, bilateral treaties that Russia had previously concluded with the State Union.

The Board further noted that in its note of 26 June 2006, Russia did not mention at all the issue of treaties that Montenegro had raised in the note of
In its assessment of the August notes, the Arbitration Panel noted that Montenegro, in its note of 4 August 2006, reaffirmed its readiness to comply with all agreements and understandings that had entered into force between the State Union of Serbia and Montenegro and the Russian Federation, but that Russia's reply in its note of 16 August 2006 did not contain a concrete proposal to reach an agreement with Montenegro on treaty accession. Instead, the Arbitral Tribunal found that the Russian reply, that Russia "takes into account the readiness of the Republic of Montenegro as a successor state to the State Union of Serbia and Montenegro to exercise the rights and fulfil the obligations arising from all international agreements in force between the Russian Federation and the State Union of Serbia and Montenegro", was not a reply that merely bypassed Montenegro's proposal with silence, but was instead deliberately non-committal in its formulation. The Panel concluded that the wording of the Russian reply in the Note of 16 August 2006 did not constitute a passive acceptance or an acceptance of any offer by Montenegro (see Award, paras 316-319).

Mr Oleg Deripaska has argued that Montenegro is bound by the FRY-Russia BIT as a result of an agreement on general treaty accession reached through the exchange of notes on 4 and 16 August 2006 respectively.

However, in the Court of Appeal's view, the notes are far from being drafted in such a way as to reflect a common intention to be bound by all the international agreements in force between Russia and the State Union at the time of Montenegro's independence. In making that assessment, it should be noted in particular that the lexical meaning of the Russian expression 'принимает к сведению' appearing in Russia's note of 16 August 2006 - whether translated into English as 'takes note of', 'acknowledges' or 'takes into consideration' - does not support the interpretation of the note put forward by Mr Deripaska and no evidence has been adduced to support a different meaning of that expression in diplomatic language.

Nor do the contents of the notes of January and May 2007 relied on by Mr Deripaska in the Court of Appeal support such an interpretation of the 2006 August Notes. In addition, in March 2007 Montenegro and Russia started a process of consultation on the revision of bilateral treaties. The fact that the states had an intention to start such a consultation process contradicts the fact that they considered that a general treaty accession had taken place in the summer of 2006. In conclusion, the Court of Appeal finds that the evidence relied upon by Mr Deripaska in this regard does not show that an agreement on general treaty accession, including the FRY-Russia BIT, was concluded between Montenegro and Russia through the diplomatic exchange of notes in the summer of 2006. Accordingly, the action cannot be upheld on the ground that the FRY-Russia BIT is effective between Montenegro and Russia as a result of the conclusion of an agreement on treaty succession between the States through the exchange of diplomatic notes.

5.2.2.3 The question of whether an agreement on succession has been reached by implied act and tacit agreement

Oleg Deripaska has claimed that a number of circumstances exist which imply that succession has in any event taken place through implied acts and tacit understandings. In this context, he has argued, inter alia, that the Russian and Montenegrin authorities have acted as if Montenegro had generally succeeded to bilateral treaties with Russia and applied bilateral treaties without specific agreement to do so. According to Oleg Deripaska, the behaviour of states with regard to other bilateral treaties, i.e. the use of parties, shows that all treaties of the State Union continued to apply between Russia and Montenegro. Thus, according to Oleg Deripaska, there is a tacit agreement in accordance with the Parties' practice and a common understanding of the validity of the FRY-Russia BIT.

In examining the question of whether succession had taken place by implied act or tacit agreement, the arbitral tribunal found that there was no evidence to support this (see Award, paragraph 336). The Arbitral Tribunal stated that the fact that two States mutually continue to apply one or more treaties concluded by the representative State by tacit agreement does not imply that the States have agreed on a more general level to continue to apply all the treaties of the representative State, including those for which there is no evidence of continued application. The Arbitral Tribunal found that the evidence presented by Mr Oleg Deripaska did not show a sufficiently clear and consistent state practice in the relationship between Montenegro and Russia to support such an agreement in respect of all bilateral treaties by which the State Union was bound. Rather, according to the Board, the investigation showed that States had dealt with bilateral treaties on a case-by-case basis, continuing to apply certain treaties either explicitly or by implication, while remaining completely inactive or silent in relation to others. There was no study directly concerned with the way in which States had dealt with the FRY-Russia BIT. The Arbitral Tribunal found that although Montenegro and Russia could have approached the other State from 2006 onwards to raise the issue of the status of the FRY-Russia BIT, neither had done so. (See Award, paragraphs 331 and 334-336.)

Oleg Deripaska has invoked the practical application of a number of bilateral treaties by Montenegro and Russia in support of the claim that succession took place by tacit agreement or implication. The Court of Appeal, like the Arbitral Tribunal, finds that the few examples of the application of bilateral treaties between Montenegro and Russia which have been adduced cannot be taken as evidence of general treaty succession in respect of all the bilateral agreements in force between the State Union and Russia. Thus, the investigation does not show that a succession agreement has been reached by tacit agreement or by tacit action in the manner claimed by Oleg Deripaska.

5.2.2.4 Additional circumstances invoked in support of an agreement on succession

Oleg Deripaska has argued that the manner in which the FRY-Russia BIT has been reported to various international organisations and databases with regard to its validity between Montenegro and Russia suggests that Montenegro considered the agreement to be valid. In this respect, the Court of Appeal limits itself to finding - as the Arbitral Tribunal found (see Award, paragraph 342) - that the reporting does not provide clear support for the validity of the FRY-Russia BIT between Montenegro and Russia, that it has been somewhat inconsistent and, moreover, has varied over time.

Oleg Deripaska has also underlined the importance of the Russian Foreign Ministry's understanding of the FRY-Russia BIT in force between Montenegro and Russia. In this regard, he has relied, inter alia, on the Russian Foreign Ministry's letter replies from 2016 onwards to Oleg Deripaska's Russian representative. He has also relied on an exchange of notes between Montenegro and Russia in 2018 and 2019, which was not invoked before the Arbitral Tribunal. The Court of Appeal notes that the evidence consists of documents drawn up ten years or more after the alleged treaty succession was supposed to have taken place in the summer of 2006. In addition, it was produced close to or after Oleg Deripaska invoked the present arbitration proceedings. The probative value of the evidence is limited in this light.

Oleg Deripaska has also cited research showing that Russia and Montenegro took steps, both politically and in more practical terms, to strengthen their economic cooperation and to emphasise the importance of Russian investment for Montenegro. According to the Court of Appeal, there is no reason to doubt that economic cooperation between the States was important and that Russian investors made substantial investments in the country. However, the investigation does not show, either on its own or in conjunction with the other evidence presented, that there was a general treaty succession or a succession to the FRY-Russia BIT after Montenegro's independence. Not least in view of the importance of economic exchanges between the States, it would have been natural for one of them to raise the question of the status of the FRY-Russia BIT. However, as the Arbitral Tribunal found, neither Russia nor Montenegro did so (see Arbitral Award, paragraph 336).

Overall, the Court of Appeal finds that the above-mentioned investigation - in conjunction with the other investigations referred to - does not show that Oleg Deripaska has been able to demonstrate that the FRY-Russia BIT is in force between Montenegro and Russia.

5.2.3 The question whether Montenegro has lost the right to invoke the invalidity of the Treaty

Oleg Deripaska has argued that Montenegro, by its actions, has given Russia the impression that all agreements and treaties concluded with Russia would continue to be valid, that Russia has accepted and loyally complied with this and that Montenegro should therefore be precluded from raising an objection to the invalidity of the FRY-Russia BIT under the principle of estoppel.

In view of the assessments made by the Court of Appeal above, Oleg Deripaska has also failed to demonstrate that Montenegro's actions gave Russia the impression that all agreements and treaties concluded with Russia would remain valid. For this reason alone, there is no basis for applying any principle of estoppel.

5.2.4 Concluding remarks on the jurisdiction of the arbitral tribunal

The Court of Appeal has concluded that there is no support in international custom for a rule of automatic succession to bilateral investment treaties or for a presumption of treaty continuity applicable to the relationship between Montenegro and Russia, which would have meant that Montenegro was legally bound by the FRY-Russia BIT. Furthermore, the Court of Appeal found that Oleg Deripaska has not demonstrated that any agreement was reached between Montenegro and Russia on succession to the FRY-Russia BIT either through unilateral declarations by Montenegro, exchange of diplomatic notes between the two states or through tacit agreements or implied actions. Nor has Oleg Deripaska demonstrated that Montenegro has acted in a manner that could result in Montenegro losing the right to object that the FRY-Russia BIT would not be effective between Montenegro and Russia.

In conclusion, the assessments made by the Court of Appeal mean that Mr Deripaska has not shown that the Arbitration Board has jurisdiction to hear the dispute which he requested the Board to hear. The Court of Appeal does not therefore make any different assessment of the question of jurisdiction from that made by the Arbitration Board. The arbitral award must therefore not be altered. Mr Deripaska's claim must therefore be dismissed.

5.3 Court costs

The Court of Appeal's assessment of the case means that Oleg Deripaska, as the losing party, must pay Montenegro's costs (see Chapter 18, Section 1 of the Code of Criminal Procedure).

Montenegro claims reimbursement of costs in the amount of EUR 628 456 and USD 86 075, of which EUR 592 372 relates to legal fees and the remaining amount relates to legal fees, legal opinion costs of Professor Duncan B. Hollis and Professor Patrick Dumberry, as well as costs for translations and bids.

Mr Oleg Deripaska has ordered the Court of Appeal to examine the merits of Montenegro's application for costs.

The case has been decided after five days of main hearing. The written material referred to and adduced in evidence by both parties was extremely voluminous. In view of this and of the nature of the case, not least the importance of the outcome of the dispute for Montenegro, the compensation requested by Montenegro for the costs of the proceedings may be considered reasonable.

5.4 The question of whether the judgment should be appealed

The Court of Appeal considers that the case contains questions where it is important for the guidance of the application of the law that an appeal is examined by the Supreme Court. The Court of Appeal therefore allows an appeal against the judgment (Article 43(2) LSF).

6 HOW TO APPEAL, see annex A

Appeal by 2022-12-08

Per Carlson, Judge Advocate of the Court of Appeal, Kerstin Norman, Judge-Rapporteur, and Göran Söderström, Counsellor of the Court of Appeal, participated in the judgment.

How to appeal the decision of the Court of Appeal

Anyone wishing to appeal the decision of the Court of Appeal must do so by writing to the Supreme Court. However, the appeal must be sent or delivered to the Court of Appeal.

Last time to appeal

The appeal must be lodged with the Court of Appeal no later than the date specified at the end of the Court of Appeal's decision.

Decision on detention, restrictions under Chapter 24. 5 a § of the Code of Criminal Procedure or travel prohibition may be appealed without time limit.

If the appeal has been filed in time, the Court of Appeal forwards the appeal and all documents in the case to the Supreme Court.

Appeal to the Supreme Court

The Supreme Court requires leave to appeal to hear an appeal.
The Supreme Court may grant leave to appeal only if

1. it is of importance for the guidance of the application of the law that the appeal is heard by the Supreme Court or if

2. there are exceptional grounds for such review, such as the existence of grounds for revision, miscarriage of justice or the fact that the outcome of the case in the Court of Appeal is manifestly due to serious misconduct or error.

The appeal shall contain information on

1. the name, address and telephone number of the complainant,
2. the decision appealed against (name and division of the Court of Appeal, date of the decision and case number),
3. the amendment to the decision requested by the appellant,
4. the reasons which the appellant wishes to give for the decision to be altered,
5. the grounds which the appellant wishes to put forward for the grant of leave to appeal; and
6. the evidence relied on by the appellant and what is to be proved by each piece of evidence.

Simplified notification

If the case is under appeal, the Supreme Court may use simplified service of documents in the case, provided that the addressee has been informed of such service there or at an earlier instance.

More information

For information on the Supreme Court trial, see www.hogstadomstolen.se

Instructions for appeal HR, decision, with pt - Produced by the Swedish Judicial Authority -