

Addiko Bank AG v. Montenegro
(ICSID Case No. ARB/17/35)

Excerpts of Award dated November 24, 2021 made pursuant to Rule 48(4) of the
ICSID Arbitration Rules of 2006

Claimant

Addiko Bank AG (Austrian entity)

Respondent

Montenegro

Tribunal

Bernard Hanotiau (President; Belgian), appointed by the co-arbitrators

Pierre-Yves Tschanz (Swiss/Irish), appointed by the Claimant

Brigitte Stern (French), appointed by the Respondent

Award

Award of November 24, 2021 in English (unpublished)

Instrument relied on for consent to ICSID arbitration

Agreement between the Government of the Republic of Austria and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, signed on October 12, 2001 and entered into force on August 1, 2002

Procedure

Applicable Arbitration Rules: ICSID Arbitration Rules of 2006

Place of Proceedings: Washington, D.C.

Procedural Language: English

Full procedural details: Available at <http://www.worldbank.org/icsid>

Factual Background

The Claimant, Addiko Bank AG, is an Austrian bank, which issued Swiss Franc-indexed mortgage loans through a locally incorporated entity in Montenegro between 2006 and 2011. A principal feature of these loan agreements was the currency clause, which stated that though the principal and monthly annuities were stated in CHF, the debtor was obligated to repay the loan in EUR, with the EUR amount payable converted from CHF on the date of payment.

The global financial crisis caused the value of the CHF to appreciate from 2009 to 2015 due to the surging demand for CHF. Thus, the Swiss National Bank set a ceiling exchange rate in 2011. Four years later, in 2015, the Swiss National Bank discontinued this exchange rate, and the CHF sharply appreciated against the Euro. Repayment of the loans at issue became much more expensive for borrowers.

As a result, members of Parliament introduced a bill entitled, “Law on Conversion of Swiss Franc Denominated Loans into Euro Denominated Loans”. This bill eventually became law after

consultation with the Central Bank of Montenegro and the relevant legislative committees. This law, *inter alia*, retroactively converted the denomination of all CHF loans to EUR at the exchange rate existing on the date of the loan agreement and fixed the interest rate of such loans. Financial institutions were instructed to repay to borrowers any excess payments made.

The Claimant claims that the retroactive and mandatory nature of the law violated the fair and equitable treatment and full protection and security provisions of the treaty and claimed damages incurred from the effects of the law its portfolio.

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ADDIKO BANK AG

Claimant

and

MONTENEGRO

Respondent

ICSID Case No. ARB/17/35

AWARD

Members of the Tribunal

Prof. Bernard Hanotiau, President
Mr. Pierre-Yves Tschanz, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Mr. Alex B. Kaplan

Assistant to the President

Ms. Gladys Bagasin

Date of dispatch to the Parties: 24 November 2021

[REDACTED]	
D. Tribunal’s Analysis	84
1. Whether the Tribunal lacks jurisdiction <i>ratione materiae</i>	84
2. Whether the Tribunal lacks jurisdiction <i>ratione personae</i>	95
VIII. THE ADMISSIBILITY OF THE CLAIMS	99
A. Respondent’s Position.....	99
[REDACTED]	
[REDACTED]	
[REDACTED]	
B. Claimant’s Reply to Respondent’s Objections	105
[REDACTED]	
[REDACTED]	
[REDACTED]	
C. Tribunal’s Analysis	109
IX. WHETHER RESPONDENT HAS FAILED TO AFFORD CLAIMANT’S INVESTMENT FAIR AND EQUITABLE TREATMENT (“FET”).....	112
A. Claimant’s Position	112
[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	
B. Respondent’s Position.....	130
[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	
C. Tribunal’s Analysis	150
1. The Applicable Legal Standard under the BIT	150

2.	Whether there has been a breach of the principles of due process and good faith.....	158
3.	Whether Claimant’s legitimate expectations were frustrated	171
4.	Whether the Law on Conversion and its Amendment were discriminatory	184
5.	Whether the Law on Conversion and its Amendment were proportionate	189
6.	Whether the Law on Conversion and its Amendment were unreasonable or arbitrary	200
X.	WHETHER RESPONDENT FAILED TO PROVIDE CLAIMANT’S INVESTMENT FULL PROTECTION AND SECURITY (“FPS”) UNDER ARTICLE 2(2) OF THE BIT	206
A.	Claimant’s Position	206
	█ [REDACTED]	
	█ [REDACTED]	
B.	Respondent’s Position.....	209
C.	Tribunal’s Analysis.....	211
XI.	WHETHER THE LAW VIOLATES THE BANK’S CONSTITUTIONALLY-GUARANTEED RIGHTS.....	215
A.	Claimant’s Position	216
	█ [REDACTED]	
	█ [REDACTED]	
	█ [REDACTED]	
	█ [REDACTED]	
B.	Respondent’s Position.....	220
	█ [REDACTED]	
	█ [REDACTED]	
	█ [REDACTED]	
C.	The Tribunal’s Analysis.....	223
XII.	WHETHER RESPONDENT IS IN BREACH OF FUNDAMENTAL PRINCIPLES OF EU LAW	224
A.	Claimant’s Position	224
B.	Respondent’s Position.....	225
C.	Tribunal’s Analysis.....	225
XIII.	DAMAGES.....	225
XIV.	COSTS	225
A.	Claimant’s Position	225
	█ [REDACTED]	
	█ [REDACTED]	
	█ [REDACTED]	

REPRESENTATION OF THE PARTIES

Representing Claimant

Dr. Leopold Specht
Dr. Florian Heindler
Ms. Laura Steinberg
Specht & Partner Rechtsanwalt GmbH
Rooseveltplatz 4-5/8
1090 Vienna Austria

Representing Respondent

Ms. Cherie Blair CBE, QC
Mr. James Palmer
Ms. Catriona Paterson
Mr. Pietro Bombonato
Ms. Sophia Louw (until March 2020)
Omnia Strategy LLP 30
Harcourt Street
London W1H 4HU
United Kingdom

Ms. Angeline Welsh
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

I. INTRODUCTION AND PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“**ICSID**”) on the basis of the Agreement between the Government of the Republic of Austria and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, which was signed on 12 October 2001 and entered into force on 1 August 2002 (the “**BIT**”),¹ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).

CLAIMANT

2. Addiko Bank AG (“**Claimant**”) is a joint stock company duly incorporated and existing under the laws of Austria, bearing registration No. FN350921k in the company register, and having its registered office at Wipplinger Straße, 34/4, A-1010 Vienna, Austria.
3. Claimant is a bank chartered under Austrian law.
4. Claimant is represented in this arbitration by its duly authorised attorneys and counsel mentioned at page [v] above.

RESPONDENT

5. Respondent is Montenegro (“**Respondent**”), an ICSID Contracting State since 10 May 2013.
6. Respondent is represented in this arbitration by its duly authorised attorneys and counsel mentioned at page [v] above.
7. Claimant and Respondent are jointly referred to as “**Parties**” and individually as a “**Party**”.

II. THE ARBITRAL TRIBUNAL

8. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed that the Arbitral Tribunal should consist of three arbitrators, one appointed by each Party, and the President of the Tribunal appointed by a multi-step procedure. Claimant appointed Mr. Pierre-Yves Tschanz as arbitrator, and Respondent appointed Prof. Brigitte Stern as arbitrator. The two party-appointed arbitrators nominated Prof.

¹ Agreement between the Government of the Republic of Austria and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, BGBl. III No. 151, 19 July 2002, p. 972 (Exhibit CL-0002) (the “**BIT**” or “**Treaty**”).

Bernard Hanotiau as President of the Tribunal. On 7 May 2018, the Acting Secretary General informed the Parties that the proposed members of the Arbitral Tribunal had accepted their respective appointments.

9. The Arbitral Tribunal has thus been constituted as follows:

- a. Prof. Bernard Hanotiau
(President)
HANOTIAU & VAN DEN BERG
IT Tower
480 Avenue Louise, Box 9
1050 Brussels
Belgium
- b. Mr. Pierre-Yves Tschanz
(nominated by Claimant)
11-bis rue Toepffer
CH-1206
Geneva
Switzerland
- c. Prof. Brigitte Stern
(nominated by Respondent)
7, rue Pierre Nicole
Code A1672
Paris 75005
France

III. THE PROCEDURAL HISTORY

10. By way of letter dated 5 September 2017 and received by the ICSID Secretariat on 6 September 2017, Claimant filed a Request for Arbitration dated 5 September 2017 (“**RfA**”) against the Republic of Montenegro.
11. On 8 September 2017, the ICSID Secretariat, in its review of the RfA, requested Claimant to indicate with supporting documents (a) the date of entry into force of the BIT, and (b) whether the BIT remained in force with respect to Montenegro following its independence.
12. On 14 September 2017, Claimant responded to the ICSID Secretariat’s email dated 8 September 2017 and furnished the information sought therein along with documents in support.

13. On 19 September 2017, the ICSID Secretary-General registered the RfA in accordance with Article 36(3) of the ICSID Convention.
14. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed that the Arbitral Tribunal should consist of three arbitrators, one appointed by each Party, and the President of the Tribunal appointed by a multi-step procedure. Claimant appointed Mr. Pierre-Yves Tschanz as arbitrator, and Respondent appointed Prof. Brigitte Stern as arbitrator. The two-party appointed arbitrators nominated Prof. Bernard Hanotiau as President of the Tribunal.
15. On 7 May 2018, the ICSID Acting Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**ICSID Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The ICSID Acting Secretary-General enclosed copies of the declarations of the members of the Tribunal for the Parties’ reference and informed the Tribunal that the RfA and its accompanying documents, the notice of registration and all correspondence between ICSID and the Parties relating to the proceedings would be sent to the Arbitral Tribunal in accordance with Rule 30 of the Arbitration Rules. The ICSID Acting Secretary-General also informed the Parties that Ms. Lindsay Gastrell, Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal.
16. On 8 May 2018, the ICSID Secretariat informed the Parties that the initial advance to cover the costs of the arbitration had been fixed at US\$ 300,000 and requested the Parties to each make payment of one half of the advance fixed *i.e.*, US\$ 150,000 by 7 June 2018.
17. On the same date, the Tribunal notified the Parties of the dates on which it was available to hold the first session and requested the Parties to confirm whether they were amenable to holding the first session by teleconference and indicate whether they were available for such teleconference on the dates suggested by the Tribunal.
18. By way of emails dated 10 May 2018 and 11 May 2018 respectively, the Parties informed the Tribunal of their amenability to the first session being held by teleconference and their respective availabilities for the first session.
19. On 14 May 2018, the Tribunal informed the Parties that the first session would be held by teleconference on 2 July 2018.
20. On 25 May 2018, the Tribunal sent the Parties the draft agenda for the first session and draft Procedural Order 1, invited the Parties to confer regarding the agenda items and the suggestions in the draft procedural order, and requested the Parties to submit a joint

proposal informing the Tribunal of their agreements and disagreements on procedural matters along with their respective positions by 8 June 2018.

21. On 8 June 2018, the Parties provided their comments to the draft Procedural Order 1.
22. On 11 June 2018, the ICSID Secretariat informed the Parties that it had received the Parties' respective wire transfers of the advances that it had requested by its letter dated 8 May 2018.
23. On 18 June 2018, the Tribunal provided the Parties with the declaration of Ms. Gladys Bagasin who had been appointed by the Tribunal as Assistant to the President of the Tribunal, with the consent of the Parties.
24. On 27 June 2018, the Tribunal requested the Parties to notify the Tribunal of their respective list of participants for the first session to be held by teleconference.
25. On 28 June 2018, the Parties furnished their respective list of participants for the first session.
26. On 29 June 2018, the ICSID Secretariat informed the Tribunal and the Parties that Mr. Alex B. Kaplan, Legal Counsel, ICSID, would be replacing Ms. Lindsay Gastrell as the Secretary of the Tribunal.
27. On 2 July 2018, in accordance with Rule 13(1) of the ICSID Rules, the Tribunal held the first session with the Parties by way of teleconference. The teleconference was attended by the following:

The Tribunal:

- a. Prof. Bernard Hanotiau
- b. Prof. Brigitte Stern
- c. Mr. Pierre-Yves Tschanz

The Administrative Secretary:

- a. Mr. Alex B. Kaplan

The Assistant to the President

- a. Ms. Gladys Bagasin

For Claimant:

- a. Dr. Leopold Specht (Specht & Partner Rechtsanwalt GmbH)
- b. Ms. Million Berhe (Specht & Partner Rechtsanwalt GmbH)
- c. Dr. Florian Heindler (Specht & Partner Rechtsanwalt GmbH)

For Respondent:

- a. Ms. Cherie Blair CBE, QC (Omnia Strategy LLP)
 - b. Mr. James Palmer (Omnia Strategy LLP)
 - c. Ms. Ema Vidak-Gojkovic (Omnia Strategy LLP)
 - d. Ms. Sophia Louw (Omnia Strategy LLP)
 - e. Ms. Angeline Welsh (Matrix Chambers)
28. On 6 July 2018, the Tribunal issued Procedural Order (“**P.O.**”) No. 1.
29. On 7 September 2018, Claimant submitted the following documents:
- a. The Memorial dated 7 September 2018 (“**Memorial**”);
 - b. Witness Statement of [REDACTED];
 - c. Witness Statement of [REDACTED];
 - d. Legal Opinion of [REDACTED]; and
 - e. Documents in support of (a) to (d) hereinabove.
30. On 28 September 2018, Respondent notified the Tribunal that Ms. Lucy Martinez (Omnia Strategy LLP) and Ms. Catriona Paterson (Omnia Strategy LLP) had been added as Respondent’s counsel and enclosed two Powers of Attorney in support thereof.
31. On 1 February 2019, Respondent filed the following documents:
- a. The Counter-Memorial dated 1 February 2019 (“**Counter-Memorial**”);
 - b. Expert Report of [REDACTED];
 - c. Expert Report of [REDACTED];
 - d. Witness Statement of [REDACTED];
 - e. Documents in support of (a) to (d) hereinabove; and
 - f. An index of Respondent’s supporting factual exhibits and legal authorities.
32. On 15 March 2019, in accordance with P.O. No. 1, the Parties filed their respective Requests for Production of Documents.
33. On 4 April 2019, the Tribunal issued P.O. No. 2, containing the Tribunal’s decisions on the Parties’ document production requests.
34. On 2 May 2019, Claimant filed a request seeking a 35-day extension to file its Reply on the Merits and Counter-Memorial on Preliminary Objections (“**Request for Extension**”).
35. On the same date, the Tribunal invited Respondent to provide its comments on Claimant’s Request for Extension by 8 May 2019.

36. On 8 May 2019, Respondent filed its comments on Claimant's request for extension objecting to such an extension being granted.
37. On 10 May 2019, Claimant filed a reply in response to the comments made by Respondent to its Request for Extension.
38. On the same date, the Tribunal invited Respondent to file its final comments on Claimant's reply dated 10 May 2019, by 11 May 2019.
39. On 11 May 2019, Respondent filed its rejoinder to Claimant's Request for Extension.
40. On 13 May 2019, Claimant filed further comments on Respondent's rejoinder to its Request for Extension. In response, Respondent requested the Tribunal to disregard Claimant's unsolicited communication of even date.
41. On the same date, the Tribunal issued its decision on Claimant's Request for Extension, granting Claimant until 27 May 2019 to file its Reply. The Tribunal also adjusted the procedural timetable taking into account this extension.
42. On 15 May 2019, due to a scheduling conflict in light of the revised procedural timetable, the Tribunal requested the Parties to indicate their preferences for scheduling the pre-hearing teleconference. The Tribunal requested the Parties to confirm whether they preferred to retain the conference call as scheduled on 18 November 2019 with only the President present, or whether they preferred to reschedule the conference call to 28 or 29 November 2019 when all the members of the Tribunal could be present.
43. On 21 May 2019, by way of separate emails, the Parties informed the Tribunal that they were available on all three suggested dates and requested the Tribunal to fix the date for the pre-hearing teleconference. Respondent, however, requested the Tribunal to issue directions to the Parties to submit their proposed timetable and their respective proposals on any other matter at least three days prior to the pre-hearing teleconference if the President was going to conduct the pre-hearing teleconference on his own, so as to enable the President to confer with the other members of the Tribunal.
44. On 23 May 2019, the Tribunal fixed the pre-hearing teleconference on 18 November 2019. The Tribunal also informed the Parties that it had taken note of Respondent's request in its communication dated 21 May 2019.
45. On 27 May 2019, Claimant filed the following documents:
 - a. The Reply to the Counter-Memorial and Preliminary Objections dated 27 May 2019 ("**Reply**");
 - b. Legal Opinion of [REDACTED];

- c. Second Legal Opinion of [REDACTED];
 - d. Second Witness Statement of [REDACTED];
 - e. Witness Statement of [REDACTED];
 - f. Expert Report of [REDACTED] on Quantum [REDACTED];
 - g. Documents in support of (a) to (f) above; and
 - h. An index with a list of factual and legal exhibits.
46. On 5 June 2019, Claimant submitted Exhibits [REDACTED]-0012 and [REDACTED]-0013, reference to which had been made in Claimant's Quantum Expert Report with some redactions.
47. On 10 June 2019, Respondent filed a request for production of documents ("**Request for Production**") and requested the Tribunal to order Claimant to:
- a. produce unredacted versions of the certain documents identified in the Request for Production;
 - b. produce the Quantum Exhibits in their native, excel format; and
 - c. pay Respondent's fees and expenses incurred in connection with the Request for Production.
48. On 12 June 2019, the Tribunal invited (a) Claimant to submit its response to Respondent's Request for Production by 18 June 2019; (b) Respondent to submit its reply to Claimant's response by 21 June 2019; and (c) Claimant to submit its final comments by 26 June 2019.
49. On 18 June 2019, as directed, Claimant submitted its response to Respondent's Request for Production requesting the Tribunal to reject Respondent's request to produce (a) the Requested Documents in unredacted form; and (b) the Quantum Exhibits in their native, excel format.
50. On 21 June 2019, Respondent submitted its reply to Claimant's response.
51. On 23 June 2019, Claimant provided new, redacted versions of some of the documents included in the Request for Production. On 25 June 2019, Respondent referred to Claimant's letter dated 23 June 2019 and made further submissions on the issue.
52. On 26 June 2019, Claimant provided its comments on Respondent's correspondence dated 21 June 2019 and 25 June 2019.
53. On 27 June 2019, Respondent wrote to the Tribunal to highlight that Claimant had, in its response dated 26 June 2019, raised new allegations to which Respondent had not previously had the opportunity to respond. Accordingly, Respondent requested the Tribunal to indicate whether it would be of any assistance if Respondent responded to Claimant's letter.

54. On 28 June 2019, the Tribunal invited Respondent to respond to Claimant's letter dated 26 June 2019 by 1 July 2019 and invited Claimant to submit its final comments by 5 July 2019.
55. On 1 July 2019, Respondent responded to Claimant's letter dated 26 June 2019.
56. On 5 July 2019, as directed by the Tribunal, Claimant provided its final comments.
57. On 18 July 2019, the Tribunal issued P.O. No. 3, which partially granted Respondent's Request for Production and directed Claimant to produce the following documents:
 - a. A completely unredacted version of section 6 of the [REDACTED] Legal Due Diligence/ Red Flag Report dated 8 August 2014 on "Montenegro";
 - b. "[REDACTED] fact book" as referenced in section G.3 on page 208 of the DD Report;
 - c. Clause 15 of the Share Purchase Agreement ("SPA") between AI Lake and HETA;
 - d. Exhibit ./15/1 in full;
 - e. Settlement Agreement dated 10 March 2016;
 - f. Settlement Agreement dated 23 December 2016; and
 - g. Native excel versions of the exhibits submitted in support of the Joint Expert Report of [REDACTED] and [REDACTED].
58. On 25 July 2019, Respondent requested the Tribunal to issue a further order requiring Claimant to comply with P.O. No. 3 without further delay.
59. On even date, the Tribunal invited Claimant to respond to Respondent's email by 29 July 2019.
60. On 26 July 2019, Claimant informed the Tribunal and Respondent that in order to obtain copies of the [REDACTED] Fact Book and the [REDACTED] Legal Due Diligence Report, it had approached HETA and AI Lake but was yet to receive a response. Claimant indicated that all other documents were ready to be produced but requested that the Parties enter into a non-disclosure agreement based on the Tribunal's suggestion in P.O. No. 3, a draft of which it would share with Respondent in due course.
61. Respondent, on even date, commented on Claimant's proposal that the Parties enter into a non-disclosure agreement with respect to documents that were the subject of P.O. No. 3, and indicated that it was unwilling to do so at such a late juncture. Respondent, instead, requested the assistance of the Tribunal to prevent further delay in Claimant's compliance with P.O. No. 3 by requesting Claimant to (a) immediately produce the documents which Claimant had confirmed were "ready to be produced"; (b) produce the [REDACTED] Fact Book and the [REDACTED] Legal Due Diligence Report by 30 July 2019.

62. On the same day, the Tribunal granted Respondent's request and directed Claimant to:
- a. produce the documents identified in P.O. No. 3, save for the [REDACTED] Fact Book and the [REDACTED] Legal Due Diligence Report, immediately; and
 - b. produce the [REDACTED] Fact Book and the [REDACTED] Legal Due Diligence Report by 30 July 2019.
63. On 1 August 2019, Respondent informed the Tribunal that Claimant had failed to produce the documents as ordered and had not provided any explanation for its delay. Respondent further submitted that it had unsuccessfully attempted to resolve the issue through *inter partes* communication. Respondent, accordingly, requested the Tribunal to order Claimant:
- a. To produce the [REDACTED] Fact Book and the [REDACTED] Legal Due Diligence Report in full and unredacted form immediately; and
 - b. In the alternative, if the documents were not produced by close of business to (a) confirm with the Tribunal whether it holds full and unredacted copies of the documents in question; (b) report in detail to the Tribunal and Respondent on the steps it had taken to obtain the document from AI Lake which would explain as to when it had communicated with AI Lake, what it had requested from AI Lake, and what response it had received from AI Lake, if any; and (c) when Claimant expected to produce the documents.
64. On the same day, Claimant responded to Respondent's letter and informed the Tribunal that despite its best efforts, it did not possess or have control over the full and unredacted copies of the [REDACTED] Fact Book and the [REDACTED] Legal Due Diligence Report. Claimant therefore requested the Tribunal to allow it to produce the documents by 6 August 2019. Claimant also requested the Tribunal to clarify whether the reference to [REDACTED] Fact Book in P.O. No. 3 as "[REDACTED] fact book as referenced in section G.3 on page 208 of the DD Report" required Claimant to produce only the section which related to section G.3 of the DD Report, or whether the entire [REDACTED] Fact Book was to be produced.
65. On 5 August 2019, the Tribunal, after considering the Parties' submissions, clarified that the entire [REDACTED] Fact Book was to be produced and directed Claimant to produce the unredacted version of section 6 of the [REDACTED] Legal Due Diligence/ Red Flag Report on Montenegro dated 8 August 2014, by 6 August 2019.
66. On 7 October 2019, Respondent submitted the following documents in accordance with P.O. No. 1:
- a. Respondent's Rejoinder dated 7 October 2019 ("**Rejoinder**");

- b. Second Expert Report of [REDACTED];
- c. Second Expert Report of [REDACTED];
- d. Expert Report of [REDACTED];
- e. Expert Report of [REDACTED];
- f. Second Witness Statement of [REDACTED];
- g. Documents in support of (a)-(f) above; and
- h. An Index of Respondent's supporting factual exhibits and legal authorities.

67. On 16 October 2019, Claimant informed the Tribunal that Respondent, in its Rejoinder and Reply on Preliminary Objections, had raised new claims which Claimant had to address with its Rejoinder on Preliminary Objections. In doing so, Claimant submitted that it would be necessary to submit witness statements (including statements by persons who had not submitted prior affidavits) and sought leave from the Tribunal to submit these witness statements with its Rejoinder on Preliminary Objections (“**Request to adduce new evidence**”).
68. On 17 October 2019, Respondent referred to Claimant's Request to adduce new evidence and requested the Tribunal to direct Claimant to give further particulars identifying precisely (a) the issues of fact on which it requests permission to respond, as well as (b) the number and names of witnesses it proposes to introduce and, thereafter, afford Respondent an opportunity to comment.
69. On 20 October 2019, the Tribunal directed Claimant to identify and explain which paragraphs under “II(C) Further Issues of Fact” in Respondent's Rejoinder contained new claims and to specify the number and the names of witnesses it proposed to introduce by 22 October 2019. The Tribunal then invited Respondent to comment on Claimant's submission by 24 October 2019.
70. On 22 October 2019, Claimant, as directed, submitted the details of the new claims in Respondent's Rejoinder and the details of the witnesses.
71. On 23 October 2019, the ICSID Secretariat notified the Parties that in light of costs incurred till date and the costs to be incurred, it was estimated that an additional advance payment of US\$ 400,000 would be necessary. Accordingly, the ICSID Secretariat requested the Parties to each make an advance payment of US\$ 200,000 by 22 November 2019.
72. On 25 October 2019, Respondent submitted its response and requested the Tribunal to reject Claimant's Request to adduce new evidence in its entirety. Respondent, however, requested that should the Tribunal permit Claimant to adduce any further evidence, the Tribunal make an order:
- a. Circumscribing the number of witness statements that may be submitted; and

- b. Granting Respondent an opportunity to submit reply evidence.
73. On 27 October 2019, Claimant responded to Respondent’s letter dated 25 October 2019 and renewed its request.
 74. On 28 October 2019, Respondent submitted its response to Claimant’s letter dated 27 October 2019.
 75. On 4 November 2019, the Tribunal issued P.O. No. 4, which rejected Claimant’s Request to adduce new evidence. However, given that Claimant was scheduled to file its Rejoinder on Preliminary Objections on 4 November 2019, the Tribunal granted Claimant a three-day extension to file the same. The Tribunal also extended the deadline for the notification of witnesses/experts for cross-examination to 9 November 2019.
 76. On 5 November 2019, the Tribunal circulated the pre-hearing agenda to the Parties and invited their respective responses by 12 November 2019.
 77. On 7 November 2019, in accordance with P.O. No. 1 (as amended by P.O. No. 4), Claimant submitted the following documents:
 - a. Claimant’s Rejoinder on Preliminary Objections dated 7 November 2019 (“**Rejoinder on Preliminary Objections**”);
 - b. Second Legal Opinion of [REDACTED];
 - c. Third Legal Opinion of [REDACTED];
 - d. Second Witness Statement of [REDACTED];
 - e. Second Witness Statement of [REDACTED];
 - f. Documents in support of (a)-(e) above; and
 - g. An index with a list of all factual and legal exhibits.
 78. On 10 November 2019, Claimant and Respondent, by way of separate emails, submitted their respective List of Witnesses/Experts for cross-examination. Claimant indicated that it wished to call the following persons for cross-examination:
 - a. [REDACTED];
 - b. [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED]; and
 - e. [REDACTED].
 79. Respondent, similarly, indicated that it wished to call the following persons for cross-examination:
 - a. [REDACTED];
 - b. [REDACTED];

- c. [REDACTED];
- d. [REDACTED];
- e. [REDACTED]
- f. [REDACTED]

- 80. On 11 November 2019, the ICSID Secretariat informed the Parties that it had received the Parties' respective wire transfers of the advances it had requested by its letter dated 23 October 2019.
- 81. On 12 November 2019, Respondent informed the Tribunal that [REDACTED], who Claimant had called for cross-examination, would not be available to attend the Hearing due to a professional obligation on another matter that could not be rescheduled. Respondent, however, clarified that [REDACTED], who had co-authored the expert reports prepared by [REDACTED], would be available for cross-examination at the Hearing.
- 82. On 13 November 2019, Respondent filed an application requesting the Tribunal to strike from the record certain parts of Claimant's Rejoinder on Preliminary Objections and the witness statements filed in support thereof for having been filed in breach of the directions of the Tribunal in P.O. No. 4 ("**Application to strike out**").
- 83. On even date, the Tribunal invited Claimant to respond to Respondent's Application to strike out.
- 84. On the same day, Claimant, on behalf of the Parties, submitted the agenda for the pre-hearing conference.
- 85. On 14 November 2019, the Tribunal provided the Parties with some comments on the agenda for the pre-hearing conference.
- 86. On the same day, Claimant informed the Tribunal that [REDACTED], who Respondent had called for cross-examination, would not be in a position to attend the Hearing due to a professional obligation which he could not reschedule. Claimant, however, clarified that [REDACTED], who had co-authored the [REDACTED], would be available for cross-examination at the Hearing.
- 87. On the same day, by way of separate letter, Claimant responded to Respondent's Application to strike out and requested the Tribunal to reject the Application.
- 88. On 15 November 2019, Respondent filed its reply to Claimant's letter dated 14 November 2019 and informed the Tribunal that it would provide detailed comments to the letter should the Tribunal consider it necessary.

89. On 18 November 2019, a pre-hearing teleconference was held. The teleconference was attended by the following persons:

The Tribunal:

- a. Prof. Bernard Hanotiau (President)

The Administrative Secretary:

- a. Mr. Alex B. Kaplan

The Assistant to the President:

- a. Ms. Gladys Bagasin

For Claimant:

- a. Dr. Leopold Specht (Specht & Partner Rechtsanwalt GmbH)
b. Ms. Million Berhe (Specht & Partner Rechtsanwalt GmbH)

For Respondent:

- a. Ms. Cherie Blair CBE, QC (Omnia Strategy LLP)
b. Ms. Catriona Paterson (Omnia Strategy LLP)
c. Ms. Sophia Louw (Omnia Strategy LLP)
d. Ms. Angeline Welsh (Matrix Chambers)

90. On the same day, Claimant replied to Respondent's letter dated 15 November 2019.
91. On 19 November 2019, the Tribunal, by way of P.O. No. 5, issued its decision on Respondent's Application to strike out. In this P.O., the Tribunal rejected Respondent's request to strike out certain paragraphs from the Rejoinder on Preliminary Objections and the documents filed along with it, but granted Respondent's request to allow it to respond to the said paragraphs by way of direct examination of its own experts and cross-examination of Claimant's witnesses during the Hearing.
92. On 21 November 2019, the Tribunal issued P.O. No. 6, setting out the hearing protocol.
93. On 6 December 2019, Claimant submitted the hearing schedule agreed upon by the Parties, and noted that the Parties disagree as to the order of the closing statements. Claimant requested that should the Tribunal dispense with the filing of post-hearing submissions, that it be allowed to close last or reserve 10 minutes for a rebuttal.
94. On 7 December 2019, Respondent submitted its comments regarding the order of the closing statements and maintained that Respondent should close last.
95. By way of a letter dated 8 December 2019, Claimant submitted a reply to Respondent's comments of 7 December 2019.

96. On 11 December 2019, the Tribunal decided that Claimant will deliver its closing submissions first, followed by Respondent. Should the Parties wish to have an opportunity for rebuttal statements, both Parties will be given a chance to do so, following the same order. The Tribunal also requested Claimant to provide an illustrative diagram of Claimant's and Hypo Alpe Adria Bank's corporate structure, and of the various transactions that resulted in Claimant's alleged investment ("**Requested Diagrams**").
97. On 14 December 2019, Claimant submitted the Requested Diagrams.
98. On 16-19 December 2019, the Hearing was held in Paris, France. The following persons were in attendance:²

The Tribunal:

- a. Prof. Bernard Hanotiau
- b. Prof. Brigitte Stern
- c. Mr. Pierre-Yves Tschanz

The Administrative Secretary:

- a. Mr. Alex B. Kaplan

The Assistant to the President:

- a. Ms. Gladys Bagasin

Counsel (for Claimant):

- a. Dr. Leopold Specht (Specht & Partner Rechtsanwalt GmbH)
- b. Ms. Laura Steinberg (Specht & Partner Rechtsanwalt GmbH)
- c. Ms. Million Berhe (Specht & Partner Rechtsanwalt GmbH)
- d. Dr. Florian Heindler (Specht & Partner Rechtsanwalt GmbH)
- e. Ms. Viktoria Mair (Specht & Partner Rechtsanwalt GmbH)
- f. Ms. Olivia Wankmüller (Specht & Partner Rechtsanwalt GmbH)
- g. Mr. Milos Komnenic (Law Office Komnenic & Associates)

Party Representatives (for Claimant):

- a. [REDACTED] (Addiko Bank AG)
- b. Ms. Petra Zirhan-Wagner (Addiko Bank AG)
- c. Mr. Stefan Choi (Addiko Bank AG)

Witnesses (for Claimant):

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]

² ICSID List of Participants.

Experts (for Claimant):

- a.
- b.
- c.

Counsel (for Respondent):

- a. Ms. Cherie Blair CBE, QC (Omnia Strategy LLP)
- b. Ms. Catriona Paterson (Omnia Strategy LLP)
- c. Ms. Sophia Louw (Omnia Strategy LLP)
- d. Mr. Pietro Bombonato (Omnia Strategy LLP)
- e. Ms. Angeline Welsh (Matrix Chambers)

Party Representatives (for Respondent):

- a. Mr. Darko Bulatović (Central Bank of Montenegro)
- b. Ms. Aleksandra Popović (Ministry of Finance of Montenegro)
- c. Ms. Bojana Bosković (Ministry of Finance of Montenegro)
- d. Ms. Tanja Luburić (Ministry of Finance of Montenegro)

Witness (for Respondent):

- a.

[REDACTED]

Experts (for Respondent):

- a.
- b.
- c.
- d.
- e.

[REDACTED]

Court Reporter:

- a. Ms. Anne-Marie Stallard (English Court Reporter)

Interpreters:

- a. Ms. Vesna Bulatovic (English-Montenegrin Interpreter)
- b. Ms. Sanja Rašović (English-Montenegrin Interpreter)
- c. Ms. Milena Marić-Vogel (English-Montenegrin Interpreter)

- 99. On 17 February 2020, Respondent wrote to the Tribunal regarding the Parties' agreement on the filing of the post-hearing briefs. It also informed the Tribunal of the Parties' disagreements regarding the format of the costs submissions and the proposed corrections to the Hearing transcript.
- 100. On 23 February 2020, Claimant submitted its comments on the issues raised by Respondent in its communication of 17 February 2020.

101. On 12 March 2020, the Tribunal issued P.O. No. 7 regarding the Parties' disagreements on the post-hearing matters.
102. On 18 April 2020, the Parties submitted their respective post-hearing briefs ("**Claimant's PHB**" and "**Respondent's PHB**"), and the agreed amendments to the Hearing transcript.
103. On 27 April 2020, the Parties submitted their respective costs submissions ("**C-CS I**" and "**R-CS I**").
104. Also on 27 April 2020, Respondent registered its objections regarding Claimant's PHB and requested the Tribunal to strike out Sections I and IV of Claimant's PHB from the record.
105. On 28 April 2020, Claimant commented on Respondent's request of 27 April 2020.
106. On 29 April 2020, Respondent provided its reply to Claimant's comments. On 1 May 2020, Claimant submitted its final comments.
107. On 5 May 2020, the Tribunal denied Respondent's request of 27 April 2020, but allowed Respondent to file a brief submission to respond to the new legal authorities submitted in Section IV of Claimant's PHB.
108. On 12 May 2020, the Parties submitted their respective reply costs submissions ("**C-CS II**" and "**R-CS II**"). Within R-CS II, Respondent also submitted its response to the new legal authorities in Section IV of Claimant's PHB.
109. On 30 September 2021, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).
110. On 13 October 2019, the ICSID Secretariat notified the Parties that in light of costs incurred to date and the costs to be incurred, it was estimated that an additional advance payment of US\$ 50,000 would be necessary. Accordingly, the ICSID Secretariat requested the Parties to each make an advance payment of US\$ 25,000 by 12 November 2021.
111. On 11 November 2021, the ICSID Secretariat informed the Parties that it had received the Claimant's wire transfer of the advance that it had requested by its letter dated 13 October 2021.

112. On 22 November 2021, the ICSID Secretariat informed the Parties that it had received the Respondent's wire transfer of the advance that it had requested by its letter dated 13 October 2021.

IV. THE PARTIES' REQUEST FOR RELIEF

113. Claimant requests the following relief:

"[...] Claimant respectfully prays the Tribunal to issue the **AWARD**:

- (1) That Respondent has breached its obligations towards Claimant under the Bilateral Investment Treaty between the Republic of Austria and Montenegro;
- (2) Respondent is therefore ordered to fully compensate Claimant, in the amount of at least [REDACTED];
- (3) Respondent is furthermore ordered to pay interest;
- (4) Respondent shall compensate Claimant for legal fees and costs incurred in these proceedings."³ (emphasis in the original)

114. Respondent requests the following relief:

"[...] Respondent requests the Tribunal to issue an award:

- a. **DECLINING** jurisdiction to hear this matter; or
- b. **DECLARING**, in the alternative, that the claims brought in this arbitration are non-admissible; or
- c. **DECLARING**, in the alternative, that the Respondent has not breached its obligations under the BIT; or
- d. **DECLARING**, in the alternative, that the Claimant's claims for damages is dismissed; and
- e. **ORDERING** the Claimant to pay the costs of this arbitration, including all the fees and expenses of ICSID and the Tribunal, and all the legal costs and other expenses incurred by the Respondent, with interest at such rates the Tribunal may deem appropriate; and
- f. **ORDERING** such other relief as the Tribunal may deem appropriate."⁴ (emphasis in the original)

³ Memorial, at 269; Reply, at VII, pp.129-130.

⁴ Counter-Memorial, at 324; Rejoinder, at 366.

V. THE FACTUAL BACKGROUND TO THE DISPUTE

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[REDACTED] Claimant applied to the Central Bank for approval.³⁰ Claimant's application stated:

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VI. THE BIT¹⁴⁵

187. Article 1 of the BIT (“Definitions”) provides in relevant part:

“For the purpose of this Agreement

(1) the term “investment” comprises all assets invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and in particular, though not exclusively:

- (a) movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges, usufructs and similar rights;
- (b) shares, bonds and any other kind of securities or participations in an enterprise;
- (c) claims to money, claims to any performance or any other claim under contract having an economic value;
- (d) intellectual and industrial property rights, including, but not limited to, copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;
- (e) concessions granted in accordance with the laws and regulations of the Contracting Party in the territory whereof the investment is being made.

(2) the term “investor” means

- (a) any natural person having the nationality of one Contracting Party and making an investment in the other Contracting Party’s territory;
- (b) any juridical person or partnership, constituted in accordance with the legislation of one Contracting Party, having its seat in the territory of that Contracting Party and making an investment in the other Contracting Party’s territory;
- (c) any juridical person or partnership, constituted in accordance with the legislation of one Contracting Party or of a third Party in which the investor referred to in a) or b) exercises a dominant influence.

[...]”

188. Article 2 of the BIT (“Promotion and Protection of Investments”) provides:

“(1) Each Contracting Party shall in its territory encourage and create, as far as possible, stable, equitable, favourable and transparent conditions for investments of investors of the other Contracting Party and admit such investments in accordance with its legislation.

¹⁴⁵ Paragraph 1 above.

(2) Investments admitted according to paragraph (1) and their returns shall at all times be accorded fair and equitable treatment and shall enjoy the full protection of the present Agreement. The same applies without prejudice to the regulations of paragraph (1) also for their returns in case of reinvestment of such returns.

(3) Any change in the form in which assets are invested including legal extension, alteration or transformation thereof shall not affect their character as investments provided that such change is made in accordance with the legislation of the host Contracting Party.”

189. Article 3 of the BIT (“Treatment of Investments”) reads in relevant part:

“(1) Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than that accorded to its own investors and their investments or to investors of any third State and their investments.

[...]”

190. Article 9 of the BIT (“Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party”) provides:

“(1) Any dispute between an investor of one Contracting Party and the other Contracting Party concerning the obligations of the latter arising from an investment made by the investor of the first Contracting Party, shall be settled, as far as possible, through amicable negotiations.

(2) If the dispute according to paragraph (1) of this Article cannot be settled by negotiations within three months, the investor may submit the dispute for settlement to a competent court of the Contracting Party which is party to the dispute.

(3) Instead of resorting to the provisions of paragraph (2) of this Article, the investor may choose to submit the dispute for settlement through arbitration to:

- (a) an ad-hoc arbitral tribunal according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL);
- (b) the International Centre for Settlement of Investment Disputes, in the event that both Contracting Parties are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18th, 1965 (ICSID Convention).

(4) Each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between

the Contracting Party and the investor, to submit any such disputes to international arbitration, if the investor so chooses. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted.

(5) The award shall be final and binding; it shall be executed according to national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

(6) A Contracting Party which is a party to a dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise the objection that the investor who is the other party to the dispute has received by virtue of a guarantee indemnity in respect of all or some of its losses.”

VII. THE JURISDICTION OF THE TRIBUNAL

191. In this chapter and the following chapters, the Arbitral Tribunal has summarised the Parties’ positions. Since the Parties’ submissions, and the exhibits, witness statements, and expert reports to which they refer, comprise thousands of pages, these summaries cannot be comprehensive. However, the Tribunal emphasises that it has not only considered the positions of the Parties as summarised in this Award, but also the detailed arguments included in their written submissions and those made at the Hearing. To the extent that these arguments are not expressly referred to herein, they must be deemed to be subsumed in the Tribunal’s analysis.

A. CLAIMANT’S CASE ON JURISDICTION

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B. RESPONDENT'S OBJECTIONS

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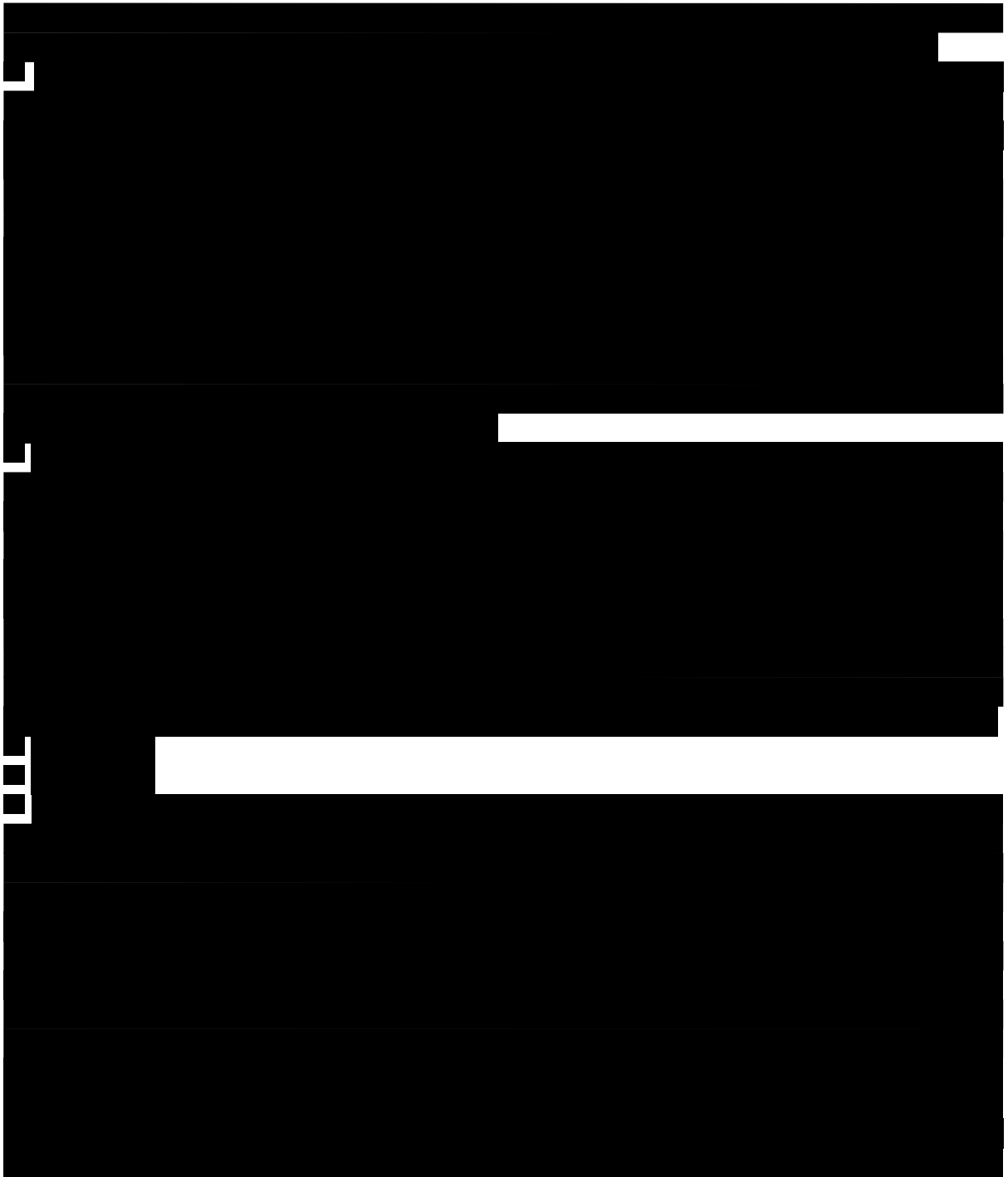
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C. CLAIMANT’S REPLY TO RESPONDENT’S OBJECTIONS

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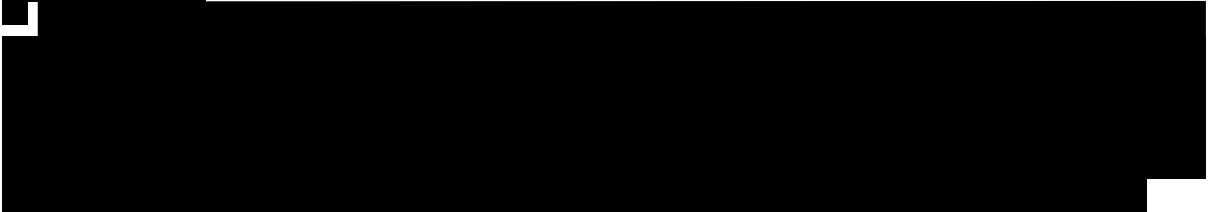
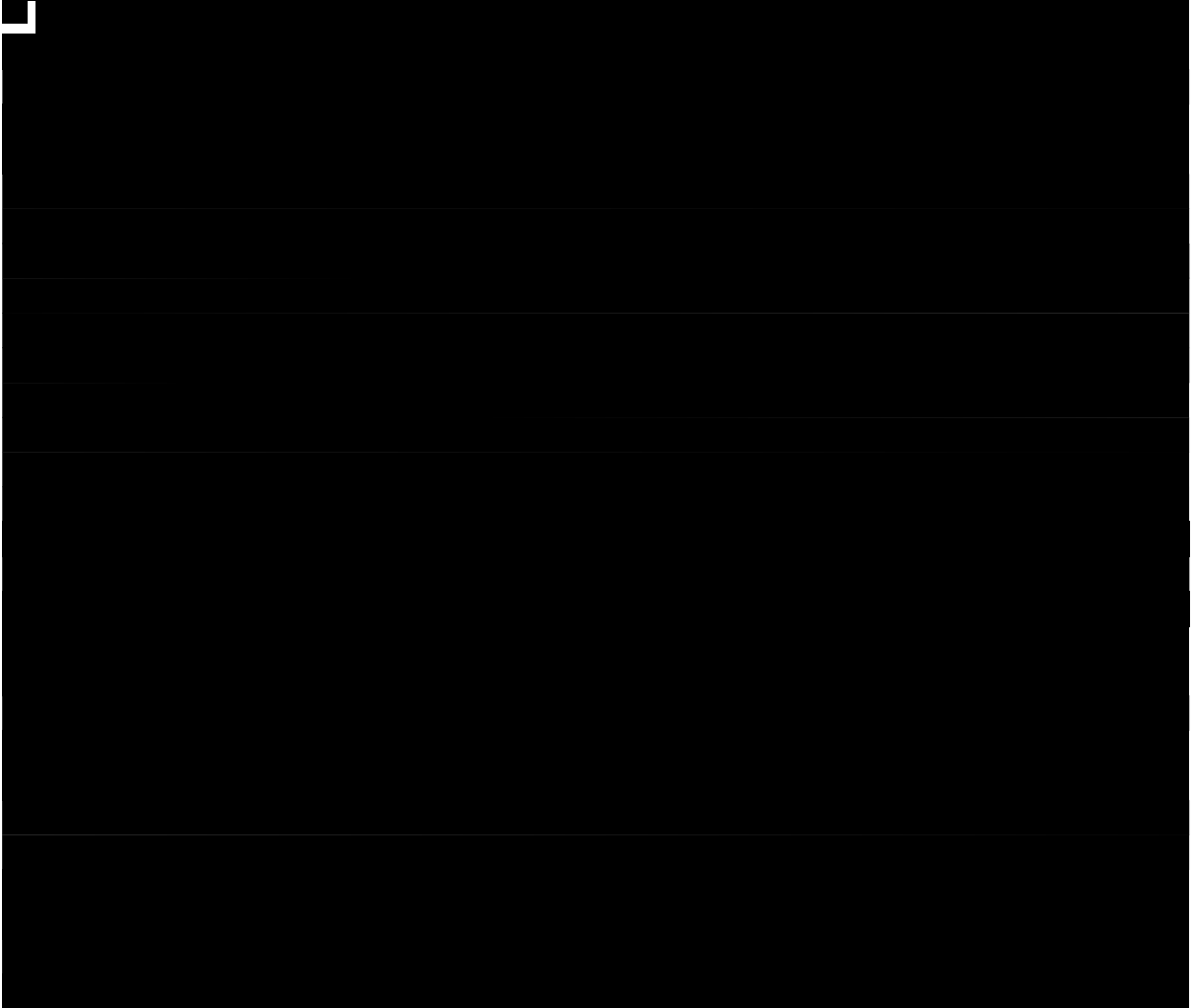
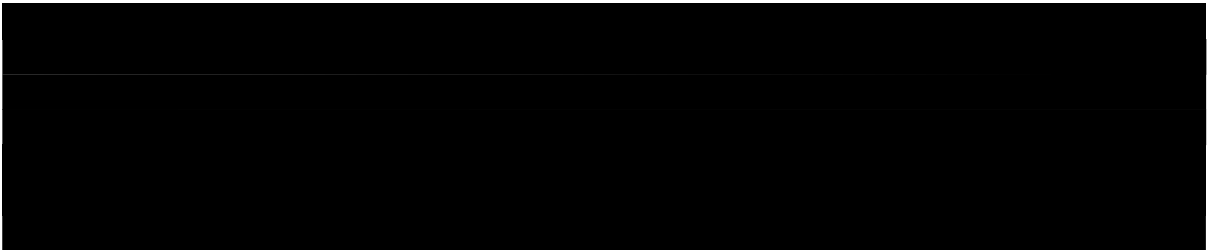
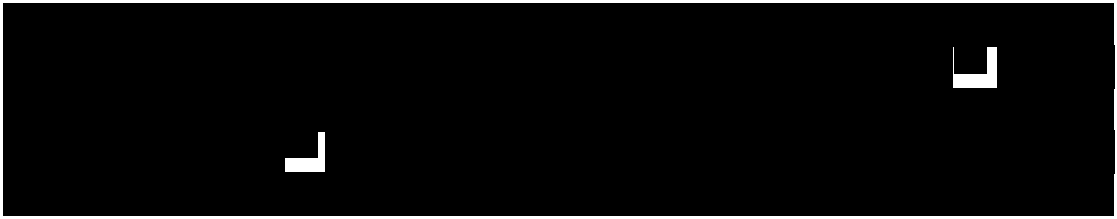
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D. TRIBUNAL’S ANALYSIS

305. At the outset, the Tribunal notes that Respondent accepts that the BIT applies to Montenegro as a matter of international law, following its secession from the Federal Republic of Yugoslavia.³⁹¹

1. Whether the Tribunal lacks jurisdiction ratione materiae

306. Article 1(1) of the BIT states:

[REDACTED]

³⁹¹ Counter-Memorial, fn. 168.

“For the purpose of this Agreement

(1) the term ‘investment’ comprises all assets invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and in particular, though not exclusively:

- (a) movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges, usufructs and similar rights;
- (b) shares, bonds and any other kind of securities or participations in an enterprise;
- (c) claims to money, claims to any performance or any other claim under contract having an economic value;
- (d) intellectual and industrial property rights, including, but not limited to, copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;
- (e) concessions granted in accordance with the laws and regulations of the Contracting Party in the territory whereof the investment is being made.

307. According to Respondent, Claimant’s alleged investments do not meet the requirements for an investment under the BIT, and also under the ICSID Convention.
308. With regard to the requirements for an investment under the BIT, Respondent contends that the words “invested by an investor” show that the investment must be an active investment, made by the investor through an exchange of resources. With regard to the requirements under the ICSID Convention, Respondent’s position is that while the ICSID Convention left the term “investment” undefined, this does not enable Claimant to avoid establishing any criteria in assessing the existence of the investment under the ICSID Convention. According to Respondent, “there is an increasing recognition in international arbitral awards that the term ‘investment’ must have an objective, inherent meaning”.³⁹² While Respondent acknowledges that the *Salini* test “is not applied as a strict criteria”,³⁹³ the criteria have evolved “as a means of establishing with reference to objective criteria whether there is an ‘investment’ for the purposes of Article 25(1) of the ICSID Convention”.³⁹⁴ Respondent maintains that Claimant has failed to meet these criteria.
309. On the other hand, Claimant argues that there is nothing in the BIT that requires the investment to be an “active investment”, and that its ownership of the Bank’s shares is sufficient to qualify as an investment under Article 1(1)(b) of the BIT. With regard to the ICSID Convention requirements, Claimant asserts that the *Salini* criteria are not jurisdictional conditions, and that tribunals have only found them to be reflective of

³⁹² Counter-Memorial, at 181.

³⁹³ Rejoinder, at 186.

³⁹⁴ Rejoinder, at 186.

typical investments. It maintains that since the BIT expressly recognises “shares, bonds and any other kind of securities or participations in an enterprise” as a protected investment, it has established the existence of an investment sufficient to meet the requirement of jurisdiction *ratione materiae*. However, in its submissions, Claimant has also sought to prove that its investments meet the *Salini* criteria.

310. The Tribunal recalls that the meaning of the term “investment” under Article 25(1) of the ICSID Convention has been, and continues to be, one of the most disputed issues in investment arbitration to date. As shown below, in its interpretation of this term, the Tribunal finds little guidance in the text of the ICSID Convention itself or in its drafting history.
311. In its interpretation of the term “investment” in the ICSID Convention, the Tribunal looks to the provisions of the Vienna Convention on the Law of Treaties (“VCLT”), beginning with Article 31(1)’s prescription that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms employed, seen in their context and in light of the object and purpose of the treaty. The Tribunal considers that, as held by the *Philip Morris v. Uruguay* tribunal, the ordinary meaning of the term “investment” is broad and may cover a wide range of economic operations and transactions, subject to the States’ agreement in their BIT, “to define the scope of the ‘investment’ that they accept to protect by their treaty”.³⁹⁵
312. The context in which the term investment is placed within the ICSID Convention, and the object and purpose of such Convention, do not provide guidance in the analysis of the term. The Preamble of the ICSID Convention refers to “the need for international cooperation for economic development and the role of private international investment therein”, which may be construed both as supporting a broad meaning for the term “investment”, and a narrower one.
313. With regard to the subsequent State practice (Article 31(3)(b) of the VCLT) or pertinent case law (even assuming that other arbitral awards can be considered to be “judicial decisions” within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice), the Tribunal finds little guidance therein. The definitions of “investment” in international investment treaties and domestic investment legislation vary considerably, as does the jurisprudence on the matter. However, it is clear from the ordinary meaning of the term “investment” from subsequent State practice and relevant arbitral jurisprudence that the term has so called “outer limits”. These are usually understood to exclude ordinary commercial transactions, such as one-off sale agreements, from the sphere of application of the ICSID Convention. As held by the *Philip Morris v. Uruguay* tribunal:

³⁹⁵ *Philip Morris v. Uruguay*, Decision on Jurisdiction, at 203 (Exhibit CL-0051(2)).

“This meaning would in any case be subject to the outer limits of an economic activity that would not encompass within the notion of investment, and therefore the Centre’s jurisdiction, a single commercial transaction, such as the mere delivery of goods against payment of the price. Within such expansive limits, however, it is for the States’ agreement, as reflected in the present case by the BIT, to define the scope of the “investment” that they accept to protect by their treaty [...].”³⁹⁶

314. The Tribunal also recalls that the drafters of the ICSID Convention deliberately chose to leave the term “investment” undefined, as shown in the 1965 Report of the Executive Directors of the ICSID Convention:

“27. No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).”³⁹⁷

315. The Tribunal notes that the Parties’ positions reflect the two schools of thought – the subjective and the objective one – on the meaning of the term “investment” under Article 25(1) of the ICSID Convention. While Claimant considers that the definition of “investment” under the BIT should be given considerable weight in interpreting Article 25(1) of the ICSID Convention, Respondent counters that beyond the definition in the BIT, the term “investment” has an inherent meaning” entailing “an active investment via a contribution of resources to Montenegro, or an exchange of resources in exchange for the investment”.³⁹⁸
316. The Tribunal, after examining the evidence before it, concludes that, whether one adopts the interpretation propounded by Claimant or the one from Respondent, it finds that Claimant made a qualifying “investment” and dismisses the objection *ratione materiae*. Adopting Claimant’s subjective interpretation based on the expression of the will of the State Parties to the BIT, ownership of the Bank’s shares would satisfy the requirements of both the ICSID Convention and the BIT. On the other hand, adopting Respondent’s interpretation, the Tribunal finds that Claimant’s shares in the Bank, acquired *via* the CKTA and the Shares Purchase Agreement, coupled with the follow-on investments in the form of capital contributions and a subordinated loan, correspond to the objective definition of an investment under the ICSID Convention and the BIT.
317. If the Tribunal adopts Claimant’s interpretation, its mere ownership of the shares in the Bank would qualify as an investment, both under Article 25(1) of the ICSID Convention, as well as Article 1 of the BIT. Claimant acquired the shares of the Bank (a) *via* the CKTA (per Claimant’s case, as of 28 June 2013, or on Respondent’s view,

³⁹⁶ *Philip Morris v. Uruguay*, Decision on Jurisdiction, at 203 (Exhibit CL-0051(2)).

³⁹⁷ ICSID Executive Directors’ Report, at 27 (Exhibit RL-0017).

³⁹⁸ Rejoinder, at 150.

as of 26 March 2014),³⁹⁹ and (b) *via* a Shares Transfer Agreement dated 9 July 2014.⁴⁰⁰ Following Claimant’s position, since the BIT specifically identifies “shares, bonds and any other kind of securities or participations in an enterprise” as an investment, Claimant’s ownership of the Bank’s shares meets the definition of the term “investment” under Article 1(1) of the BIT.

318. Under this interpretation, considering that the jurisdictional requirements in the underlying investment treaty are satisfied, it would take exceptional circumstances to refuse to exercise jurisdiction on the basis of Article 25(1) of the ICSID Convention. The Parties to the BIT have agreed to protect investments consisting of “shares, bonds and any other kind of securities or participations in an enterprise”. The Tribunal considers that there are no exceptional circumstances to justify declining jurisdiction and overriding this protection granted by the BIT parties to investments such as Claimant’s shareholding.
319. First, the Tribunal finds that the words “assets invested by an investor” does not mean, as Respondent argues, that the investment must have been an “active investment” that was made “through the contribution of resources to Montenegro or an exchange of resources to acquire an asset”.⁴⁰¹ The words “assets invested by an investor” is found in Article 1(1) of the BIT, which states, “the term ‘investment’ comprises all assets invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and in particular, though not exclusively [...] (b) shares, bonds and any other kind of securities or participations in an enterprise”. The Tribunal considers that this provision only sets forth a legal and geographical limitation to the Tribunal’s jurisdiction, meaning that the Tribunal’s jurisdiction only extends to investments which are located in or “invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter” (*i.e.*, the host State). In this case, there is no question that Claimant holds the shares in the Bank, which is located in Montenegro, the host State.
320. Second, the Tribunal notes that owning shares in a company cannot be deemed to be beyond the “outer limits” of Article 25(1) of the ICSID Convention, as it is not in any way equivalent to an ordinary commercial transaction, such as a one-off sale agreement.
321. Thus, if the Tribunal were to endorse Claimant’s interpretation of the term “investment” in Article 25(1) of the ICSID Convention, the Tribunal would find that the definition of the “investment” in Article 1(1) of the BIT falls squarely within the bounds of the term “investment” in Article 25(1) of the ICSID Convention. The Tribunal would thus uphold jurisdiction *ratione materiae* in the present case.

³⁹⁹ Respondent’s CKTA (Exhibit R-0019).

⁴⁰⁰ Share Transfer Agreement in Hypo-Alpe Aldria Bank a.d. Podgorica between Hypo Alpe Aldria Leasing d.o.o. Podgorica and Hypo SEE Holding AG, 9 July 2014 (Exhibit C-0043).

⁴⁰¹ Rejoinder, at 156.

322. If the Tribunal were to adopt Respondent’s interpretation and find that the term “investment” has an inherent meaning, encompassing the *Salini* criteria, the conclusion would be the same: Claimant has made an investment and the objection to jurisdiction *ratione materiae* must be dismissed.
323. It is common ground that the *Salini* criteria consist of the following:
- (i) A contribution by the investor;
 - (ii) A certain duration of the investor’s activity;
 - (iii) An economic risk; and possibly,
 - (iv) A contribution to the economic development of the host State.⁴⁰²
- a. Contribution*
- i. Claimant’s shares in the Bank constitutes its contribution*
324. With regard to contribution, the Tribunal finds that Claimant’s contribution consisted of the shares in the Bank. It first acquired the majority of the shares *via* the CKTA, and then purchased the 140 remaining shares through the Shares Transfer Agreement dated 9 July 2014. The Tribunal considers that the acquisition of these shares constitutes a contribution, which is something of value acquired by Claimant, which is in Montenegro.
325. There is a dispute between the Parties with regard to the date on which Claimant acquired the shares in the Bank *via* the CKTA – whether this occurred on 28 June 2013 (Claimant’s position) or 26 March 2014 (Respondent’s position). For purposes of jurisdiction, whether the acquisition occurred on either date is of no consequence, as both dates pre-date 2015 when the Law on Conversion was enacted and took effect.
326. In any event, the Tribunal considers that Claimant acquired the shares in the Bank *via* the CKTA on 26 March 2014. Since the Parties have discussed this issue extensively in their submissions, the Tribunal sets forth its analysis of the issue below.
327. Claimant argues that it should be considered as the beneficial owner of the shares as of 28 June 2013, which was the amended Effective Date of the CKTA. Respondent argues that Claimant acquired its shares in the Bank on 26 March 2014, which was the date on which the transfer of shares from HAAB to Claimant pursuant to the CKTA was registered with the CDA.⁴⁰³ Respondent disagrees with Claimant that it acquired beneficial ownership of the shares in the Bank as of 28 June 2013, or that there was a trusteeship over these shares, as the CKTA merely obliges HETA to transfer dividends

⁴⁰² *Salini v. Morocco*, at 52 (Exhibit CL-0006).

⁴⁰³ CDA (Exhibit R-0021).

to Claimant and stipulates that Claimant would reimburse HETA for costs incurred in holding the shares from that date until the date of transfer of the legal title.⁴⁰⁴

328. The Tribunal does not find merit in Claimant's argument and finds that Claimant obtained ownership over the Bank's shares on the date of the registration of the transfer of the shares in the CDA, *i.e.*, on 26 March 2014.
329. This is clear under Clause 2.3 of the CKTA, which states:

Clause 2.3

From Exhibit C-0037:

“2.3 Legal effect of the transfer

The legal effect of the transfer of the SEE shares only becomes effective after all required legal steps under local law, necessary for the legal effect under the property law, have been made. Therefore [HAAB] and [Claimant] shall each take the necessary legal steps after fulfilment of the conditions precedent, according to item 5, required under local law for the legal effect of the transfer of the SEE shares, especially sign local transfer agreements in the required form and eventually additionally required local transfer actions for a legally valid transfer.

To the extent approvals of third parties are required with regard to the investments in kind of the SEE shares in the sense of this agreement, such will be obtained before the transfer measures, described in this item 2.3, are taken.”

From Claimant's Rejoinder on Preliminary Objections (translation of a part of Clause 2.3)⁴⁰⁵

“2.3 Effectiveness of Transfer

The transfer of the SEE Participations shall be legally effective only once all legal actions have been taken which are necessary for it, according to local property law [...]

From R-0019:

“2.3 Validity of the transfer of shareholdings

Validity of the SEE ownership share transfer will come into force only after all legal measures have been taken in line with local law on legal ownership validity. [HAAB] and [Claimant] will, following the fulfilment of the suspensive condition according to point 5 which stipulates taking

⁴⁰⁴ Rejoinder, at 201.

⁴⁰⁵ Rejoinder on Preliminary Objections, at 16.

all necessary legal steps in line with the local law with regards to validity of SEE ownership shares transfer, particularly sign local contract on share transfer in required form and, if needed, add to it locally required documents for transfer.

If the third party's consent is needed for entering the ownership shares of SEE with regards to this contract, this will be acquired before steps are taken in line with paragraph 2.3."⁴⁰⁶

330. No matter which translation is used, it is clear that Clause 2.3 provides that the transfer of the shares would only become legally effective or valid when all legal measures/actions have been taken in accordance with the local law on ownership/property, *i.e.*, Montenegrin Law. The registration of Claimant's ownership of the shares in the CDA was the final step that secured Claimant's ownership of the Bank's shares.
331. Both legal experts agree on this.⁴⁰⁷ According to Claimant's expert [REDACTED], and agreed upon by Respondent's expert [REDACTED], Articles 2 and 3 of the Montenegrin Law on Securities require that shares have to be recorded in a register kept by the CDA. Per Article 100 of the Montenegrin Law on Securities, the owner as recorded in the CDA shall be considered the owner of the shares and under Article 101, "ownership may (presumably: only) be transferred by registration of the shares in another account".⁴⁰⁸
332. Considering that under Montenegrin Law, the transfer of shares would be legally effective upon the registration of such transfer in the CDA, Claimant thus obtained ownership over the shares on 26 March 2014.
333. The Tribunal is not persuaded that Claimant had beneficial ownership over the shares as of the Effective Date. Claimant relies on [REDACTED] opinion as cited in paragraph 267 above. [REDACTED] opines that since Claimant was "entitled to receive the dividends, but also had to bear any cost in connection with the holding", it can be considered the beneficial owner of the shares.⁴⁰⁹ As explained by [REDACTED],⁴¹⁰ beneficial ownership is a legal term that is defined under Article 24 of the

⁴⁰⁶ Respondent's CKTA, p.3, at Clause 2.3 (Exhibit R-0019).

⁴⁰⁷ [REDACTED]; [REDACTED].

⁴⁰⁸ [REDACTED]; Republic of Montenegro Law on Securities, Official Gazette of Montenegro, Nos. 59/00, 10/01 (Exhibit R-0020).

⁴⁰⁹ [REDACTED].

⁴¹⁰ [REDACTED].

Federal Tax Code⁴¹¹ and Article 2 of the Code on the Register for Beneficial Owners.⁴¹² In accordance with these laws, a beneficial owner is one that is “entitled to exercise control over the assets and to defend the ownership vis-à-vis third parties”.⁴¹³ Claimant’s entitlement to receive dividends, and its obligation to reimburse HETA for costs incurred in holding the shares until the legal title was transferred, merely reflect Claimant’s contractual rights and obligations in relation to HETA under the CKTA.

⁴¹¹ “1) Unless otherwise stipulated in the tax provisions, the following provisions shall apply to the attribution of the economic goods for the purpose of taxation:

- a) Assets which have been assigned for the purpose of security shall be attributed to the party granting the security.
- b) Assets which have been transferred to a trustee shall be attributed to the trustor.
- c) Assets acquired by a trustee for a trustor are attributed to the trustor.
- d) Assets over which someone exercises control like an owner are attributed to that owner.
- e) Assets belonging to more than one person shall be attributed to them as if they were entitled after fractions. The amount of the fractions shall be determined on the basis of the proportions of the assets to which the persons concerned are entitled undivided or, if the proportions cannot be determined, on the basis of the proportions which would accrue to the persons concerned in the event of the dissolution of the community.”

The above excerpt is as translated in [REDACTED]. See also Federal Tax Code, Article 24, BGBl Nr. 194/1961, entered into force 1 January 1962 (Exhibit R-0163).

⁴¹² “1) Beneficial owners are all natural persons who ultimately own or control a legal entity, including at least the following persons:

- 1. in the case of companies, in particular legal entities pursuant to § 1 par. 2 fig. 1 to 11, 13 and 14:
 - a) all natural persons who directly or indirectly hold a sufficient proportion of shares or voting rights (including in the form of bearer shares), have a sufficient interest in the company (including in the form of a business or capital share) or exercise control over the company:
 - aa) Direct beneficial owner: if a natural person holds more than 25% of the shares or voting rights in the Company, or holds more than 25% interest in the Company, or if one or more natural persons jointly exercise direct control over the Company, such natural person or persons shall be direct beneficial owners.
 - bb) Indirect beneficial owner: where an entity holds more than 25% of the shares or voting rights or more than 25% interest in the company and one or more individuals exercise joint direct or indirect control over that entity, that individual or individuals shall be indirect beneficial owners of the company.

If several entities controlled directly or indirectly by the same natural person or persons hold in aggregate more than 25 per cent of the shares or voting rights of the company or more than 25 per cent interest in the company, such natural person or persons shall be beneficial owners.

A share of shares or voting rights directly held by the aforementioned natural person or persons or a directly held participation shall be added in each case. Supreme legal entities are those legal entities in an investment chain that are directly controlled by indirect beneficial owners and those legal entities in which indirect beneficial owners directly hold shares, voting rights or an interest, if these, together with the aforementioned legal entity(s), establish beneficial ownership. If the beneficial owner performs a function under item 2 or item 3, the entity in question is always the ultimate entity.

The term ‘legal entity’ within the meaning of this item also includes comparable legal entities within the meaning of § 1 with their registered office in another member state or in a third country.

Control exists in the case of a shareholding of 50 per cent plus one share or an interest of more than 50% held directly or indirectly. Furthermore, control is also given if the criteria pursuant to § 244 para. 2 UGB (Austrian Commercial Code) are met or if a function pursuant to no. 2 or no. 3 is exercised with a supreme legal entity or if the company is ultimately controlled in some other way. Furthermore, a trustor or a comparable person establishes control through a trusteeship or a comparable legal relationship.”

The above excerpt is as translated in [REDACTED]. See also Code on the Register for Beneficial Owners, Art 2, BGBl Nr. 136/2017, entered into force 16 September 2017 (Exhibit R-0164).

⁴¹³ [REDACTED]

They do not reflect any right held by Claimant to have control over the shares and defend its ownership vis-à-vis third parties. Therefore, the Tribunal agrees with Respondent that Claimant did not qualify as a beneficial owner under Austrian Law. The Tribunal therefore finds no basis to hold that Claimant was the “beneficial owner” of the shares as of the Effective Date.

334. The motivation behind the CKTA was for the parties to benefit from the Reorganization Tax Act. This Act allows parties to transfer assets at their book value without taxation of the difference between book value and real value of the assets (the profit). The Reorganization Tax Act defines the Effective Date as “the day on which the assets are to be transferred to the acquiring corporation with tax effect. The date can also be referred back to a date prior to the signing of the contribution agreement [...].”⁴¹⁴ The Tribunal agrees with [REDACTED] that the Effective Date is the date on which only the tax effect is transferred to the acquiring corporation, but not the title to the shares.⁴¹⁵ Thus, the Effective Date does not indicate the date on which Claimant became the owner of the shares.
335. In conclusion, the Tribunal holds that Claimant first became a shareholder of the Bank as of the date of the registration of the transfer in the CDA, which was on 26 March 2014.

ii. Claimant’s shares in the bank, coupled with its capital contributions and the subordinated loan it extended in favour of the Bank, constitutes its contribution

336. Respondent maintains that since Claimant paid no consideration in return for its acquisition of the Bank’s shares *via* the CKTA, there was no contribution of resources nor an exchange of resources in exchange for the investment.⁴¹⁶
337. Even if the Tribunal accepts that the definition of “investment” includes an element of contribution, then, on the facts of the case, Claimant made a contribution.
338. Claimant’s acquisition of the Bank’s shares (as discussed in the section above), and its follow-on investments in 2015 and 2016, viewed globally, constitute Claimant’s contribution under Respondent’s understanding of the term “investment”. It is acknowledged by Respondent that Claimant made subsequent contributions to the Bank’s capital in 2015 and 2016, and that these contributions are investments.⁴¹⁷ These capital contributions are supported by documentary evidence in the form of the Bank’s

⁴¹⁴ [REDACTED].

⁴¹⁵ [REDACTED].

⁴¹⁶ Rejoinder, at 150, 204.

⁴¹⁷ Tr., Day 1, 50:21-50:24.

audited financial statements.⁴¹⁸ Moreover, the Bank's 2016 financial statements establish that Claimant extended a subordinated loan in favour of the Bank on 16 December 2016.⁴¹⁹

339. The Tribunal considers that the follow-on investments made in 2015 and 2016 should be considered together with Claimant's acquisition of shares in the Bank, and not in isolation. These investments are part of the same overall operation, of the same investment as the initial acquisition of shares which occurred in 2014. Indeed, it was *because* Claimant acquired the shares in 2014 that it made several follow-on investments in 2015 and 2016. In other words, Claimant acquired the shares in 2014, before the dispute arose, and supported its investment through capital contributions and a loan when such investment required it to lend support. This distinguishes the instant case from other cases where no investment existed before the dispute with the host State arose.

b. Duration of activity

340. The Parties have not substantively discussed this issue. The Tribunal observes that Claimant's investment entailed a certain duration: after acquiring the shares in the Bank in 2014, Claimant continued to hold these shares for a number of years, throughout the series of events pertinent for this arbitration.

341. Therefore, the Tribunal finds that the investment meets the criterion of duration.

c. Economic risk

342. Respondent argues that Claimant was insulated from risks up until the Closing of the SPA between AI Lake and HETA on 20 July 2015, as HETA assumed all financial and operational risks vis-à-vis the Bank prior to the Closing of the transaction. By the time Claimant assumed any risk, the draft Law on Conversion was then being debated, and was in fact enacted 11 days after the SPA. Moreover, according to Respondent, the existence of the Buyer Brush Transactions undermines the risk.

343. The Tribunal considers that Claimant, as the sole shareholder of the Bank, a commercial enterprise, was subject to the economic and business risks that are characteristic in any commercial enterprise such as a bank. The fact that HETA "remain[ed] responsible for the provision of funding and liquidity to the Members of the Target Group [Claimant and the SEE Banks] until Closing"⁴²⁰ only shows that *prior to Closing*, the seller of the shares (HETA), and not the purchaser (AI Lake), remained responsible for Claimant and the SEE Banks – a common feature of a share purchase agreement. This says

⁴¹⁸ Financial Statement of Addiko Bank AD Podgorica, 2015, p.67 (Exhibit C-0009); Financial Statement of Addiko Bank AD Podgorica, 2016, p. 58 (Exhibit C-0023).

⁴¹⁹ Financial Statement of Addiko Bank AD Podgorica, 2016, p. 60 (Exhibit C-0023).

⁴²⁰ SPA between HETA and AI Lake, Clause 10.2.2. (Exhibit R-0113).

nothing about the risks incurred by Claimant after Closing, which remained the normal business risks associated with an investment in a bank.

344. Therefore, the Tribunal finds that the investment meets the criterion of economic risk.

d. Contribution to the economic development of the host State

345. Respondent contends that Claimant has submitted no evidence to prove any contribution to Montenegro's development. On the other hand, Claimant submits that through its banking operations and the introduction of new products and services in the banking sector, it has contributed to the development of the economy of Montenegro.

346. The Tribunal considers that the contribution to the economic development of the host State is not a decisive criterion for determining the existence of an investment. In any event, the Tribunal finds that Claimant's investment within the banking sector, an essential sector for any host State, entailed a contribution to the economic development of Montenegro.

347. In conclusion, regardless of whether the Arbitral Tribunal adopts the interpretation of the term "investment" put forward by Claimant or the one put forward by Respondent, the result remains that Claimant has made a qualifying "investment" under Article 25(1) of the ICSID Convention and Article 1(1) of the BIT, and the objection to jurisdiction *ratione materiae* is dismissed.

2. Whether the Tribunal lacks jurisdiction *ratione personae*

348. Article 1(2) of the BIT states that:

“(2) the term ‘investor’ means

- (a) any natural person having the nationality of one Contracting Party and making an investment in the other Contracting Party's territory;
- (b) any juridical person or partnership, constituted in accordance with the legislation of one Contracting Party, having its seat in the territory of that Contracting Party and making an investment in the other Contracting Party's territory;
- (c) any juridical person or partnership, constituted in accordance with the legislation of one Contracting Party or of a third Party in which the investor referred to in a) or b) exercises a dominant influence.”

349. While Respondent acknowledges that Claimant is a legal entity registered in Austria,⁴²¹ it submits that Claimant is not an investor protected by the BIT because Claimant has not made an “active” investment in Montenegro. According to Respondent, Article

⁴²¹ Counter-Memorial, at 187; Rejoinder, at 153(a).

1(2)(b) of the BIT requires that the investor must be “making an investment” in the host State, and that the verb “making” denotes an “active relationship between the investor and the asset held”,⁴²² meaning that there must be “an acquisition for value or exchange of resources”.⁴²³ Respondent submits that passive ownership is not enough to meet the requirements to qualify as a protected investor under Article 1(2)(b). Respondent submits that its interpretation is supported by Article 1(1) of the BIT which defines “investment” as “all assets invested by an investor”.

350. The Tribunal recalls that the VCLT is applicable in the relationship between Austria and Montenegro, and both Parties refer to the VCLT as support for their arguments. Thus, the Tribunal shall interpret the BIT in light of the provisions of the VCLT.
351. Interpreting the provision in accordance with Article 31(1) of the VCLT, the Tribunal is not persuaded that a “good faith” interpretation of the term “making” in Article 1(2) of the BIT, which takes into account the “ordinary meaning” of the terms employed seen “in their context” and in light of the “object and purpose of the Treaty”, supports the interpretation suggested by Respondent.
352. The Tribunal is of the view that the ordinary meaning of the verb “making” includes an act of acquiring an investment which can be defined as gaining possession or control of, or getting or obtaining something. The emphasis is not on the exchange of monetary value for title or possession, but on the act of obtaining title or possession. Thus, “making” an investment includes instances in which title or possession is obtained over an asset that qualifies as an investment. In this case, Claimant acquired (*i.e.*, obtained title to, gained control over) the shares of the Bank on 26 March 2014, when the transfer was registered with the CDA. Claimant thereafter acquired the remaining 140 shares of the Bank through the Shares Transfer Agreement dated 9 July 2014.
353. Further, the Tribunal considers that the context of the verb “making”, as well as the object and purpose of the Treaty, equally demonstrate that Respondent’s restrictive interpretation of Article 1(2) is not supported by the BIT.
354. First, the Tribunal notes that the relevant part of Article 1(2) defines “investor” as “any juridical person or partnership, constituted in accordance with the legislation of one Contracting Party, having its seat in the territory of that Contracting Party and making an investment in the other Contracting Party’s territory”. Much like the language in Article 1(1) (“assets invested by an investor [...] in the territory of the other Contracting Party in accordance with the laws and regulations of the latter [...]”), the Tribunal considers that this provision only sets forth a legal and geographical limitation to the Tribunal’s jurisdiction. Therefore, the BIT requires that the investment must be made in the “other Contracting Party’s territory”, *i.e.*, the host State. Nothing in this provision

⁴²² Counter-Memorial, at 188.

⁴²³ Rejoinder, at 165.

and in the other BIT provisions requires an investor to be “active” rather than passive. An investor can “make” either an active or passive investment, and the only requirement under the BIT is that such investment be made in “the other Contracting Party’s territory”.

355. Second, as explained in the previous paragraph as well as in paragraph 319 above, the words “all assets invested by an investor [...] in the territory of the other Contracting Party” in Article 1(1) also do not lend credence to Respondent’s interpretation that an active investment is required for an investment to be protected under the BIT. The Tribunal similarly finds that this merely sets forth a legal and geographical limitation to the Tribunal’s jurisdiction.
356. Third, the Tribunal also considers that the interpretation Respondent offers is at odds with the object and purpose of the Treaty. For instance, the Treaty’s Preamble states:

“DESIRING to create favourable conditions for greater economic co-operation between the Contracting Parties,
DESIRING to create and maintain favourable conditions for reciprocal investments,
RECOGNIZING that promotion and protection of investments may strengthen the readiness for such investments and hereby make an important contribution to the development of economic relations [...]”

357. The Tribunal does not consider that such vague and general terms can support the restrictive interpretation of the term “investor” propounded by Respondent. It is the Tribunal’s view that Respondent’s narrow interpretation of the Treaty in general, and Article 1(2) in particular, which seeks to limit the Treaty’s interpretation to one class of investors (*i.e.*, “active” investors) is in direct conflict with the Preamble’s stated purpose of creating favourable conditions for greater economic cooperation between Austria and Montenegro. Investments from “passive” investors would equally serve to promote economic cooperation and the flow of investments from one of the Contracting Parties to the BIT to the other, and would thus meet the stated purposes in the Preamble.
358. Lastly, Respondent has cited the award dated 20 May 2019 in *Clorox Spain S.L. v. Bolivarian Republic of Venezuela* to support its arguments regarding the requirement of an active investment. The *Clorox* tribunal stated:

“800. It is undisputed that Clorox Spain owns 100% of Clorox Venezuela’s shares. Therefore, Clorox Spain owns an asset in the territory of a Contracting Party which, *prima facie*, may be protected under the Treaty.

801. However, it results from the text of the Treaty that its protection is limited to assets that were invested by an investor of a Contracting Party in the territory of the other. This is clearly set out in Article I(2), which

defines as investments ‘... *every kind of assets invested by investors of one Contracting Party ...*’ [...]

[...]

802. In order to enjoy the Treaty’s protection, the asset must have been invested (Article I(2)) and the investment must have been made (Article III(1)) or realised (Articles IV(1) and V(1)) by an individual or entity of one of the Contracting Parties in the territory of the other Contracting Party. In light of the Vienna Convention, which establishes in its Article 31.1 that “[A] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”, regardless of the adjective used by the Treaty, the owner of an asset in the territory of one of the Contracting Parties must have been the active subject of the action of investing. In the absence of this action of investing, there is no investor, which, after all, seems to be nothing more than a simple tautology.

[...]

805. In this respect, both Parties recognise that the BIT requires the investor to invest in the territory of the other Contracting Party. It is on the interpretation of the action of investing that the Parties disagree. Therefore, the Tribunal does not consider to be fully accurate the Claimant’s statement that the Respondent’s position seeks to add additional criteria. Actually, the objection raised by the Respondent does not entail additional requirements to the definition of investment, but simply argues that the alleged investment by Clorox Spain cannot qualify as such because it does not reflect any action of investing. It is the existence of such action of investing that the Tribunal shall analyse to determine whether the shares of Clorox Venezuela, of which Clorox Spain is the owner, constitute an investment, and consequently, whether Clorox Spain is a protected investor.

[...]

815. The Tribunal cannot share such reasoning. The Tribunal is not convinced that said interpretation is compatible with Article 1 of the Treaty, which defines investments as ‘... *every kind of assets, invested by investors of one Contracting Party in the territory of the other Contracting Party.*’ The interpretation rule enshrined in article 31(1) of the Vienna Convention requires that treaties’ provisions be interpreted ‘*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*’. If one gives to the words ‘*invested by investors of one Contracting Party*’ its ordinary meaning, the Treaty requires that in order to have a protected

investment, the holding of shares must result from an action of investing by an investor of one Contracting Party.”⁴²⁴ (emphasis in the original)

359. At the outset, the Tribunal notes that the above-cited award has been annulled. In any event, the award does not stand for what Respondent seeks to ascribe to it. Nothing in the text above supports Respondent’s interpretation that the investment must be “active” in order to be protected. The *Clorox* tribunal, in interpreting the terms “assets invested by investors”, did not state that the investor had to have an active role in order to have an investment that is protected, but only that the claimant has to make a showing of an “investment action”, *i.e.*, that claimant *did something* that could be deemed *investing*.
360. In other words, Claimant meets the definition of “investor” in Article 1(2): Claimant is a “juridical person or partnership, constituted in accordance with the legislation of one Contracting Party, having its seat in the territory of that Contracting Party and making an investment in the other Contracting Party’s territory”. Claimant’s investment, that it *made* (in the sense of “acquired”), consists of its shares in the Bank *via* CKTA, the remaining 140 shares of the Bank within Montenegro, and the follow-on investments in the form of capital contributions and a subordinated loan to the Bank.
361. Therefore, the Tribunal dismisses Respondent’s objections to the Tribunal’s jurisdiction *ratione personae*.

VIII. THE ADMISSIBILITY OF THE CLAIMS

A. RESPONDENT’S POSITION

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⁴²⁴ *Clorox v. Venezuela* (Exhibit RL-0064).

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B. CLAIMANT’S REPLY TO RESPONDENT’S OBJECTIONS

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C. TRIBUNAL’S ANALYSIS

398. Article 9 of the BIT states:

█ [REDACTED]

**“Article 9
Settlement of Disputes between a Contracting Party and an Investor
of the other Contracting Party**

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party concerning the obligations of the latter arising from an investment made by the investor of the first Contracting Party, shall be settled, as far as possible, through amicable negotiations.

(2) If the dispute according to paragraph (1) of this Article cannot be settled by negotiations within three months, the investor may submit the dispute for settlement to a competent court of the Contracting Party which is party to the dispute.

(3) Instead of resorting to the provisions of paragraph (2) of this Article, the investor may choose to submit the dispute for settlement through arbitration to:

- (a) an ad-hoc arbitral tribunal according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL);
- (b) the International Centre for Settlement of Investment Disputes, in the event that both Contracting Parties are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18th, 1965 (ICSID Convention).

[...]

399. In accordance with Article 31 of the VCLT, the interpretation of a treaty must be made “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.
400. The crux of the Parties’ positions turns on the interpretation of the term “instead of” in Article 9(3) of the BIT, in relation to Article 9(2). A good faith interpretation of the terms “instead of” in Article 9(3), which is based on the ordinary meaning of these terms, is “in the place of” or “as a substitute for”.⁵⁰⁶ In other words, the dispute resolution options in paragraphs (2) and (3) are mutually exclusive. An investor may go to domestic courts, or, as a substitute for this option, it may go to international arbitration. There is no good faith interpretation of the words “instead of” which permits the two options under paragraphs (2) and (3) to be cumulative.
401. However, that is not the end of the analysis, as it does not provide any clarity on the object of the investor’s choice. This requires an analysis of the context in which the terms “instead of” are placed, *i.e.*, an analysis of the entirety of Article 9.

⁵⁰⁶ See, <https://www.merriam-webster.com/dictionary/instead%20of>.

402. The Tribunal considers that paragraphs (2) and (3) of Article 9 use very clear language to provide that the investor's option concerns *the same dispute*. Indeed, according to Articles 9(2) and 9(3) of the BIT, "[i]f the dispute according to paragraph (1) of this Article cannot be settled by negotiations within three months", the investor can submit "the dispute" for settlement to the domestic court of the host State party to the dispute (paragraph (2)). However, instead of selecting this option, the investor may choose to go to arbitration with "the dispute" (paragraph (3)).
403. Therefore, if a dispute has been submitted to a competent court under Article 9(2), an investor is precluded from submitting *the same dispute* to arbitration under Article 9(3). Conversely, if the disputes are different, the two options are not mutually exclusive.
404. The word "dispute", in its ordinary meaning, refers to a controversy or disagreement. A dispute is characterised by three elements: (a) the parties to the dispute; (b) the object of the dispute; and (c) the cause of action. It is only if these three elements are identical that two disputes are the same (in the case of identity of parties, a party is assimilated to its privies).
405. The next question is whether "the dispute" that is currently before this Tribunal has been submitted to a domestic court under Article 9(2), through the action filed before the Montenegrin Constitutional Court.
406. The Constitutional Court dispute was initiated by the Bank, Claimant's subsidiary. In this regard, as one of the privies of the Bank, Claimant is assimilated to a party to the Montenegrin proceedings. While not formally named as respondent in the initiative, the Government of Montenegro was a participant in the proceedings and when requested to submit an opinion by the Constitutional Court, it submitted a previous opinion submitted to the Parliament.⁵⁰⁷ The object of the Montenegrin proceedings was the alleged unconstitutionality of various provisions of the Law on Conversion and the Amendment as a matter of Montenegrin Law. The cause of action in the Montenegrin proceedings was Montenegrin law, and specifically, Montenegrin constitutional law.
407. In the present arbitration proceedings, the Parties are Claimant and the Republic of Montenegro. Both Parties are considered privies of the parties to the Montenegrin proceedings. The object of these proceedings is whether the Law on Conversion and the Amendment breach international law, and specifically, the BIT. The cause of action of these proceedings is international law, not Montenegrin law. The fact that Claimant may refer as evidence of breaches of the BIT to various pieces of Montenegrin law does not affect the outcome of this analysis. While the Tribunal may look to the extent to which Montenegrin law has been complied with, this will be part of its factual inquiry.

⁵⁰⁷ Law on the Constitutional Court of Montenegro, Office Gazette of Montenegro, No. 64/2008 dated 27 October 2008, Article 19 (Exhibit R-0107); See also Rejoinder, at 225(b) where Respondent states that "it was a respondent in the proceedings before the Constitutional Court".

However, its legal analysis and ultimate decision will be carried out pursuant to the precepts of international law, and specifically the BIT. In this respect, the Tribunal recalls that, pursuant to Article 3 of the International Law Commission Articles on State Responsibility, “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”. Thus, the Constitutional Court’s decision that the Law on Conversion and the Amendment are compliant with domestic law, is no answer to the question whether the Law on Conversion and the Amendment are compliant with the BIT and international law.

408. In other words, the dispute before the Montenegrin Constitutional Court and the present arbitration proceedings are distinct, as they do not have the same object or the same cause of action. Consequently, the fork-in-the-road provision included in paragraphs (2) and (3) of Article 9 of the BIT does not come into play.
409. In conclusion, the Tribunal considers that Claimant’s claims regarding Respondent’s alleged breach of the BIT and international law are admissible, and denies Respondent’s objection in relation thereto.
410. This conclusion is arrived at by two members of the Arbitral Tribunal based on the reasoning discussed above. One member of the Tribunal arrives at the same conclusion by applying the fundamental basis of the claims test, since the proceeding before the Constitutional Court relates to the constitutionality of the Law on Conversion and the Amendment without any request for damages, while the present case is one for compensation due to alleged violations of Claimant’s rights under the BIT.

IX. WHETHER RESPONDENT HAS FAILED TO AFFORD CLAIMANT’S INVESTMENT FAIR AND EQUITABLE TREATMENT (“FET”)

A. CLAIMANT’S POSITION

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(3) Any change in the form in which assets are invested including legal

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B. RESPONDENT'S POSITION

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C. TRIBUNAL’S ANALYSIS

1. The Applicable Legal Standard under the BIT

a. The general standard

537. Claimant contends that the Law on Conversion and its Amendment are in contravention of the BIT. Specifically, Claimant argues that Respondent’s conduct in promulgating the Law on Conversion and its Amendment was a failure to accord Claimant’s investment fair and equitable treatment, as provided for in Article 2(2) of the BIT.⁷⁴⁷ In its pleadings, Claimant has broken its case down into various components of the FET standard and addressed how they were breached by Respondent. Before that, however, Claimant engages in some discussion as to what is encompassed by the FET standard under the BIT.⁷⁴⁸

[REDACTED]

⁷⁴⁷ Memorial, at 179-230; Reply, at 264-431.

⁷⁴⁸ Memorial, at 179-186; Reply, at 265-278.

538. The Tribunal understands the thrust of these submissions to be two-fold. First, Claimant contends that the applicable standard under Article 2(2) of the BIT is not the same as the minimum standard of treatment under customary international law, but a broader, autonomous standard.⁷⁴⁹ Second, Claimant contends that investment treaty tribunals have generally defined the FET standard to include the following elements:

- Procedural fairness and due process
- Absence of harassment and abuse of power
- Lack of discrimination and arbitrariness
- Reasonableness
- Proportionality
- Transparency
- Stability and predictability
- Legitimate expectations; and
- Legality including compliance with domestic law.⁷⁵⁰

539. Respondent does not disagree with Claimant's view. This is borne out from its Rejoinder, where it states:

“254. ... [T]he Claimant engages in a lengthy, academic discussion of arbitral jurisprudence interpreting the fair and equitable treatment standard and its component elements. The Respondent does not dispute these general statements of arbitral tribunals seeking to explain the meaning of fair and equitable treatment.”⁷⁵¹

540. Respondent, however, contends that Claimant's analysis fails to address a significant threshold question – the standard to which the conduct of a State is to be judged.

⁷⁴⁹ Memorial, at 179-180; Reply, at 268-278 referring to *Biwater Gauff v. Tanzania*, at 591 (Exhibit CL-0018); *Tecmed v. Mexico*, at 155, 156 (Exhibit CL-0026); *MTD v. Chile*, at 110-112 (Exhibit CL-0019); *Occidental v. Ecuador*, Award, at 188-190 (Exhibit CL-0130); *CMS v. Argentina*, Award, at 282-284 (Exhibit RL-0047); *PSEG v. Turkey*, at 239 (Exhibit CL-0125); *Siemens v. Argentina*, at 291 et seq. (Exhibit CL-0037); *Enron v. Argentina*, Award, at 258 (Exhibit RL-0132); *Vivendi v. Argentina II*, Award, at 7.4.5-7.4.9 (Exhibit CL-0033); *Continental Casualty v. Argentina*, Award, at 254 (Exhibit RL-0036); *National Grid v. Argentina*, at 170-171 (Exhibit CL-0152); *Bayindir v. Pakistan*, Award, at 164, 168, 173 (Exhibit RL-0104); *Azurix v. Argentina*, Award, at 361 (Exhibit CL-0119); *Urbaser v. Argentina*, Award, at 604 (Exhibit CL-0120); *CME v. Czech Republic*, at 156 (Exhibit CL-0121); Christoph Schreuer, “*Fair and Equitable Treatment in Arbitral Practice*”, *The Journal of World Investment & Trade* 6 (3) (2005), p.360 (Exhibit C-0025); *Saluka v. Czech Republic*, at 294 (Exhibit CL-0021); *Oko Pankki v. Estonia*, at 230 (Exhibit CL-0122); *Teinver v. Argentina*, Award, at 666 (Exhibit RL-0113); *Cervin v. Costa Rica*, at 452 et seq. (Exhibit CL-0123); *Valores Mundiales v. Venezuela*, at 530 (Exhibit CL-0124); *Inmaris Perestroika v. Ukraine*, Award, at 265.

⁷⁵⁰ Memorial, at 183; Reply, at 265-267 referring to *Micula v. Romania*, Award, at 519 (Exhibit RL-0083); *Siag v. Egypt*, Award, at 450 (Exhibit CL-0097); *MTD v. Chile*, at 109 (Exhibit CL-0019); *LG&E v. Argentina*, Decision on Liability, at 131 (Exhibit RL-0131); *Saluka v. Czech Republic*, at 309 (Exhibit CL-0021); *Invesmart v. Czech Republic*, at 200 (Exhibit RL-0123); *Inmaris Perestroika v. Ukraine*, Award, at 265; *Rumeli v. Kazakhstan*, at 609 (Exhibit CL-0029); *Biwater Gauff v. Tanzania*, at 602 (Exhibit CL-0018); *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.74 et seq. (Exhibit RL-0135); *Unglaube v. Costa Rica*, at 242 (Exhibit CL-0115); *Deutsche Bank v. Sri Lanka*, at 420 (Exhibit CL-0116); *Bosh International v. Ukraine*, at 212 (Exhibit CL-0117); *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, at 284 (Exhibit CL-0118).

⁷⁵¹ Rejoinder, at 254.

Respondent notes that although different tribunals have described this threshold in different ways, the precise language only has limited relevance.⁷⁵² Referring to the tribunal's view in *AES v. Kazakhstan*, Respondent contends that "all interpretations of the phrase set a significant threshold of impropriety".⁷⁵³

541. In light of the Parties' positions, the first question for the Tribunal to consider is whether the phrase "[i]nvestments admitted [...] shall at all times be accorded fair and equitable treatment [...]" in Article 2(2) refers to the minimum standard of treatment under customary international law or whether it refers to a separate, autonomous standard.

542. Article 2 of the BIT titled "Promotion and Protection of Investments" provides:

"(1) Each Contracting Party shall in its territory encourage and create, as far as possible, stable, equitable, favourable and transparent conditions for investments of investors of the other Contracting Party and admit such investments in accordance with its legislation.

(2) Investments admitted according to paragraph (1) and their returns shall at all times be accorded fair and equitable treatment and shall enjoy the full protection of the present Agreement. The same applies without prejudice to the regulations of paragraph (1) also for their returns in case of reinvestment of such returns.

(3) Any change in the form in which assets are invested including legal extension, alteration or transformation thereof shall not affect their character as investments provided that such change is made in accordance with the legislation of the host Contracting Party."⁷⁵⁴

543. Interpreting the Treaty in accordance with the canons of treaty interpretation set out in Article 31(1) of the VCLT, the Tribunal is of the view that the reference to "fair and equitable treatment" in Article 2(2) is not a reference to the minimum standard of treatment under customary international law. The minimum standard of treatment is a well-established concept in international law and the parties to the treaty could have specifically referred to it, if they wished for the customary international law standard to apply. International investment law is replete with examples of investment treaties where contracting parties have expressly made reference to the minimum standard of treatment.

544. Article 2(2) of the BIT in the present case, however, does not refer to international law or to the minimum standard of treatment. It therefore appears that the contracting parties intended for the standard therein to be an autonomous one.

⁷⁵² Rejoinder, at 255 referring to *Waste Management (II) v. Mexico*, at 98 (Exhibit CL-0025); *Biwater Gauff v. Tanzania*, at 597 (Exhibit CL-0018).

⁷⁵³ Rejoinder, at 255; *AES v. Kazakhstan* (Exhibit RL-0079).

⁷⁵⁴ The BIT, Article 2 (Exhibit CL-0002).

545. This view has been endorsed by other investment tribunals as well. For instance, in *Biwater Gauff v. Tanzania*, the tribunal, while discussing a similarly phrased provision in the UK-Tanzania BIT, held:

“590. In the Arbitral Tribunal’s view, as noted by Schreuer and Dolzer, caution must be exercised in any generalised statement about the nature of the ‘fair and equitable treatment’ standard, since this standard finds different expression in different treaties. For example, some treaties (such as the BIT here) simply refer to ‘fair and equitable treatment’. Others include express language treating this standard as an element of the general rules of international law (e.g. the French model treaty), or list this standard alongside the rules of international law.

591. Given the wording of Article 2(2) of the BIT here, the Arbitral Tribunal sees force in the argument that the Contracting States here ought to be taken to have intended the adoption of an autonomous standard, on the basis, as stated by Christoph Schreuer, that: ‘it is inherently implausible that a treaty would use an expression such as ‘fair and equitable treatment’ to denote a well-known concept such as the ‘minimum standard of treatment in customary international law’. If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression’.”⁷⁵⁵

546. Similarly, in *Saluka v. Czech Republic*, the tribunal observed:

“294. Whichever the difference between the customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the ‘fair and equitable treatment’ standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the ‘fair and equitable treatment’ standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a ‘fair and equitable treatment’ standard such as the one laid down in Article 3.1 of the Treaty.”⁷⁵⁶

⁷⁵⁵ *Biwater Gauff v. Tanzania*, at 590-591 (Exhibit CL-0018). In this case, the relevant provision of the BIT (Article 2(2)) provided: “Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party”.

⁷⁵⁶ *Saluka v. Czech Republic*, at 294 (Exhibit CL-0021). In this case, the relevant provision of the BIT (Article 3.1) provided: “Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.”

547. Having decided that the FET standard under the BIT is an autonomous standard, the next question for the Tribunal to consider is what the contours of this standard are. This is not an easy task. In *Oko Pankki OYJ v. Estonia*, for instance, the tribunal observed:

“238. [...] [A]n FET standard is difficult to define, in the abstract, as a matter of international law. The term remains significantly ambiguous and imprecise; it cannot be determined by reference to a dictionary; and it is clearly not synonymous with ‘equity’ under national laws, or even common notions of ‘fairness’ (which may differ between investors and capital-importing states and between states with developing and developed economies). Whilst, in the Tribunal’s view, its meaning significantly overlaps with the minimum standard under customary international law, this FET standard clearly provides a greater protection for the foreign investor. According to the minimum standard under customary international law, an investor is protected against the host state’s [sic] fraud, bad faith, capricious and wilful discrimination or where the host state ‘deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State’ [...].”⁷⁵⁷

548. A similar view was echoed by the tribunal in *Biwater Gauff v. Tanzania*. After finding that the BIT in fact referred to an autonomous standard as opposed to the customary international law minimum standard, the Tribunal stated:

“592. Having said this, the Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.

593. The concept of ‘fair and equitable treatment’ is not precisely defined in the BIT, but appears to give each arbitral tribunal much latitude. As noted by one commentator: ‘It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interest. It is therefore a concept that depends on the interpretation of specific facts for its content’.

594. Similarly, as put by the OECD, the general standard gives the arbitrators the possibility to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes.

595. The BIT therefore leaves the precise scope of the ‘fair and equitable treatment’ standard to the determination of the Arbitral Tribunal, which:

⁷⁵⁷ *Oko Pankki v. Estonia*, at 238 (Exhibit CL-0122).

‘will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable’.”

549. The Tribunal agrees with these observations. A judgment of what is fair and equitable must depend on the facts of the particular case.⁷⁵⁸

b. The relevant threshold

550. A question of threshold, however, remains open. In the Tribunal’s view, Respondent is correct that Claimant has not articulated the standard to which the conduct of a State is to be judged. Respondent is also correct that the threshold is a high one.⁷⁵⁹

551. In *David Minnotte v. Poland*, for instance, it was held:

“190. [...] While the precise formulations of the fair and equitable treatment standard in these, and other, awards differ, they all have in common the notion that the State must be shown to have acted delinquently in some way or other if it is to be held to have violated that standard. It is not enough that a claimant should find itself in an unfortunate position as a result of all of its dealings with a respondent.”⁷⁶⁰

552. The Tribunal agrees with this decision. The standard of fair and equitable treatment under the Treaty does not protect a claimant from any State conduct or intervention. To succeed in a claim that its investment was not accorded fair and equitable treatment, it is incumbent upon Claimant to show that there was some degree of impropriety in the State’s conduct.

c. Specific components of the standard

553. Having determined the relevant threshold against which a State’s conduct is to be judged for there to be a violation of Article 2(2) of the BIT, the next question for the Tribunal to decide is what the specific components of the FET standard are, under the BIT. Claimant contends that the FET standard includes elements such as procedural fairness, due process, absence of harassment and abuse of power, lack of discrimination and arbitrariness, reasonableness, proportionality, transparency, stability, predictability, legitimate expectations, and legality.⁷⁶¹ Respondent expressly confirms that it does not dispute that these elements form part of the FET standard under the Treaty.⁷⁶²

⁷⁵⁸ *Mondev v. USA*, at 118 (Exhibit CL-0128).

⁷⁵⁹ *Biwater Gauff v. Tanzania*, at 597 (Exhibit CL-0018); *Waste Management (II) v. Mexico*, at 98 (Exhibit CL-0025); *Thunderbird v. Mexico*, at 194 (Exhibit CL-0142); *AES v. Kazakhstan*, at 314 (Exhibit CL-0149).

⁷⁶⁰ *David Minnotte v. Poland*, at 198 (Exhibit RL-0080).

⁷⁶¹ Reply, at 265-267.

⁷⁶² Rejoinder, at 254.

554. The Tribunal agrees with the Parties. Various tribunals have held that the FET encompasses the abovementioned elements. In *MTD v. Chile*, for instance, the tribunal observed:

“109. [...] ‘[F]air and equitable treatment’ is ‘a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality’.”⁷⁶³

555. Similarly, in *Micula v. Romania*, it was held:

“519. According to Dolzer and Schreuer, tribunal practice shows that the concepts of transparency, stability and the protection of the investor’s legitimate expectations play a central role in defining the FET standard, and so does compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion and harassment.”⁷⁶⁴

556. In *Electrabel v. Hungary*, the tribunal stated:

“7.74. [...] [T]he obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor’s reasonable expectations with respect to the legal framework adversely affecting its investment.”⁷⁶⁵

557. Claimant has referred to several other awards issued by tribunals, where the concept of fair and equitable treatment has been discussed (see Reply, at paragraphs 265-266 as well as footnotes 294 to 319). The Tribunal shares the scholarly opinions set out in these decisions and will take into account these elements when examining Respondent’s conduct.

558. In addition to these elements, however, and equally importantly, both Parties acknowledge that a State’s right to regulate is also an important consideration when applying the FET standard. The Parties also acknowledge that a balancing exercise needs to be undertaken between this right to regulate and an investor’s expectations.⁷⁶⁶

⁷⁶³ *MTD v. Chile*, at 109 (Exhibit CL-0019).

⁷⁶⁴ *Micula v. Romania*, Award, at 519 (Exhibit RL-0083).

⁷⁶⁵ *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.74 (Exhibit RL-0135).

⁷⁶⁶ Memorial, 184; Reply, at 300-304 referring to *Saluka v. Czech Republic*, at 306 (Exhibit CL-0021); *Electrabel v. Hungary*, Award, at 165 (Exhibit RL-0092); *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, at 273 (Exhibit CL-0118); *El Paso v. Argentina*, Award, at 358 (Exhibit CL-0131); *Mobil v. Argentina*, Decision on Jurisdiction and Liability, at 942 (Exhibit CL-0105); Counter-Memorial, at 211; Rejoinder, at 259-274, referring to *Eiser v. Spain*, at 362 (Exhibit RL-0081); *Parkerings v. Lithuania*, at 332 (Exhibit RL-0034); *EDF v. Romania*, at 217-218 (Exhibit CL-0028); *BG Group v. Argentina*, at 298 (Exhibit RL-0082); *Micula v. Romania*, Award, at 666 (Exhibit RL-0083); *Blusun v. Italy*, at 319(4) (Exhibit RL-0084); *Wirtgen v. Czech Republic*, at 408 (Exhibit RL-0085); *Paushok v. Mongolia*, at 373 (Exhibit RL-0086).

559. The Tribunal agrees with the Parties and the various decisions and scholarly material to which they have referred. A State's right to regulate/legislate is an important aspect of its sovereignty and the inclusion of the FET standard in a treaty does not eliminate this right. As explained by the tribunal in *Eiser v. Spain*:

“362. Absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs. As other tribunals have observed, '[i]n order to adapt to changing economic, political and legal circumstances the State's regulatory powers still remain in place.' '[T]he fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.’”⁷⁶⁷

560. The Tribunal also agrees with Respondent that when balancing a State's right to regulate against an investor's expectations, the Tribunal must afford significant latitude to the State to decide what is appropriate for its own internal needs. This view has been endorsed by several other tribunals. For instance, in *S.D. Myers v. Canada*, the tribunal noted:

“261. [...] [A] [...] tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.”⁷⁶⁸

561. Similarly, in *Marfin v. Cyprus*, the tribunal (referring to the abovementioned paragraph 261 in *S.D. Myers v. Canada*) observed:

“870. The Tribunal endorses this view. It is not up to an arbitral tribunal constituted under an investment treaty to sit in judgment over difficult political and policy decisions made by a State, particularly where those decisions involved an assessment and weighing of multiple conflicting interests and were made based on continuously developing threats to the safety and soundness of the financial system. Unless the measure at issue

⁷⁶⁷ *Eiser v. Spain*, at 362 (Exhibit RL-0081) referring to *Parkerings v. Lithuania*, at 332 (Exhibit RL-0034); *EDF v. Romania*, at 217-218 (Exhibit CL-0028).

⁷⁶⁸ *S.D. Myers v. Canada*, at 261 (Exhibit RL-0046).

is shown to be arbitrary, capricious and unrelated to a rational policy, or manifestly lacking even-handedness, a tribunal should not intervene.”⁷⁶⁹

562. The Tribunal concurs with the abovementioned views. The Tribunal will therefore take into account these principles, as well as the relevant facts and circumstances of the case, in deciding whether Respondent’s conduct was consistent with its obligation to ensure fair and equitable treatment to Claimant’s investment.

2. Whether there has been a breach of the principles of due process and good faith

563. In its Memorial, Claimant contends that Respondent violated the principle of due process by adopting the Abbreviated Procedure in passing the Law on Conversion and its Amendment.⁷⁷⁰ On a related note, Claimant also contends that Respondent’s actions were not in good faith because it introduced the Law on Conversion and its Amendment using public interest “as a pretext” to favour a small group of its citizens and to single out Claimant for unfavourable treatment.⁷⁷¹

564. Claimant submits that Parliament is permitted to adopt the Abbreviated Procedure only in exceptional circumstances and provided that the proposer of the law gives reasons as to why it is necessary to adopt such procedure. Specifically, Article 151 of the Rules of Parliamentary Procedure provides that Parliament can resort to the Abbreviated Procedure only in the following circumstances: (a) when there are unforeseen circumstances capable of causing harmful consequences, should Parliament fail to act promptly; and (b) when there is a need to harmonise Montenegrin laws with those of the European Union, or with international agreements and conventions.⁷⁷²

565. Claimant submits that the proponents of the Law on Conversion failed to submit a valid justification for the Law being adopted using the Abbreviated Procedure. Moreover, the attempted justification was incorrect and misleading. Claimant refers to two statements that it considers to be incorrect. The first one is the statement that a “large number” of Montenegrin citizens find themselves in “debt bondage”.⁷⁷³ The second is the statement

⁷⁶⁹ *Marfin v. Cyprus*, at 870 (Exhibit RL-0091).

⁷⁷⁰ Memorial, at 187, 200.

⁷⁷¹ Reply, at 279.

⁷⁷² Memorial, 187-188; Rules of Procedure of the Parliament of Montenegro, Official Gazette of the Republic of Montenegro, Nos. 51/2006 of 4 August 2006 and 66/2006 of 3 November 2006; Official Gazette of Montenegro, Nos. 88/2009 of 31 December 2009, 80/2010 of 31 December 2010, 39/2011 of 4 August 2011, 25/2012 of 11 May 2012, 49/2013 of 22 October 2013 and 32.2014 - Decision of the Constitutional Court of 31 July 2014, Page 51, Article 151 (cited with amendments) (Exhibit CL-0015) provides: “Exceptionally, a law may be adopted under urgent procedure. Urgent procedure may be applied for adoption of a law that is to regulate issues and relations resulting from circumstances that could have not been foreseen and whose failure to be adopted could cause adverse effects, as well as a law that needs to be harmonised with European legislation or international treaties and conventions. The proposer of the law shall be obliged to state the reasons why it is necessary to adopt the law under the urgent procedure in the explanatory statement to the Bill.”

⁷⁷³ Memorial, at 190.

that the Law on Conversion set forth “a solidary sharing of the costs of exchange rate differences between the state, bank and borrowers”.⁷⁷⁴

566. According to Claimant, both these statements are false because the Law on Conversion pertains to a very small number of borrowers and because the Law “puts the burden of addressing the problems of borrowers under the Swiss Franc Loans onto the Bank only”.⁷⁷⁵
567. Respondent rejects these arguments and responds as below.
568. First, Respondent contends that Claimant is required to meet a high threshold to demonstrate lack of due process. According to Respondent, Claimant has to show that the procedure adopted is “manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of judicial propriety)”⁷⁷⁶ or lacking in transparency and candour to show that there has been a breach of due process.⁷⁷⁷ However, Claimant has failed to do so.
569. Alternatively, Respondent contends that even if Claimant is right and the Abbreviated Procedure was incorrectly adopted, there would not be a breach of due process for the following reasons:
- There are no legal consequences in Montenegro for such incorrect use of parliamentary procedure, provided that the law was enacted with the requisite majority, as it was in this case.
 - Even though the Abbreviated Procedure was in fact used, there is no basis to suggest that the Law on Conversion or its Amendment were enacted without due care and consideration.⁷⁷⁸
570. Similarly, Respondent contends that a high standard of proof is required to rebut the presumption of good faith. Referring to *Bayindir v. Pakistan*, Respondent submits that the standard for proving bad faith is a demanding one, which Claimant has not been able to meet.⁷⁷⁹ In any event, Respondent suggests that Claimant’s case is based on a misunderstood and selective reading of the justification given in support of the Law on Conversion and its Amendment.⁷⁸⁰

⁷⁷⁴ Memorial, at 153-160, 190.

⁷⁷⁵ Memorial, at 192-194.

⁷⁷⁶ Counter-Memorial, at 245 referring to *AES v. Hungary*, at 9.3.40 (Exhibit RL-0039).

⁷⁷⁷ Counter-Memorial, at 245; *Waste Management (II) v. Mexico*, at 98 (Exhibit CL-0025); *PSEG Global v. Turkey*, at 174 (Exhibit CL-0125).

⁷⁷⁸ Counter-Memorial, at 246-247.

⁷⁷⁹ Rejoinder, at 276; *Bayindir v. Pakistan*, Award, at 143 (Exhibit RL-0104).

⁷⁸⁰ Counter-Memorial, at 250-255.

571. The Tribunal has considered the Parties’ positions and the facts and circumstances of the case. As evidenced by the Tribunal’s findings in the preceding section, it is not in dispute that the principles of due process and good faith form part of the FET standard under the BIT. The point of contention, however, is whether Respondent’s actions were in violation of the principle of due process and/or done in bad faith.
572. The Tribunal considers each of these issues in sequence.
573. Looking at the issue of due process first, Respondent is correct that Claimant has not raised this point in its Reply or responded to Respondent’s case set out in the Counter-Memorial.⁷⁸¹ Claimant therefore does not appear to pursue this argument anymore.
574. However, assuming that Claimant does in fact maintain this claim, the Tribunal agrees with Respondent that the threshold Claimant is required to meet to demonstrate a lack of due process is a demanding one.
575. In *AES v. Hungary*, for instance, it was held:

“9.3.40. The Tribunal has approached this question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state’s acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – to use the words of the Tecmed Tribunal – that the standard can be said to have been infringed.”⁷⁸²

576. Similarly, in *Waste Management (II) v. Mexico*, it was observed:

“98. [...] Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process [...]” (emphasis added)

577. Likewise, in *Adel a Hamid Al Tamimi v. Oman*, the Tribunal noted:

⁷⁸¹ Rejoinder, at 253.

⁷⁸² *AES v. Hungary*, at 9.3.40 (Exhibit RL-0133).

“390. In the Tribunal’s view, therefore, to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman’s regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations. It will certainly not be the case that every minor misapplication of a State’s laws or regulations will meet that high standard. That is particularly so, in a context such as the US–Oman FTA, where the impugned conduct concerns the good-faith application or enforcement of a State’s laws or regulations relating to the protection of its environment.”

578. The Tribunal agrees with the views expressed in these decisions. In other words, the Tribunal agrees that there is a need for the process to be “manifestly unfair or unreasonable”, to demonstrate “a complete lack of transparency and candour” or to “surprise a sense of judicial propriety” for there to be a due process violation. Minor procedural irregularities will not amount to a violation of the due process principle as long as the principles of natural justice were respected, and actions were taken in a transparent manner.
579. With this background, there are therefore two questions to consider – was there any procedural irregularity in Respondent adopting the Abbreviated Procedure? If the answer to this question is no, the analysis can end there. If the answer is yes, the question becomes – does that procedural irregularity meet the high threshold for a due process violation set out above?
580. Looking at the first question – both Parties’ experts broadly agree that the Abbreviated Procedure can be adopted when there are unforeseen circumstances which may have harmful effects if the legislature does not act without delay.⁷⁸³ Both Parties’ experts also agree that the proponent of the law is obliged to refer to the reasons why it is considered necessary to adopt the Abbreviated Procedure.⁷⁸⁴ The point on which the Parties’ expert views diverge, however, is whether this justification was in fact given by the proponents of the Law on Conversion and its Amendment at the time of their enactment. [REDACTED] believes that appropriate justification was not given.⁷⁸⁵ [REDACTED], on the other hand, believes that such justification was given.⁷⁸⁶
581. The answer to this issue lies in the record. The record shows that the first draft of the Law on Conversion was tabled on 4 February 2015 by [REDACTED]

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██████████ of the DF political party. Appended to this first draft was an explanation, which, among other things, set out the following reasons for the adoption of the Law on Conversion:⁷⁸⁷

“CHF loans that Montenegrin citizens were using unconsciously and without necessary information and warnings failed to be given both by loan providers, i.e. banks and regulator, i.e. Central Bank, have made the financial position unbearable for thousands of loan beneficiaries in Montenegro.

Notwithstanding the formal legal basis of the standing of commercial banks, as loan providers in CHF, that they are only upholding the agreement that was consensually signed by both parties with the loan beneficiaries, we do believe that the losses of citizens incurred due to the strengthening CHF against EUR are huge, subsequently triggering the debt bondage, i.e. situations when a debtor is repaying his contracted installments with interest, yet the nominal amount of debt is increasing, thus the debtor, regardless the regular repayment of his instalment in EUR, is becoming more and more indebted in EUR, which is unfair and unhuman.

A huge surge in value of CHF against EUR has brought loan beneficiaries, regularly repaying their installments, into the slavery position, thus requiring the reaction of both state and legislator in order to resolve this problem in a manner that all parties in this loan arrangement (bank, client or state) bear jointly and severally the cost of financing new costs based on foreign exchange currency differences.

We believe that this situation arise [sic] due to the consequence of external shocks, which have not been triggered neither by the bank nor the beneficiary, but that the state through the regulator the Central Bank of Montenegro has omitted to educate the citizens on the threat of indexation of CHF denominated loans and accompanying foreign exchange currency risk. The state has also omitted the chance of preventing these speculative agreements shocks by amending regulations.

Having in mind the difficulty of the situation in which huge number of Montenegrin citizens are found, i.e. debt bondage, we do believe that it has been justified and necessary that the legislator makes urgent intervention aimed at halting the occurrence of more severe consequences and proposal od [sic] assuming foreign exchange currency differences by the state, bank and loan beneficiary.”⁷⁸⁸ (emphasis added)

⁷⁸⁷ Draft Bill (Exhibit R-0067).

⁷⁸⁸ Draft Bill, pp.3-4 (Exhibit R-0067).

582. In addition to these reasons, the draft also set out a proposal for adopting the Law on Conversion using the Abbreviated Procedure in the following terms:

“Basis for the adoption of this Law in summary proceeding is laid out in article 151 of the Rules of Procedure of the Parliament. A law that should regulate the issues and relations generated due to unforeseen circumstances may be adopted in summary proceeding, and the failure to adopt a law may trigger adverse consequences.”⁷⁸⁹

583. Similarly, the draft proposal for the Amendment made on 1 August 2016 also contained an explanation elaborating on the reasons for enacting the law. It provided an article-by-article clarification of the proposed amendments and concluded with the following excerpt to justify the use of the Abbreviated Procedure:

“The reasons for enacting this Law in abbreviated procedure are entailed in the provisions of the Article 151 of the Rules of Procedure of the Assembly. The law can be enacted in abbreviated procedure if it regulates issues and relations which emerged in circumstances that could not have been foreseen while failure to enact the law could cause harmful consequences.

The failure to adopt this law would lead to a great number of citizens, clients and their families (over 2000) suffer significant damage caused by foreclosures which are consequences of not implementing the Law on Conversion of loans from Swiss Francs in line with the provisions of this Law.”⁷⁹⁰

584. Having considered these two documents, two points became readily apparent. First, these drafts show that the proponents of the Law on Conversion and its Amendment were aware of Article 151 of the Rules of Procedure, and were mindful that certain requirements needed to be met. Second, the reasons for the proposed Law on Conversion and its Amendment suggest that the proponents considered the CHF Loan crisis to have arisen out of unforeseen circumstances and to be of such seriousness so as to require Parliament’s urgent intervention.

585. [REDACTED] suggested that where reasons for adopting the Abbreviated Procedure are given, the question as to whether those reasons are sufficient is one that is entirely within the discretion of the Montenegrin Parliament and is not subject to judicial review.⁷⁹¹ [REDACTED] was not cross-examined on this point. The Tribunal found [REDACTED] to be both cogent and clear. The Tribunal accepts his evidence.

⁷⁸⁹ Draft Bill, p.5 (Exhibit R-0067).

⁷⁹⁰ Explanatory Notes to the Draft Bill, pp.7-8 (Exhibit R-0111).

⁷⁹¹ [REDACTED].

586. The Tribunal is therefore unpersuaded by Claimant’s argument that the proponents of the Law on Conversion and its Amendment gave no justifications for utilising the Abbreviated Procedure.
587. Although this finding is, in itself, sufficient for the Tribunal to reach a conclusion that Respondent did not violate the principle of due process in adopting the Law on Conversion and its Amendment, the Tribunal notes that it would have reached the same conclusion even if the Law and its Amendment could not have been adopted using the Abbreviated Procedure.
588. In the Tribunal’s opinion, taking Claimant’s case at its highest, there is still no breach of due process because it has not been shown that the procedure adopted was “manifestly unfair or unreasonable” or lacking transparency and candour. A review of the chronology of events will show that after the initial draft was introduced into Parliament on 4 February 2015, it took approximately 5 months for the Law on Conversion to be enacted.
589. During this interim period, the following events took place:
- The Law on Conversion was deliberated upon and certain amendments were suggested by one [REDACTED] (Member of Parliament).⁷⁹²
 - These amendments were put before the Legislative Committee, the Committee on Economy, Finance and Budget as well as the Government of Montenegro in accordance with Article 149(2) of the Rules of Parliamentary Procedure.⁷⁹³
 - The Committee on Economy, Finance and Budget submitted a report on the second draft of the Law on Conversion deeming the amended text “acceptable” and requested the Government of Montenegro and the Central Bank of Montenegro to furnish their respective opinions until the start of the parliamentary discussion.⁷⁹⁴
590. It is only after these steps were completed that the Law on Conversion was put to two votes on 31 July 2015 (a General Vote to adopt the Bill and a Detailed Vote to adopt the text), where it was adopted with an overwhelming majority.⁷⁹⁵

⁷⁹² Democratic Socialist Party of Montenegro Amendments to the Proposal of the Law on the Conversion of Swiss Franc Denominated Loans dated 3 July 2015 (Exhibit R-0068).

⁷⁹³ Letters from Parliament to the Legislative Committee, Committee for Economy, Finance and Budget and the Government regarding the Amendment to the Law on Conversion dated 3 July 2015 (Exhibit R-0069).

⁷⁹⁴ Committee for Economy, Finance and Budget report on the amendments to the proposal for the Law on the conversion of Swiss Franc (CHF)-Dominated Loans into (EUR)-Denominated Loans, 10 July 2015 (Exhibit R-0070).

⁷⁹⁵ Vote on Draft Law on Conversion dated 31 July 2015 (Exhibit R-0071). The General vote was 53-8 (4 abstentions) in favour of the Law and the Detailed Vote was 52-6 (5 abstentions) in favour of the Law.

591. A similar pattern of events preceded the enactment of the Amendment as well. On 1 August 2016, a few Members of Parliament proposed certain amendments to the Law on Conversion.⁷⁹⁶ As with the Law on Conversion itself, these amendments were also placed before the Legislative Committee and the Committee on Economy, Finance and Budget, where they were discussed.⁷⁹⁷ It was only once all of these steps were taken that the proposal for amendment was put to vote on 1 September 2016 and adopted unanimously.⁷⁹⁸

592. Further, and in any event, Respondent's expert explains that there is no legal consequence in Montenegro if an incorrect procedure was used as long as the law was adopted by majority (which is clear in this case).⁷⁹⁹ He observes:

“The Montenegrin Constitutional Court will only declare an act counter-constitutional if the procedural rules which are enshrined in the Constitution have been breached, for example where the required majority envisaged by the Constitution for enactment of various types of laws was not obtained. Article 151 is only a rule of parliamentary procedure; it does not feature in the Constitution and so non-compliance with it could not be a reason for any legislation being declared void.”⁸⁰⁰

593. Although Claimant's expert, [REDACTED], argues otherwise and suggests that “non-compliance with the Rules of Procedure of the Parliament of Montenegro [...] results in the law being unconstitutional from a formal point of view”,⁸⁰¹ he has failed to explain what he means by “formal” unconstitutionality and what effect such “formal” unconstitutionality has on the Law on Conversion and its Amendment. For this reason and for the reasons set out above in paragraph 585 above, the Tribunal prefers [REDACTED] evidence.

594. The Tribunal therefore does not find that there was any impropriety in the procedures that were followed in adopting the Law and its Amendment. Claimant's allegation of breach of due process must therefore fail.

⁷⁹⁶ Explanatory Notes to the Draft Bill (Exhibit R-0111).

⁷⁹⁷ Legislative Committee Report on the consideration of the Proposal for the Law on Amendments and Supplements to the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans, submitted by group of MPs, with an amendment submitted by MP Nebojša Medojević dated 30 August 2016 (Exhibit R-0074); Committee on Economy, Finance and Budget Report on Consideration of the Proposal for the Law on the Conversion of Swiss Franc (CHF)-Denominated Loans Into Euro (EUR)-Denominated Loans dated 30 August 2016 (Exhibit R-0077).

⁷⁹⁸ Proposal for the Law on Amendments and Supplements to the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans dated 30 August 2016 (Exhibit R-0075); Listing of Parliamentary Vote on Law in General dated 1 September 2016 (Exhibit R-0076).

⁷⁹⁹ [REDACTED].

⁸⁰⁰ [REDACTED].

⁸⁰¹ [REDACTED].

595. With respect to good faith, the Tribunal begins its analysis of whether Respondent has violated the principle of good faith by identifying the standard against which Respondent's conduct is to be judged.

596. In its Reply, Claimant has referred to several decisions which set out the appropriate standard. For instance, in *Waste Management (II) v. Mexico*, the tribunal noted:

“138. The Tribunal has no doubt that a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”⁸⁰²

597. Similarly, in *Frontier Petroleum v. Czech Republic*, the tribunal observed:

“Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government [...].”⁸⁰³

598. Likewise, in *Oostergetel v. Slovakia*, the tribunal stated:

“Finally, although it is a general principle of national and international law, the notion of good faith has been analyzed by investment tribunals as an element of the FET standard. Actions such as conspiracy of state organs to inflict damage on an investment, or the use of legal instruments for purposes other than those for which they were created, have been cited by tribunals as examples of actions performed in bad faith which may constitute a violation of the standard.”⁸⁰⁴

599. These decisions cited by Claimant make clear that the standard for showing a violation of the principle of good faith is an exacting one. To prove a violation of the standard of good faith, it must be shown that the State “conspired” to inflict damage on an investment or used a legal instrument “for purposes other than those for which” it was created or engaged in comparable conduct. A similar view is discernible from the decisions cited by Respondent.⁸⁰⁵ Moreover, it is a general principle of international law that “good faith is to be presumed, whilst an abuse of right is not”.⁸⁰⁶

⁸⁰² *Waste Management (II) v. Mexico*, at 138 (Exhibit CL-0025).

⁸⁰³ *Frontier Petroleum v. Czech Republic*, at 300 (Exhibit CL-0126).

⁸⁰⁴ *Oostergetel v. Slovakia*, at 227 (Exhibit CL-0127).

⁸⁰⁵ *Bayindir v. Pakistan*, Award, at 143 (Exhibit RL-0104); *Chevron v. Ecuador*, First Interim Award, at 143 (Exhibit RL-0107); *Oil Platforms Case*, at 33 (Exhibit RL-108).

⁸⁰⁶ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953, 2006), p. 305 (Exhibit RL-0095).

600. With this background, the question before the Tribunal is whether Claimant has adequately shown Respondent's conduct as contravening the high standard set out in the abovementioned decisions so as to displace the presumption of good faith. The Tribunal answers this question in the negative. In the present case, apart from asserting that the public interest put forth by the legislature is misleading (*i.e.*, being used as a pretext), Claimant does not provide adequate evidence to show *mala fide* on part of Respondent.
601. Claimant has not properly articulated on what basis it claims that (a) the Law on Conversion and its Amendment were used as a pretext; or (b) the Law on Conversion was singling out Claimant for unfavourable treatment. In the Tribunal's opinion, this is enough to dismiss the allegation of bad faith, since bad faith has to be proven and a high threshold has to be met. The Tribunal, however, nevertheless evaluates Claimant's limited arguments on this point below.
602. In its Memorial and Reply, Claimant argued that Respondent's invocation of public interest was abusive and misleading for two reasons. First, Claimant submits that the statement that a "large number" of Montenegrin citizens find themselves in "debt bondage" is false because the Law on Conversion pertains to a very small number of borrowers.⁸⁰⁷ Second, Claimant suggests that the statement that the Law set forth "a solidary sharing of the costs of exchange rate differences between the state, bank and borrowers" is also false because the Law "puts the burden of addressing the problems of borrowers under the Swiss Franc Loans onto the Bank only".⁸⁰⁸
603. Respondent refutes these arguments. Instead, it suggests that Claimant's case is based on a selective reading and misunderstanding of the justification given in support of the Law and its Amendment.⁸⁰⁹
604. Having considered the facts and circumstances on the record, the Tribunal agrees with Respondent. Claimant has produced no evidence to suggest that the Law on Conversion and its Amendment were not enacted in the public interest. The explanatory statements accompanying both the Law and its Amendment (reproduced in paragraphs 581 and 583 above) give the impression that these pieces of legislation were enacted to protect the CHF Loan borrowers from financial distress.⁸¹⁰

⁸⁰⁷ Memorial, at 190.

⁸⁰⁸ Memorial, at 153-160, 190.

⁸⁰⁹ Counter-Memorial, at 250-255.

⁸¹⁰ Draft Bill (Exhibit R-0067); Explanatory Notes to the Draft Bill, pp.7-8 (Exhibit R-0111).

605. The Tribunal does not agree with Claimant that the phrase “[m]indful of the dramatic situation faced by a large number of Montenegrin citizens who have found themselves in debt bondage”⁸¹¹ is misleading for the following reasons.
606. First, whether or not there were a “large number” of Montenegrin citizens who were affected by the CHF Loan crisis is not a factor to which the Tribunal gives significant weight because there is no reasonable way to opine on whether or not the number of loan holders is large. Even if the Tribunal were to consider that the Law on Conversion pertained to a small number of individuals, where individuals are suffering from severe financial distress, even a small number can seem large. In any event, Claimant has furnished no authority to suggest that a Parliament cannot enact a legislation to protect a small group of individuals.
607. Second, Claimant’s attempts to link the number of borrowers to the negligible impact on the economic development of Montenegro is misconceived. Even assuming that there was only a negligible impact on Montenegro’s economic development, the Montenegrin Parliament’s motivation in passing the Law on Conversion and its Amendment does not appear to have been predicated on the Montenegrin economy.⁸¹² Rather, the Parliament’s motivation appears to have been the need to protect the CHF Loan holders from financial distress. This is evident from the extract of the Draft Bill:

“[W]e do believe that the losses of citizens incurred due to the strengthening CHF against EUR are huge, subsequently triggering the debt bondage, i.e. situations when a debtor is repaying his contracted installments with interest, yet the nominal amount of debt is increasing, thus the debtor, regardless the regular repayment of his instalment in EUR, is becoming more and more indebted in EUR, which is unfair and unhuman.

[...]

Having in mind the difficulty of the situation in which huge number of Montenegrin citizens are found, i.e. debt bondage, we do believe that it has been justified and necessary that the legislator makes urgent intervention aimed at halting the occurrence of more severe consequences and proposal od [sic] assuming foreign exchange currency differences by the state, bank and loan beneficiary.”⁸¹³

⁸¹¹ Memorial, at 189. The wording in Respondent’s translation of the original document is not substantially different and provides “[h]aving in mind the difficulty of the situation in which huge number of Montenegrin citizens are found, *i.e.*, debt bondage”. See Draft Bill (Exhibit R-0067).

⁸¹² Draft Bill (Exhibit R-0067); Explanatory Notes to the Draft Bill, pp.7-8 (Exhibit R-0111).

⁸¹³ Draft Bill, pp.3-4 (Exhibit R-0067).

608. The more pressing question therefore is whether the CHF Loan holders were in financial distress. For if they were, it cannot be said that the Law on Conversion or its Amendment were used for purposes other than those for which they were created.
609. In the present case, Respondent's witness, [REDACTED], testified as to the financial hardships suffered by the CHF Loan holders. [REDACTED] was a member of the team which had been instructed to act on behalf of some of the CHF loan holders in a collective action against the Bank before the Montenegrin courts.⁸¹⁴ She gave evidence in this arbitration on the experiences of individual loan holders and how their annuities increased (among other things).⁸¹⁵ She highlighted that several of the borrowers of the CHF Loans were, as a result of the appreciation of the Swiss Franc, on the verge of bankruptcy, with the monthly annuities payable exceeding their respective incomes. She also pointed out how even after many years of loan repayment, the amount repayable in Euros had actually increased due to the rise in the value of the Swiss Franc.⁸¹⁶ The Tribunal found [REDACTED] to be a reliable witness, and that her testimony is supported by documentary evidence.
610. The record also shows that the CHF Loan borrowers were having difficulties in meeting their payment obligations. There were several legal actions that were commenced by the CHF Loan holders seeking relief from their payment obligations.⁸¹⁷ The matter was also pursued and discussed before the Committee for Economy, Budget and Finance of the Montenegrin Parliament.⁸¹⁸ Contemporaneous news articles show that the CHF Loans became a matter of concern in several countries in the SEE region (including Montenegro, Bosnia, Croatia, and Serbia).⁸¹⁹ For instance, one news article noted: "Although a relatively small number of Montenegrins took loans indexed in CHF several years ago, for each one of them this arrangement represents a big problem. The drastic increase of CHF in relation to euro has brought nearly 500 people and their families into a situation out of which they cannot see the way out [...]"⁸²⁰
611. Claimant also seems to acknowledge this. In its Memorial, Claimant briefly observed:

"76. As a consequence of the unpegging of the Swiss Franc from the Euro, repayment of Swiss Franc Loans in Euro currency became more expensive for borrowers. Households and businesses were affected."⁸²¹

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817 Plaintiff's Lawsuit dated 17 May 2013 (Exhibit R-0058); [REDACTED].

818 CEZAP Initiative (Exhibit R-0060).

819 Bankar News Article 'In Bosnia, as many as 23 people committed suicide due to loans' dated 21 January 2016 (Exhibit R-0062); Balkan Insight News Article 'Serbian Swiss Franc Borrowers Plan More Protests' dated 2 December 2015 (Exhibit R-0063); Balkan Insight News Article 'Indebted Croats Plan Protest Rallies in Zagreb' dated 23 April 2015 (Exhibit R-0064).

820 Radio Free Europe News Article "Borrowers of 'Swiss Francs' in Montenegro Cannot See a Way Out" dated 21 January 2015 (Exhibit R-0066).

821 Memorial, at 76.

612. All of these pieces of evidence indicate that the CHF Loan borrowers were indeed in financial distress. Claimant's first argument regarding the justification for the Law on Conversion and its Amendment must therefore fail.
613. Similarly, the Tribunal finds that Claimant's second contention must also fail. Claimant argues that Respondent's statement that the Law set forth "a solidary sharing of the costs of exchange rate differences between the state, bank and borrowers" is false because the Law put the burden of addressing the problems of borrowers under the Swiss Franc Loans onto the Bank only. What Claimant fails to consider, however, is that when the original proposal for the Law on Conversion was made and the explanatory statement was furnished, the Law on Conversion did in fact propose a burden-sharing arrangement.⁸²² Respondent's statement therefore could not have been misleading when it was made because it was true at the time. It was only pursuant to amendments proposed in July 2015 that this burden-sharing arrangement was replaced with a different arrangement. In this modified arrangement, although the burden was placed on Claimant, such burden was offset by allowing the Bank to charge a higher rate of interest at 8.2% p.a.⁸²³
614. The Tribunal is therefore unconvinced by Claimant's assertion that Respondent "misrepresented the regime set forth by the Law in order to claim a public interest justifying the Law".
615. Similarly, the Tribunal is also unconvinced that the Law on Conversion and its Amendment were used as punitive measures or were motivated by anything other than to alleviate the financial distress of the CHF Loan holders. In the Tribunal's opinion, reference to negative comments made by a couple of Parliamentarians against Claimant is not sufficient to infer that the Law on Conversion and its Amendment were being used as a "pretext" to punish Claimant. This is all the more the case when the law was passed with an overwhelming majority. In *SD Myers v. Canada*, it was observed:

"161. The intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives. Each of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole."⁸²⁴

⁸²² Draft Bill (Exhibit R-0067).

⁸²³ Democratic Socialist Party of Montenegro Amendments to the Proposal of the Law on the Conversion of Swiss Franc Denominated Loans dated 3 July 2015 (Exhibit R-0068).

⁸²⁴ *S.D. Myers v. Canada*, at 161 (Exhibit RL-0046).

616. In the present case, the record does not give the impression that the Law was passed to punish the Bank. The legislative intent was to protect the CHF Loan holders. The circumstances faced by the CHF Loan holders and the explanatory notes set out above give this impression and there is nothing that Claimant has said apart from reference to the negative comments made by a few Parliamentarians to rebut that view.
617. For all these reasons, Claimant's allegations of bad faith are rejected.

3. Whether Claimant's legitimate expectations were frustrated

618. The next issue for the Tribunal's consideration is whether Claimant's expectations were frustrated by Respondent, in contravention of Article 2(2) of the BIT.
619. Briefly put, Claimant contends that when the Bank began issuing the CHF Loans, the disbursement of such loans was perfectly legal, and its related activities were being undertaken with the knowledge and under the supervision of the Central Bank. Claimant therefore obtained the necessary licenses and made extensive investments into the Bank, based on the regulatory framework as it existed then, the rights and obligations guaranteed under the Montenegrin Constitution, and the protections afforded to investors under international law and the BIT.⁸²⁵
620. Claimant submits that these facts built certain expectations based on the legal order of Montenegro, the level of stability and transparency of the regulatory regime, and the even-handedness of the regime as it stood at the time when the investment was made.⁸²⁶ Respondent, however, did not implement its policies (*i.e.*, the Law on Conversion) in a *bona fide* manner. The Law on Conversion violated the principles of consistency, transparency, even-handedness and non-discrimination and hence violated Claimant's legitimate expectations.⁸²⁷
621. Respondent disagrees with Claimant's position and advances three reasons why Claimant's case based on legitimate expectations cannot be sustained. First, Respondent contends that only specific assurances or representations made by a State can give rise to legitimate expectations. Respondent claims that no such assurances or representations have been made in the present case. Second, Respondent argues that Article 2(1) of the BIT does not impose a strict obligation on Respondent to ensure a stable legal framework. Rather Article 2(1) is framed in aspirational language. Third, Respondent submits that Claimant was not induced by any expectations and even if it were, such expectations were not objectively reasonable.⁸²⁸

⁸²⁵ Memorial, at 204-205; Reply, at 312.

⁸²⁶ Memorial, at 205; Reply, at 313.

⁸²⁷ Memorial, at 203-209; Reply, at 312-335.

⁸²⁸ Counter-Memorial, at 205-334; Rejoinder, at 279-298.

622. The Tribunal has considered the Parties' positions on this issue. It is not controversial that the protection of an investor's legitimate expectations forms part of the FET standard. Several investment treaty tribunals have confirmed this. For instance, in *Electrabel v. Hungary*, it was stated:

"7.74. [...] The obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment.

7.75. It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations [...]."⁸²⁹

623. Similarly, in *Saluka v. Czech Republic*, the Tribunal observed:

"301. [...] An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."⁸³⁰

624. The Tribunal echoes the views of these tribunals.

625. The point of disagreement between the Parties, however, is whether Respondent frustrated Claimant's expectations in the present case. In the Tribunal's opinion, this question requires an inquiry into what Claimant contends its expectations were, whether Claimant was induced into making the investment based on these expectations, whether Claimant's expectations were objectively reasonable and whether the BIT protects the expectations upon which Claimant relied.

626. The Tribunal considers each of these issues below.

627. Claimant contends that its CHF Loans and its banking practices were at all times in compliance with Montenegrin law. The Bank had obtained the necessary licenses and its activities were undertaken with the knowledge and supervision of the Central Bank of Montenegro.⁸³¹ This is not disputed by Respondent. Claimant's case is that its legitimate expectations "rested on the legal order of Montenegro as it stood at the time when the investment was made" and that it was justifiable for Claimant to expect to operate in an environment which was stable and transparent.⁸³²

⁸²⁹ *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.74-7.75 (Exhibit RL-0135).

⁸³⁰ *Saluka v. Czech Republic*, at 301 (Exhibit CL-0021).

⁸³¹ Memorial, at 204; Reply, at 312.

⁸³² Memorial, at 208; Reply, at 315.

628. The Tribunal is not persuaded by this argument for the following reasons.
629. First, the Tribunal agrees with Respondent that, generally, explicit assurances and/or representations need to be made by the host State, and need to be relied upon by an investor, in order for expectations to be legitimate. Moreover, assurances or representations must be specific.
630. The observations in *Parkerings v. Lithuania* are good examples of this approach. In this case, it was held:

“330. In order to determine whether an investor was deprived of its legitimate expectations, an arbitral tribunal should examine ‘[...] the basic expectation that were taken into account by the foreign investor to make investment [...]’. In other words, the Fair and Equitable Treatment standard is violated when the investor is deprived of its legitimate expectation that the conditions existing at the time of the Agreement would remain unchanged.

331. The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment.

332. It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.

333. In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its

investment in order to adapt it to the potential changes of legal environment.”⁸³³

631. In *Blusun v. Italy*, the tribunal elaborated on the nature of the undertaking by the host State and made distinctions between a general law and a contract or promise. The relevant part reads:

“371. It is true that informal representations can present difficulties, which is why tribunals have increasingly insisted on clarity and the appropriate authority to give undertakings binding on the state. It is also true that a representation as to future conduct of the state could be made in the form of a law, sufficiently clearly expressed. But there is still a clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment. There is a further distinction between contractual commitments and expectations underlying a given relationship: however legitimate, the latter are more matters to be taken into account in applying other norms than they are norms in their own right. International law does not make binding that which was not binding in the first place, nor render perpetual what was temporary only [...].”⁸³⁴

632. A similar view was expressed by the *Koch v. Venezuela* and *Philip Morris v. Uruguay* tribunals. In *Koch v. Venezuela*, it was noted:

“8.47 As regards the FET standard under customary international law, the factual evidence remains relevant, to be addressed below. However, as to such evidence, the Tribunal does not consider that the result in this case would be materially different under an FET’s autonomous standard. There was no cogent evidence of KOMSA’s legitimate expectations induced by any specific undertaking or representation made to KOMSA by the Respondent to induce KOMSA’s investment. It is well settled that provisions of general legislation or state policies applicable to a plurality of persons do not suffice generally to establish legitimate expectations required under an FET autonomous standard.”⁸³⁵

633. Likewise in *Philip Morris v. Uruguay*, it was held:

“426. It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation

⁸³³ *Parkerings v. Lithuania*, at 330-333 (Exhibit RL-0034).

⁸³⁴ *Blusun v. Italy*, at 371 (Exhibit RL-0084).

⁸³⁵ *Koch v. Venezuela*, at 8.47 (Exhibit RL-0112).

applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.”⁸³⁶

634. The Tribunal endorses the opinions of these tribunals. An investor’s legitimate expectations are generally created by specific undertakings and representations made by a host State to the investor in order to induce investment. The question, however, is whether any such promise or assurance was made in the present case.
635. Having considered the record, the Tribunal does not believe so. In the present case, Respondent made no specific promise or assurance to Claimant with regard to the CHF Loans or the legal order of Montenegro. Claimant does not even contend otherwise.⁸³⁷ Claimant therefore could not have had any expectations from Respondent based on any express assurance or representation.
636. Claimant, however, argues that legitimate expectations can also exist in the absence of express assurances. The Tribunal does not disagree with this argument. As seen above, *Parkerings v. Lithuania* suggests that a claimant can have legitimate expectations from a host State if the host State gave certain implied assurances that were relied upon by the investor when making the investment. A similar position has also been endorsed by other tribunals. For instance, in *Saluka v. Czech Republic*, the tribunal opined:

“329. The Tribunal finds that the Claimant’s reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government [...].”⁸³⁸

637. In *Electrabel v. Hungary*, the tribunal noted:

“7.78 Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State. While specific assurances given by the host State may reinforce the investor’s expectations, such an assurance is not always indispensable [...]. Specific assurances will simply make a difference in the assessment of the investor’s knowledge and of the reasonability and legitimacy of its expectations.”⁸³⁹

638. This Tribunal agrees with these decisions. It is true that an investor can, in some circumstances, have expectations based on implied assurances. The onus, however, is

⁸³⁶ *Philip Morris v. Uruguay*, Award, at 426 (Exhibit RL-0094).

⁸³⁷ Reply, at 329. Claimant has not pleaded or identified any specific assurance made by Respondent. To the contrary, Claimant argues “[h]owever, Respondent erroneously to [sic] assume that specific undertakings are the only way to create legitimate expectations. Legitimate expectations exist also where the host state has not provided express assurances of stability or other specified treatment to investors.”

⁸³⁸ *Saluka v. Czech Republic*, at 329 (Exhibit CL-0021).

⁸³⁹ *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.78 (Exhibit RL-0135).

on Claimant to show that such assurances were in fact made and that it took into account these assurances when making its investment.

639. The issue therefore for the Tribunal to consider is whether Respondent made any implied assurance to Claimant and whether Claimant took such implied assurance into account at the time of making its investment.
640. Having considered the Parties' pleadings and the record of the arbitration, the Tribunal answers both these questions in the negative. The only alleged 'expectation' that Claimant claims to have is the one pertaining to legal stability. This, however, cannot truly be characterised as an 'expectation' because it lacks specificity and adds very little, if anything, to the substantive content of the FET standard.
641. In any event, Claimant has provided no evidence to show that it was induced by the regulatory framework surrounding the CHF Loans at the time of making its investment. In fact, it is unlikely that Claimant would have such evidence because the CHF Loans predate Claimant's investment in the Bank by several years. The CHF Loans were issued in the period between 2006 and 2011.⁸⁴⁰ Claimant's investment in the Bank was made, at the earliest, only on 28 June 2013.⁸⁴¹ Moreover, there is no averment or evidence suggesting that Claimant relied on the CHF Loans as a product within the Bank's portfolio when it made its investment.
642. For all these reasons, the Tribunal does not find that Respondent made any implied assurance to Claimant or that Claimant could have taken into account any implied assurance at the time of making its investment in the Bank.
643. However, assuming that Claimant was in fact induced by the regulatory framework, the Tribunal finds that its expectation for a stable (*i.e.*, almost immutable) legal framework would not have been reasonable for two reasons. Firstly, as noted by the tribunal in *Parkerings v. Lithuania*, the exercise of due diligence by an investor is a precondition for the protection of its legitimate expectations. It is incumbent on the investor to anticipate that the circumstances prevailing then might change, and therefore structure its investment so as to adapt it to potential changes in the legal environment.⁸⁴² However, no such due diligence exercise was performed by Claimant in this instance.⁸⁴³ Secondly, Claimant's understanding of the stability requirement in Article 2 of the BIT is misconceived. The Tribunal elaborates on each of these points below.
644. Looking at the lack of due diligence first, Claimant entered into the CKTA on 28 June 2013 and requested the Central Bank of Montenegro to approve the transfer of shares on 17 July 2013. By this time, had Claimant performed its due diligence, it ought to

⁸⁴⁰ Memorial, at 61.

⁸⁴¹ Reply, at 6.

⁸⁴² *Parkerings v. Lithuania*, at 333 (Exhibit RL-0034).

⁸⁴³ P.O. No.2, p. 53.

have been aware that the Bank was exposed to considerable credit risk and that the Bank was poorly managed. The fact that the Bank's asset quality was poor and that its credit risk exposure was high is evident from the various audits undertaken by the Central Bank of Montenegro in the period between 2009 and 2013. For instance, in the 2009 audit, the Central Bank observed:

“The Bank's credit risk exposure is high. The risk measuring practices are not satisfactory. The Bank does not assess the credit risk adequately because the Bank has failed to fully implement the provisions of the Decision on Minimum Standards for managing the risks in the banks, with regards to the classification of assets on the basis of delay in repayments of debts as well on the basis of financial information on clients...

The Bank's revenue is poor. On the day of the control, the Bank has achieved a negative financial result in amount of 4,756,000 EUR. From the beginning of its operations (April 2006), the Bank has continuously operated with loss (the accumulated loss from previous years amount to 19,466,000 EUR). The key factor that has affected the non-profitable operation of the Bank is the low quality of the assets, i.e. the Bank's poor practices of loan approval and the poor credit risk management practice.

The Bank's Capital is extremely poor. On the control day, the Bank's own resources, following the correction of data by the control amount to only 5.406.000 EUR. The adjusted solvency coefficient has considerably decreased and amounts to 1.29%. The decrease of the solvency coefficient has been a result of a determination of high level of additional reservations for the credit risk during the control, which has been conditioned by the Bank's high exposure to the risk.

[...]

High exposure to credit risk, i.e. poor loan approval practices, i.e. poor credit risk management practices, continuing operations with loss, as well as an extremely poor capital of the Bank, point to poor management of the Bank by the Bank's management.

It has been found that the Bank has approved the mortgage loans to private individuals and on that basis the Bank has established lien mortgages on immovable properties whose estimated value had not fulfilled minimum required conditions. Thus, certain loans have not been secured with properties whose value is minimum three times higher than the loan amount...In addition, the collateral value estimates have been done in the moment of loan approval and have not taken into account the situation in the real estate market at the time. Bearing in mind the price fluctuations and real estate market non-liquidity, the Control finds that the Bank is highly exposed to debt collection risk with regards to mortgage loans. In some cases the Bank has issued loans which were secured by properties

whole [sic] value was less than the loan amount. The control also found that, during the process of loan approval, the Bank failed to identify and record the primary sources of loan repayments. In the examined sample, it was found that the loans have been structured so that the monthly annuities are not in line with the established limits, so the monthly annuities have exceeded the half of personal income.”⁸⁴⁴

645. In another audit in 2012, the Central Bank’s tone and tenor did not change. A perusal of its audit report shows that the Central Bank continued to be wary of the Bank’s credit risk. A relevant excerpt of this audit report is reproduced below:

“The Bank’s exposure to the credit risk is high. On the day of the control, level of the overdue loans is high and amount to 99,031,000 EUR which amounts to 46.85% of the total loans. The Bank has sold its assets to Hypo Development at the end of 2010 and during the 2011, which significantly decreased its loan portfolio as well as its nonperforming assets and has decreased reserves set aside for credit loss. However, despite this, the number of the overdue loans is still high and the level of the nonperforming assets (NPA) and criticized assets (BCDE) compared to total assets is higher than the system’s average.”⁸⁴⁵

646. In the 2013 audit report as well, the Central Bank made similar observations. For instance, the Central Bank noted:

“The Bank's exposure to credit risk is moderate to high. The quality of credit risk management needs to be improved. The overall credit risk is moderate to high. By mid-2012, in order to strengthen the future business development and reinforce the concept of continuation of operations, the Bank’s Restructuring Plan was approved by the Parent bank, including the sale of non-performing assets as a significant segment. In the period from 2010 to 2012, in five tranches, the Bank made a significant reduction of the credit portfolio through the sale of the balance and off balance receivables to the legal entity, Hypo-Alpe-Adria Development DOO. It greatly reduced the credit risk of the Bank, which was transferred to another legal entity within the Group. Through the sale of the NPL, the Bank has improved the quality of its portfolio which has positively reflected onto the overall performance of the bank’s business. Despite the significant improvement in the quality of the credit portfolio, the amount of loans that are overdue is still high and the same is above the system’s average. The control finds this concerning, especially considering the fact that the bank has a high exposure to a small number of loan beneficiaries (15 of the biggest creditors) whereby any potential delays in the case of just several clients would significantly affect the significant amount of the loans which are already overdue and would affect the quality of portfolio.

⁸⁴⁴ Central Bank Control Report dated 30 June 2009 (Exhibit R-0030).

⁸⁴⁵ Central Bank Control Report dated 31 January 2012 (Exhibit R-0031).

The level and severity of weakness and potential risk require an increased level of attention and a level of caution, since the specified may further negatively affect the amount of NPL, restructured loans and acquired assets. A review of the reports submitted to the Central Bank revealed that the Bank had not properly disclosed all the restructured loans, and the loans approved with a grace period.”⁸⁴⁶

647. These audit reports show that a reasonable investor would have been aware at the relevant time that the risk of default in the Bank’s portfolio (including the CHF Loans) was high. Apart from these issues in the management of the Bank and its portfolio, by this time, Claimant would have also become aware that the Bank’s customers were beginning to organise themselves through CEZAP. The record shows that on 17 May 2013, *i.e.*, approximately one month prior to the execution of the CKTA, 267 customers of the Bank commenced a collective action against the Bank. In this collective action, the customers, among other things, requested the Basic Court in Podgorica to issue the following judgment:

“1. **IT IS DETERMINED** that Article 1, paragraphs 1 and 2, and Article 6, paragraph 2 of the Housing Loan Agreement concluded between all Plaintiffs and the Defendant (which will be accurately indicated during the proceedings) shall be null and void.

2. **THE DEFENDANT SHALL**, within 15 days from the day the judgement becomes final, for each Plaintiff individually, retrospectively recalculate the monthly annuities in accordance with the EUR/CHF exchange rate on the loan disbursement date, and refund the difference of the monthly annuities charged more to the Plaintiffs, or reduce the liabilities of the Plaintiffs under the indicated agreements by the amount determined. The Defendant shall reimburse the costs of the proceedings to the Plaintiffs.”⁸⁴⁷

648. The above excerpt shows that prior to the execution of the CKTA, the Bank’s customers were already requesting the Montenegrin courts to declare the currency clause and the variable interest rate provision in the Swiss Franc loan agreements null and void. Claimant ought to have been aware of this.

649. By the time Claimant became the registered shareholder in the Bank, *i.e.*, 26 March 2014, several other noticeable developments had taken place, which should have forewarned Claimant that the regulatory landscape surrounding the CHF Loans could change.

650. First and foremost, other proceedings between the Bank and its customers, separate from the collective action, had been commenced. In one such proceeding initiated by

⁸⁴⁶ Central Bank Control Report dated 31 March 2013 (Exhibit R-0029).

⁸⁴⁷ Plaintiff’s Lawsuit dated 17 May 2013 (Exhibit R-0058).

the Bank against one of its customers, the High Court appeared to suggest that the currency clause coupled with the variable interest rate could have resulted in disproportionate gains to the Bank. This is evident from the following remarks made by the court while remitting the matter back to the lower court for reconsideration:

“As a rule, banks may not apply two or more protective clauses for preserving the value of the capital and the contracted interest represents the bank’s revenue for invested capital and the price of the risk that the bank is assuming for investing its capital. In the concrete case, it would mean that the bank generated revenues based on the contracted interest and the application of foreign currency clause, thus the first instance court should bear in mind that the judicial protection is not provided for legal transaction generating disproportionate pecuniary gain to parties in obligations.

In a retrial, the first instance court should engage financial court expert witness to provide opinion on the amount of revenue generated by the plaintiff through the contracted interest rate and the application of the foreign currency clause, the amount of common revenue generated by investing capital through the similar risky loans, ultimately enabling the court to bring accurate and legally grounded decision in this legal matter by previously assessing whether the revenue of the plaintiff, accrued and expressed through the contracted interest rate and the application of foreign currency clause, would represent an obvious disproportion between obligations.”⁸⁴⁸

651. Second, six months after initiating the collective action, the Bank’s customers also petitioned the Parliamentary Committee for Economy, Budget and Finance by way of an “Initiative”, seeking its direct intervention.⁸⁴⁹ In this “Initiative”, the Bank’s customers highlighted the adverse impact of the CHF Loans and requested the Committee to, among other things, involve the public authorities in the resolution of the case. Separately, they also requested the Committee to amend the Law of Obligations and made certain proposals to prevent such situations from arising in the future.⁸⁵⁰
652. Third, around the same time as the filing of the “Initiative” before the Parliamentary Committee, some of the Bank’s customers also sought assistance from the Banking Ombudsman, an independent institution established to assist with out-of-court settlements between banks/financial institutions and their customers. The Banking Ombudsman prepared and issued his report to the Parliamentary Committee on Economy, Budget and Finance, recounting the various complaints received from the Bank’s customers and the steps that had been taken to resolve the issues that had been raised. In this report, the Banking Ombudsman criticised the Bank for the CHF Loans,

⁸⁴⁸ Ruling of the Higher Court of Podgorica in App. No. 5754/12-11 dated 1 October 2013 (Exhibit R-0059).

⁸⁴⁹ CEZAP Initiative (Exhibit R-0060).

⁸⁵⁰ CEZAP Initiative (Exhibit R-0060).

which he characterised as a “high-risk banking product” and suggested that the Bank settle its claims with its customers.⁸⁵¹

653. In the Tribunal’s view, all of these factors would have put a reasonable investor on notice that changes to the regulatory framework surrounding the CHF Loans could occur. Although Claimant did not conduct its due diligence, AI Lake did, and AI Lake’s due diligence exercise⁸⁵² confirms the Tribunal’s view above.

654. AI Lake’s due diligence flagged some, if not all, of the abovementioned issues. In the [REDACTED] Legal Due Diligence Red Flag Report dated 8 August 2014 (the “**DD Report**”), there was a reference to some of the actions that had been initiated against the Bank. The DD Report flagged the risk associated with these actions and observed:

“As there is no established judicial practice in this matter, we cannot comment on the likely outcome. However, we have made online research on this issue and found that general position among the Banking Ombudsman and the Board of Economy, Finance and Budget of Assembly of Montenegro is in favour of the customers.

If the plaintiffs succeed with their claims, bank’s funding of such loans may be affected.”⁸⁵³

655. In light of this risk assessment, the DD Report recommended that AI Lake assess the impact of the negative development of the case with their financial advisors and include a warranty into the SPA for all losses arising out of the dispute or adjust the purchase price.⁸⁵⁴

656. In addition to the lack of due diligence, the Tribunal does not agree with Claimant’s understanding of the stability requirement in Article 2 of the BIT. Claimant contends that Article 2(1) provides for an obligation of stability in addition to the stability requirement under the BIT. This cannot be accepted. The Tribunal agrees with Respondent that the stability requirement in Article 2 of the BIT cannot be interpreted as a stabilisation clause imposing restrictions on Respondent’s ability to alter the regulatory framework. This is not what is contemplated within the concept of stability under the FET standard. This is even more so because the obligation to provide a “stable” regulatory framework, alluded to by Claimant, is phrased in aspirational terms under the BIT. The precise phrase in Article 2(1) is “[e]ach Contracting Party shall in its territory encourage and create, as far as possible, stable, equitable, favourable and transparent conditions for investments of investors of the other Contracting Party [...]”. (emphasis added).

⁸⁵¹ Ombudsman Report (Exhibit R-0046).

⁸⁵² [REDACTED] Legal Due Diligence Red Flag Report dated 8 August 2014 (Exhibit R-0117).

⁸⁵³ [REDACTED] Legal Due Diligence Red Flag Report dated 8 August 2014, p. 208 (Exhibit R-0117).

⁸⁵⁴ [REDACTED] Legal Due Diligence Red Flag Report dated 8 August 2014, p. 208 (Exhibit R-0117).

657. Elsewhere in its pleadings, Claimant also seems to agree with this view. Claimant repeatedly acknowledges that Respondent has a sovereign right to legislate and adapt its legal system to changing circumstances.⁸⁵⁵ This position has been endorsed in *Saluka v. Czech Republic*, where the tribunal held:

“304. This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States’ [sic] obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.

305. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well [...].”⁸⁵⁶

658. Similarly, in *EDF v. Romania*, the tribunal opined:

“217. The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State’s normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.

218. Further, in the Tribunal’s view, the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors.”⁸⁵⁷

659. The Tribunal shares the views taken by these tribunals. The obligation to “encourage and create, as far as possible, stable, equitable, favourable and transparent conditions for investments of investors of the other Contracting Party” and the stability

⁸⁵⁵ Memorial, at 184; Reply, at 327.

⁸⁵⁶ *Saluka v. Czech Republic*, at 304-305 (Exhibit CL-0021).

⁸⁵⁷ *EDF v. Romania*, at 217-218 (Exhibit CL-0028).

requirement implicit in the FET standard is not tantamount to a stabilisation clause and it would be unreasonable for an investor to expect otherwise. The stability requirement under the BIT must be balanced against the State's sovereign right to regulate.

660. For this reason, and because Claimant did not conduct its due diligence adequately, the Tribunal finds that Claimant's expectations could not have been reasonable.
661. Although the above reasons are sufficient to dismiss the claim, assuming that Claimant's expectations were legitimate and reasonable, its claim for breach of the FET standard would still fail because the Law on Conversion and its Amendment were enacted in response to a rational public policy objective and were suitably tailored to that policy.
662. As mentioned above, Claimant acknowledges that Respondent has a sovereign right to regulate and adapt its legal system to changed circumstances.⁸⁵⁸ Claimant, however, argues that this right to regulate "cannot fundamentally modify the regulatory framework for the investment beyond the acceptable margin of change".⁸⁵⁹
663. The Tribunal agrees with the legal principles identified by Claimant. However, the Tribunal cannot agree with Claimant on the facts, because Claimant has provided no evidence to show that the regulatory framework surrounding the investment was overhauled or transformed.
664. As identified in the chapter on jurisdiction above, Claimant's investment are the shares it has acquired in the Bank as well as the capital contributions that it has made in the Bank and the subordinated loan that it has extended to the Bank. The 2015 Audited Financial Statements for the year ended 31 December 2015 identify the Bank's business activities to include "loan, deposit and guarantee operations, domestic and international clearing and settlement, depo services, safe depositing services, issuance, processing and registering of payment instruments (including credit cards)".⁸⁶⁰ In other words, the Bank's Audited Financial Statements show that the Bank was engaged in several activities other than the issuance of CHF Loans at the time the Law on Conversion was passed.
665. With this in mind, the Tribunal is not persuaded that the Law on Conversion and its Amendment had the effect of transforming the entire regulatory framework under which Claimant was operating. The effect was confined only to the Bank's loan related activities and specifically to only one product, namely, the CHF Loans. In the Tribunal's opinion, this is just a small part of the overall legal framework in which the Bank

⁸⁵⁸ Memorial, at 184; Reply, at 327.

⁸⁵⁹ Reply, at 327; *Total v. Argentina*, at 163 (Exhibit CL-0104); *El Paso v. Argentina*, Award, at 402 (Exhibit CL-0131); *Toto v. Lebanon*, Award, at 243-244 (Exhibit RL-0117); *CMS v. Argentina*, Award, at 275 (Exhibit RL-0047).

⁸⁶⁰ Financial Statement of Addiko Bank AD Podgorica, 2015, p. 8 (Exhibit C-0009).

operated and fails to satisfy the high threshold that is required to be met. Claimant's contention must therefore fail.

666. For all these reasons, the Tribunal rejects Claimant's contention that the Law on Conversion and its Amendment frustrated its legitimate expectations.

4. Whether the Law on Conversion and its Amendment were discriminatory

667. In its submissions, Claimant mentions that the BIT contains two sources for the prohibition of discrimination: (a) the guarantee of FET under Article 2(2), and (b) the guarantee of national treatment under Article 3(1). However, Claimant does not base any of its allegations on any less favourable treatment than that accorded to Montenegro's own investors, and additionally argues that discrimination need not be based on nationality alone. Thus, the Tribunal considers that Claimant's claims are made pursuant to the standard of FET under Article 2(2).
668. As discussed in paragraph 553 above, the FET standard encompasses a prohibition of discrimination. Both Parties agree on this.⁸⁶¹
669. In *Saluka v. Czech Republic*, the tribunal found that "State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification"⁸⁶², finding that:

"307. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.

[...]

309. The 'fair and equitable treatment' standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does

⁸⁶¹ Reply, at 346; Rejoinder, at 302.

⁸⁶² *Saluka v. Czech Republic*, at 313 (Exhibit CL-0021).

not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.”⁸⁶³ (emphasis added)

670. In *Plama v. Bulgaria*, as cited by Claimant, the tribunal held that discrimination occurs when “like persons [are] treated in a different manner in similar circumstances without reasonable or justifiable grounds”.⁸⁶⁴

671. The Tribunal agrees. Consequently, in order to establish discrimination, Claimant must show that (a) compared to investments in like circumstances (b) its investment was subjected to different treatment, and (c) such different treatment was without reasonable justification or based on unjustifiable distinctions. Considering that Claimant has failed to present a proper comparator/similar case, its allegations on discrimination cannot stand.

a. Claimant has failed to present a proper comparator

672. As mentioned above, to prove discrimination, Claimant must establish that its investment was treated differently from other similar cases, which are in like circumstances to its own. As held in *Lemire v. Ukraine (II)*:

“Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be ‘*discriminatory and expose[s] the claimant to sectional or racial prejudice*’; or a measure must ‘*target[ed] Claimant’s investments specifically as foreign investments*’.”⁸⁶⁵ (emphasis in the original)

673. A showing of differential treatment is not enough. The differential treatment must be contextualised, such that the differential treatment must have been applied to materially similar comparators. According to the tribunal in *Electrabel v. Hungary*,

“175. ... In the Tribunal’s view, a mere showing of differential treatment is not sufficient to establish unlawful discrimination, or, in this context, irrationality in breach of the ECT’s FET standard. For discriminatory treatment, comparators must be materially similar, and there must then be no reasonable justification for differential treatment. Electrabel has not

⁸⁶³ *Saluka v. Czech Republic*, at 307, 309 (Exhibit CL-0021).

⁸⁶⁴ *Plama v. Bulgaria*, at 184 (Exhibit RL-0127).

⁸⁶⁵ *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, at 261 (Exhibit CL-0118).

established that MVM's situation was materially similar to that of Dunamenti or Electrabel itself."⁸⁶⁶ (emphasis added)

674. In *Crystallex v. Venezuela*, the tribunal discussed the claimant's arguments as to non-discrimination under the FET standard and found that claimant must show different treatment in similar circumstances without reasonable justification, and the failure to establish an adequate comparator would justify the dismissal of the claims on discrimination:

"615. As the Tribunal has already stated, non-discrimination and due process are central components of FET [...]

616. To show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification, typically on the basis of its nationality or similar characteristics. The Tribunal believes that, under this standard, the Claimant has not sufficiently established that it was discriminated against by Venezuela. The Tribunal is of the view that no adequate comparator was presented to its attention which would justify a conclusive finding on discrimination [...]. In other words, the Claimant has not sufficiently established that the fact that Venezuela has entered into a contractual relationship with a Chinese company after the fall-out of its relationship with Crystallex proves discriminatory conduct against Crystallex. The Tribunal has of course not overlooked the repeated and rather derogatory references to 'transnationals' and 'transnational companies' in the President's and some Ministers' statements. While the Tribunal is not unsympathetic to Crystallex's complains that it was targeted based on its 'transnational' nature and cannot exclude that discrimination actually occurred under the circumstances, it is of the view that a showing of discrimination would require more conclusive evidence of facts which are not reflected in the record."⁸⁶⁷ (emphasis added)

675. The Tribunal agrees with the decisions cited above that a claimant must show a difference between the treatment it received, vis-à-vis the treatment received by a materially similar comparator. The failure to establish such a comparator would justify the dismissal of the claim that it was subjected to discrimination.
676. Claimant contends that the Law on Conversion was discriminatory because it treated Swiss Franc Loans differently from Euro-denominated loans. Respondent, on the other hand, submits that this comparison is inapposite as these two types of loans are not similarly situated.

⁸⁶⁶ *Electrabel v. Hungary*, Award, at 175 (Exhibit RL-0092).

⁸⁶⁷ *Crystallex v. Venezuela* (Exhibit RL-0130).

677. The Tribunal agrees with Respondent that Euro-denominated loans cannot be accepted as a valid comparator to the Swiss Franc Loans. The Swiss Franc Loans were loans wherein the principal and monthly annuity were stated in Swiss Francs, but the debtors were obliged to repay the loan in Euros, with the Euro amount payable converted from Swiss Francs on the date of payment. The Euro-denominated loans were loans that were stated in Euros, and were also payable in Euros, without any conversion necessary. Thus, the Euro-denominated loans were not affected by the sharp changes in the CHF-EUR rate. This is in contrast to its effect on the Swiss Franc Loans, where the appreciation of the Swiss Franc against the Euro meant that the Swiss Franc Loans became more expensive, as they had to be repaid in Euros.
678. As held in the cases above, the failure to present an adequate comparator would justify a conclusive finding on discrimination. Claimant having failed to present an adequate comparator, the Tribunal therefore dismisses the discrimination claim.
679. However, even if the Tribunal were to consider Swiss Franc Loans and Euro-denominated loans to be appropriate comparators, Claimant has failed to provide evidence as to how the portfolios for these two types of loans developed in the relevant period. ██████████ graph only illustrates the alleged performance of the two types of loans in the first half of 2015, and does not say anything about their performance from the time the Bank started issuing the Swiss Franc Loans up until the Law on Conversion was enacted. Moreover, the Tribunal cannot rely on the figure in ██████████ expert report, as he did not identify the source and basis of his conclusion that the performance of these two types of loans did not differ significantly. The Tribunal also notes that ██████████ is presented as a legal expert in the field of Montenegrin constitutional law and international law, and his opinion on the performance of the two types of loans does not relate to such fields.

b. Claimant was not subjected to targeted discrimination

680. As discussed in paragraphs 669-674 above, the discrimination test is whether the treatment of Claimant's investment was different from the treatment of an entity in a like situation, without any rational justification. As explained above, this test was not met and the analysis can simply stop here. In any event, the Tribunal finds that Claimant has not submitted sufficient factual evidence to support the allegation of targeted discrimination.
681. As Claimant argues in paragraph 445 above, which Respondent does not contest,⁸⁶⁸ discriminatory intent or bad faith is not a requirement for a finding of discriminatory

⁸⁶⁸ Counter-Memorial, at 266.

treatment.⁸⁶⁹ Claimant however makes the argument that it was, in bad faith, subjected to targeted discrimination. The Tribunal finds that this is not proven on the facts.

682. Claimant's allegation that it was subjected to targeted discrimination is based on the fact that the Bank was the only bank affected by the Law. Claimant submits that since it was the only investor disbursing Swiss Franc Loans, the Law on Conversion was a disguised attempt to directly target the Bank. This is further evidenced, according to Claimant, by the accusatory language used by Members of Parliament during the proceedings leading to the enactment of the law.
683. The Tribunal is not convinced that these two circumstances establish that Claimant was subjected to targeted discrimination. The fact that the Bank was the only bank affected by the Law cannot, by itself, prove that it was unjustly targeted by the Law. As established in paragraphs 604-616 above, a legitimate public purpose was established as basis for the Law on Conversion and its Amendment.
684. Moreover, the Tribunal is unconvinced that the allegedly accusatory language used by two Members of Parliament prove targeted discrimination against Claimant's investment. Negative comments by two Parliamentarians during debates is not sufficient to infer that the Law and its Amendment were aimed to target Claimant. As held in the case of *SD Myers v. Canada*, the intent of the Government can only be determined by examining the evidence as a whole:

“161. The intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives. Each of the many persons involved in framing government policy may approach a problem from a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. The Tribunal can only characterize CANADA's motivation or intent fairly by examining the record of the evidence as a whole.”⁸⁷⁰

685. As found by the Tribunal in the sections above, the Law on Conversion and its Amendment were passed pursuant to a legitimate public purpose, were enacted after being put to two votes which resulted in the law being passed with an overwhelming majority (in the case of the Law on Conversion) or unanimously (in the case of the Amendment). The negative statements by two Members of Parliament cannot conclusively show that the Law aimed to unjustifiably target the Bank.

⁸⁶⁹ *Siemens v. Argentina*, at 321 (Exhibit CL-0037); *El Paso v. Argentina*, Award, at 305 (Exhibit RL-0049); *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.125 (Exhibit RL-0135); *LG&E v. Argentina*, Decision on Liability, at 146 (Exhibit CL-0027).

⁸⁷⁰ *S.D. Myers v. Canada*, at 161 (Exhibit RL-0046).

5. Whether the Law on Conversion and its Amendment were proportionate

686. Closely linked with the above issue is the question of proportionality. Claimant contends that the proportionality test requires an examination of the following three points:
- a. Suitability of a particular measure for the pursuit of a legitimate Government purpose;
 - b. Necessity evidencing the least restrictive measure; and
 - c. Proportionality *stricto sensu*.⁸⁷¹
687. Respondent disagrees. Instead, Respondent argues that this Tribunal should follow the test laid down in *Marfin v. Cyprus* where it was held that the tribunal should determine “whether the measures ‘bea[r] a reasonable relationship to some rational policy’ and were appropriately tailored so as not to impose an excessive burden on an investor”.⁸⁷²
688. Having considered the Parties’ positions, the Tribunal agrees with Respondent. The test set out in *Marfin v. Cyprus* is therefore appropriate. Claimant too has also alluded to it in passing.⁸⁷³
689. In *Marfin v. Cyprus*, the tribunal held:
- “1213. [...] The Tribunal has already concluded in Section IX.C .2 above, in the context of its expropriation analysis, that it is not the role of an international arbitral tribunal to evaluate the substantive correctness of economic and policy choices made by a State. This same conclusion is equally valid in the context of an FET analysis. In the words of the *S.D. Myers v. Canada* tribunal, the FET standard does not create an ‘open-ended mandate to second-guess government decision-making’. On the facts of this case, the Tribunal should not determine, with the benefit of hindsight, whether the challenged measures were the best solution that could have preserved the investors’ interests and could have achieved the legitimate policy goal being pursued. Instead, the Tribunal will limit its analysis of the challenged measures’ proportionality to determining whether the measures ‘bea[r] a reasonable relationship to some rational policy’ and were appropriately tailored so as not to impose an excessive burden on an investor.”⁸⁷⁴
690. The first question for the Tribunal to consider therefore is whether the measure bears a reasonable relationship to a rational policy. The Tribunal has already considered this issue in paragraphs 604-616 above. There, the Tribunal found that the Law on

⁸⁷¹ Reply, at 383.

⁸⁷² Rejoinder, at 313.

⁸⁷³ Reply, at 396.

⁸⁷⁴ *Marfin v. Cyprus*, at 1213 (Exhibit CL-0150).

Conversion and its Amendment were indeed enacted to further a legitimate public interest or a rational policy objective. The Tribunal's findings therein are equally applicable in this context.

691. The Law on Conversion was promulgated to protect the borrowers of the CHF Loans from financial distress. The explanatory note to the Draft Bill stated:

“[...] Having in mind the difficulty of the situation in which huge number of Montenegrin citizens are found, i.e. debt bondage, we do believe that it has been justified and necessary that the legislator makes urgent intervention aimed at halting the occurrence of more severe consequences and proposal od [sic] assuming foreign exchange currency differences by the state, bank and loan beneficiary.”⁸⁷⁵

692. Although that iteration of the draft Bill did not crystallise into law (the burden-sharing mechanism was replaced with the responsibility on the Bank), the explanatory note makes clear that Respondent's intention was to alleviate the suffering of the CHF Loan borrowers.

693. Similarly, the explanatory note to the draft Bill proposing amendments to the Law on Conversion stated:

“Montenegro's Parliament enacted the Law on Conversion of Swiss Franc loans in May 2015 and was the first country in the region to efficiently and justly solve one quite difficult situation in which the Swiss Franc loan holders found themselves in, and who, because they lacked sufficient knowledge of the currency risks, became victims of aggressive media propaganda of the commercial banks. They took loans which were issued in euros but indexed in Swiss Francs, which brought the clients into the debt bondage following the appreciation of the Swiss Francs exchange rate compared to euros.

Although precise norms of the Law clearly define the content of the Law and the obligations of the banks, as providers of the loans, and the Central Bank as a state authority in charge of supervision of the implementation of this law, some serious difficulties and problems have emerged in the implementation of the Law.

The Central Bank did not supervise the implementation of this Law by third-parties, commercial companies to which the banks assigned their collectables, justifying it with the explanation that it is not in charge of monitoring the business of commercial companies, which continued with foreclosures over the clients' properties while ignoring the Law on Loan Conversion. Due to issues in the law implementation, 95 loans which are

⁸⁷⁵ Draft Bill, pp. 3-4 (Exhibit R-0067).

in possession of HETA in worth of 100 million EUR (out of total sum of 130 million EUR) were not converted, which led to more than 30 writ of execution, which is contrary to the Law on Conversion.”⁸⁷⁶

694. Moreover, the Committee on Economy, Finance and Budget noted:

“The Committee learned about the reasons for adopting the amendments and supplements to the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans, stated in the introductory speech of the representative of the proposer, aimed at eliminating problems in the application of the Law by including in the conversion also loans repaid regularly or the loans where the bank performed enforced collection, as well as the loans were [sic] the bank had terminated the agreement and ceded claims under those agreements to third parties, in order to bring into equal position all beneficiaries of the CHF-denominated loans [...].”⁸⁷⁷

695. For these reasons and for the reasons set out in paragraphs 604-616 above, the Tribunal concludes that the Law on Conversion and its Amendment did in fact have a reasonable relationship to a rational policy.

696. The second question to consider therefore is whether the Law on Conversion was appropriately tailored so as to not impose an excessive burden on the investor. In the Tribunal’s view, this requires an inquiry into features of the legislation and the effect it had on Claimant’s investment.

697. Some of the features of the Law on Conversion as passed are as follows:

- a. The law encompasses all CHF-denominated Loans;
- b. It provides that the basis for loan conversion shall be the amount that a client received in the bank as at the loan agreement date (Article 1);
- c. It imposes an obligation on commercial banks (and third parties to whom the bank ceded receivables) to, within 30 days, convert all the CHF Loans into Euro denominated loans at the official exchange rate published by the Central Bank of Montenegro as at the loan agreement date (Article 2);
- d. It mandates that the commercial banks recalculate the loans at a fixed interest of 8.2% per annum (Article 3);
- e. The law makes clear that it also applies to loans which have been repaid during the regular repayment period or enforced collection such that third parties shall repay to the client funds exceeding the obligation stipulated under the law (Article 3a);

⁸⁷⁶ Explanatory Notes to the Draft Bill (Exhibit R-0111).

⁸⁷⁷ Committee on Economy, Finance and Budget Report on Consideration of the Proposal for the Law on Conversion of Swiss Franc (CHF)-Denominated Loans Into Euro (EUR)-Denominated Loans dated 30 August 2016, p. 1 (Exhibit R-0077).

- f. The commercial banks must offer the loan beneficiaries new loan conversion and loan scheduling agreements calculated in Euros within 45 days of the entry into force of the law (Article 4).⁸⁷⁸

698. A perusal of these features makes it readily apparent (as Claimant contends) that the Law on Conversion and its Amendment (a) were retroactive in nature; (b) applied to loans that have already been converted, terminated, repaid or assigned; (c) placed the entire burden of resolving the predicament of the borrowers of the CHF Loans on the Bank even though the Bank had complied with all laws and regulations when the CHF Loans were disbursed to its customers; and (d) did not set a deadline for the Bank's customers to accept the offer to enter into new loan agreements for the Bank to be in compliance with the legislation.⁸⁷⁹
699. The question, however, is whether these features impose an excessive burden on Claimant and the Bank. The Tribunal considers each of these features in turn.
700. Looking at retroactivity first, Claimant's case appears to be that, because the Law on Conversion is retroactive, and because it applies to already repaid CHF Loans, it violates the FET standard. The Tribunal disagrees. There is no rule in international law that a retroactive measure is by its very nature in violation of the FET standard. The cases referred to by Claimant such as *Total v. Argentina*⁸⁸⁰ show that retroactivity is one of several factors to be considered by the Tribunal in determining whether there has been a breach of FET. The onus is, however, on Claimant to show that the retroactive nature of the measure was in contravention of the FET standard.
701. Claimant has failed to adequately discharge this burden. Apart from asserting that the retroactive application of the Law on Conversion and its Amendment to the CHF Loans "constitutes...a violation of FET standard"⁸⁸¹ and "caused considerable amount of damages and losses",⁸⁸² Claimant has not articulated why it considers the retroactive effect of the legislation to violate the FET standard. It has not explained why the retroactive application of the legislation to loans that have already been converted, terminated, repaid or assigned is disproportionate. It has also failed to sufficiently

⁸⁷⁸ Law on Conversion of Loans in Swiss Franc CHF into Euro EUR "Official Gazette of Montenegro" No. 40/2015, of 14 August 2015 (Exhibit CL-0001).

⁸⁷⁹ Memorial, at 200, 226; Rejoinder, at 336-343, 393.

⁸⁸⁰ *Total v. Argentina*, at 129 (Exhibit CL-0104). The relevant paragraph provides: "In domestic legal systems the doctrine of legitimate expectations supports "the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation". This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), appears to be applicable mostly in respect of administrative acts and protects an individual from an incoherent exercise of administrative discretion, or excess or abuse of administrative powers. The reasons and features for changes (sudden character, fundamental change, retroactive effects) and the public interest involved are thus to be taken into account in order to evaluate whether an individual who incurred financial obligations on the basis of the decisions and representations of public authorities that were later revoked should be entitled to a form of redress".

⁸⁸¹ Reply, at 343.

⁸⁸² Memorial, at 228.

particularise the damages and losses that it claims to have suffered as a result of such retroactivity.

702. In the present case, the Tribunal considers that there were good reasons for the Law on Conversion to be retroactive. The Tribunal has already discussed how the object of the Law on Conversion and its Amendment was to protect the CHF Loan holders. It is unclear that this object could have been met if the CHF Loans were converted at the exchange rate in 2015 because it would have been disadvantageous for the borrowers. As explained by Respondent's witness, [REDACTED], "[g]iven the increase in the principal and the interest that had accumulated since the date of disbursement of the loan, the plaintiffs' debts at th[e] time [the Bank was proposing to convert the loans] were significant and converting their loans into Euros would have been highly disadvantageous".⁸⁸³ This view is also corroborated by Claimant's own witness, [REDACTED], who made the following statement in cross-examination:

"Well, the clients had at any point of time the right to terminate the CHF agreement and to convert into euro. So if he would have converted in 2007 or 2008 or 2009, it would be significantly better for him; and if he would have converted in 2015, after the Swiss National Bank gave up the cap, it would be, let's say, the most painful".⁸⁸⁴ (emphasis added)

703. In other words, in order to address the public issue it was intended for, conversion of the CHF Loans had to be from the date before the extreme fluctuation in the CHF-Euro exchange rate.
704. As for Claimant's second grievance above, *i.e.*, that the Amendment extended the Law on Conversion's retroactive application to converted, terminated, repaid or assigned loans, the Tribunal finds that this Amendment appears to have been introduced to bring clarity on whether or not default interest would apply in cases where the loans were unilaterally terminated or ceded in practice. In other words, the Amendment was introduced to ensure that there was consistency in practice and that all CHF Loan borrowers were placed on an equal footing.⁸⁸⁵ The explanatory statement to the Amendment to Article 3 makes this apparent in the following terms:

"The proposed amendment in conjunction with paragraphs 1 and 2 of this article is introduced for the purpose of legal and editorial improvement of the proposed text.

Paragraph 3 is proposed to explicitly regulate the treatment of default interest in the case of agreements being unilaterally terminated and/or

⁸⁸³ [REDACTED].

⁸⁸⁴ Tr., Day 1, 205:16-206:1.

⁸⁸⁵ Proposal for the Law on Amendments and Supplements to the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans dated 30 August 2016 (Exhibit R-0075).

ceded to third parties and thus avoiding possible misinterpretation in practice.

In other words, the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans, as well as the proposed measures and amendments to that law, do not contain provisions that clearly define whether in the course of calculation based on terminated agreements, including claims ceded to third parties, the application of the Law on Default Interest Rate is excluded or not. In such a situation, an obligor of the conversion - commercial bank or a third party, may include the statutory default interest rate in the calculation of the debt, in the manner that the amount of the debt, calculated using the interest rate of 8.2% (inclusive of the date of the agreement), would be increased, and the amount of the statutory default interest from the time of termination of the agreement until the date of the conversion executed in accordance with the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans.

If this issue is not clearly defined with the amendments made to the law, there is a high risk that the application of the provisions on debt calculation based on terminated agreements will result in different interpretations by the obligor of the conversion - commercial banks or third parties and their clients, so it is necessary that the law should clearly define whether or not the Law on Default Interest Rate applies to these cases. To that effect, the proposed amendment pertaining to Article 3 paragraph 3 of the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans contains an alternative solution as well, depending on the legislator's position on deciding between these two solutions.”⁸⁸⁶

705. As for the third issue identified by Claimant, *i.e.*, that the Law on Conversion imposed the entire burden on Claimant, the Tribunal agrees that the Law, as passed, required Claimant to shoulder the entire effect of reconversion of the CHF Loans. This was offset, however, by providing for an interest rate of 8.2% that was to be retroactively applied.⁸⁸⁷
706. Respondent contends that this interest rate was considerably higher than the market at that time and took into account the bank’s commercial interests.⁸⁸⁸ Respondent has produced a loan agreement between one [REDACTED] and the Bank. As per this

⁸⁸⁶ Proposal for the Law on Amendments and Supplements to the Law on the conversion of Swiss Franc (CHF)-denominated loans into Euro (EUR)-denominated loans dated 30 August 2016 (Exhibit R-0075).

⁸⁸⁷ Law on Conversion of Loans in Swiss Franc CHF into Euro EUR "Official Gazette of Montenegro" No. 40/2015, of 14 August 2015 (Exhibit CL-0001).

⁸⁸⁸ Counter-Memorial, at 118(b).

loan agreement, the rate of interest due on the loan was 5.1%.⁸⁸⁹ Respondent has also produced the Bank's CHF Loan marketing material. As per this document, the interest rate illustrated was 5.45%. Respondent's quantum experts suggested that the fixed rate interest element across the CHF Loan portfolio varied from 4.1% to 5.1%.⁸⁹⁰ Claimant does not dispute these assertions.

707. Instead, Claimant contends that the higher interest rates did not offset its losses. Claimant advances two submissions in support of this view. First, Claimant states that "Swiss Franc Loans properly serviced by the borrowers and terminated due to the expiration of the term of such loan agreements had to be recalculated in Euro currency and converted into Euro currency within 30 days from the date of the Law entering into force. Accordingly, loans indexed to the Swiss Franc, which had been properly serviced by the borrowers and terminated in accordance with the underlying agreements had to be recalculated and the Bank had to return part of the receivables from such loans to the borrowers".⁸⁹¹
708. The Tribunal finds this argument to be unsupported by evidence. There is no particularisation of what amounts had to be returned, what amounts were actually returned to the borrowers, or the extent to which the Bank actually suffered harm. Although Claimant pleads that the application of a retroactive foreign exchange rate "[led] to the assumption [that] the Bank would have to make payments to former customers in an amount of 52.142,43 EUR",⁸⁹² it has not been averred or shown that such payments were in fact made.
709. Moreover, there is an inconsistency in the limited evidence adduced by Claimant making it difficult for the Tribunal to assess the correctness of its representations. Whereas Exhibit C-0022, *i.e.*, a table analysing the losses from Swiss Franc Loans, shows that the Bank estimated a loss of EUR 2.26 million to be incurred by making payments to former borrowers,⁸⁹³ Claimant's expert, [REDACTED], has concluded that the actual loss was only EUR 52,152.⁸⁹⁴ Respondent's expert, [REDACTED], on the other hand, suggests otherwise and claims that for loans approved prior to 2011, Claimant would have been better off because it would have been allowed to levy an 8.2% interest on loans taken when the Euro was significantly stronger than the Swiss Franc.⁸⁹⁵

⁸⁸⁹ Mortgage Loan Agreement No. 1621902209 between the Bank and [REDACTED] dated 20 February 2007, at Article 5 (Exhibit R-0043).

⁸⁹⁰ [REDACTED].

⁸⁹¹ Memorial, at 171.

⁸⁹² Reply, at 499.

⁸⁹³ Swiss Franc Loan Portfolio, Addiko Bank AD Podgorica, 2015 (Exhibit C-0022). To arrive at the figure of EUR 2.26 million, the sum of the estimated losses for all loans referred to as "closed" in the exhibit, either due to having matured, been prepaid or HBM refinanced have been considered. See [REDACTED].

⁸⁹⁴ [REDACTED].

⁸⁹⁵ [REDACTED].

710. In any event, even assuming that Claimant did in fact have to bear the additional cost of EUR 52,152 in the form of repayments to erstwhile borrowers, the Tribunal is not satisfied that the threshold of an excessive burden has been satisfied in this instance. In the Tribunal's opinion, an excessive burden means that the harm suffered by the party bearing the burden is significant in financial terms. The existence of a "cost" element, without more, is insufficient. The onus is on a claimant to show the magnitude of the harm inflicted upon the investment, which Claimant has failed to do in this instance.
711. For all these reasons, the Tribunal rejects Claimant's first argument.
712. Second, Claimant argues that the loss that it had to incur was not adequately neutralised by the higher interest rates because in practice, customers with better credit ratings could avail of loans with an interest rate significantly below the rate prescribed by the Law.⁸⁹⁶ Claimant states that the average rate of interest charged by the Bank in relation to the converted loan portfolio was 5.12% because it was only those customers who were not able to refinance their CHF Loans due to poor credit rating, who were forced to accept the higher interest rate.⁸⁹⁷
713. [REDACTED] gives evidence on the issue. In his second witness statement, he observes:
- "21. The Bank's offer to refinance the CHF Loans contained interest rates much below 8.2% p.a. The interest rate stipulated in the Law was not competitive on the Montenegrin market. The average rate of interest realized by the Bank on loans after conversion to Euro indexation was below 6% p.a.
22. In the context of refinancing the CHF Loan portfolio, the Bank was put on a competitive disadvantage. Customers with good credit rating were targeted by competitors of the Bank who offered interest rates lower than the ones of the Bank. Customers with bad credit rating had no choice but refinancing their CHF Loan with the Bank. As a result, the Bank lost customers which were regularly servicing their payment obligations. It remained with the less attractive segment of its loan portfolio."⁸⁹⁸
714. He also produced an offer made to one of the Bank's customers, which shows that the Bank offered an interest rate of 6.5% as against the rate of 8.2% provided by the Law.⁸⁹⁹
715. Respondent submits that this inability of the Bank to charge a higher interest rate is irrelevant. According to Respondent, the Bank's inability to levy the higher interest

⁸⁹⁶ Reply, at 523-531.

⁸⁹⁷ [REDACTED].

⁸⁹⁸ [REDACTED].

⁸⁹⁹ Decision on approval of Offer containing Special terms of Loan Conversions from CHF Currency and the Offer, (Exhibit CS1-0003).

rates is a consequence of its own previous actions, which caused the customers to lose confidence in the Bank.⁹⁰⁰ Moreover, Respondent points out that it is always open to borrowers to refinance their loans and that refinancing was a feature of the market.⁹⁰¹

716. Having considered the Parties' positions, the Tribunal agrees with Respondent. Exhibit CS1-0003, produced by ██████████ sheds some light on this issue. This Exhibit titled 'FACT SHEET for CONVERTED loans' examines the effect of the Law on Conversion on one loan issued by the Bank. Set out therein is the calculation method, which provides:

“Calculation of the total amount of debt according to the Law on Conversion is carried out so that the new loan repayment plan in EUR is made, based on the amount of disbursed loan, starting from the date of concluding the Loan Agreement by applying the interest rate of 8.2% annually, where all the previous repayments regarding the loan are subtracted from the calculation of borrower's liabilities under the new repayment plan, while a possible difference between the liabilities from the new repayment plan and the previously repaid amounts of the borrower (based on the interest) is added to the principal, and the interest rate of 8.2% is applied on such principal until the end of the loan repayment period.”⁹⁰²

717. In cross-examination, ██████████ confirmed that this meant that when the Bank recalculated the debts due from the borrowers, it applied 8.2% to the historical portion of the loan (*i.e.*, the portion that had already been accrued).⁹⁰³ In other words, at the very least, the Bank was able to charge 8.2% p.a. interest up until the date on which the CHF Loans were converted. When Claimant argues therefore that it could not charge interest rates of 8.2% p.a., it seems to be suggesting that it could not charge 8.2% p.a. interest prospectively from the date on which the Bank made the offer to convert the CHF Loans and the offer was accepted by the customer.
718. The fact that Claimant did not prospectively charge 8.2% interest to all customers does not seem to be in dispute between the Parties. Exhibit CS1-0003 is an example of the Bank offering an interest rate of 6.5%.⁹⁰⁴ Claimant alleges that its inability to charge 8.2% was because of Respondent's actions and was a consequence of the Law on Conversion. The Tribunal is not persuaded that this is the case.

⁹⁰⁰ Rejoinder, at 316; ██████████.

⁹⁰¹ Rejoinder, at 363(c).

⁹⁰² Decision on approval of Offer containing Special terms of Loan Conversions from CHF Currency and the Offer, Fact Sheet for Converted Loans (Exhibit CS1-0003).

⁹⁰³ Tr., Day 1, 207:13-207:17.

⁹⁰⁴ Decision on approval of Offer containing Special terms of Loan Conversions from CHF Currency and the Offer, Fact Sheet for Converted Loans (Exhibit CS1-0003).

719. On the contrary, the Tribunal finds some truth in Respondent's argument that the Bank's inability to levy the higher interest rate is a consequence of its own previous actions, which caused the customers to lose confidence in the Bank. The following excerpt of [REDACTED] evidence in cross-examination is telling in this regard:

"Q. Right. So just to recap, now the bank didn't meet the budget that was anticipated in this document in Exhibit R-0183 for a number of reasons, including it didn't meet its budget for customer deposits, for retail loans, for interest income, for expenses, and none of this had anything to do with the Swiss-franc loan portfolio, did it?

A. Well, this is a question which cannot be answered like that, in that way, because, for example, the deposit gathering is mainly a question of trust in the bank, which means if the bank is -- or an institution is permanently in the media with negative media coverage, if the clients most probably would not consider to deposit their money with such an institution, which means that there might be a context or a connection between negative media presence and the ability of a bank to collect deposits.

Q. Was there negative publicity of the bank prior to the Law on Conversion coming into effect?

A. Yes."⁹⁰⁵

720. The above excerpt makes it clear that there was indeed negative publicity against the Bank which was hindering its operations and preventing it from achieving its annual targets. In the Tribunal's opinion, Respondent cannot be held responsible for actions and omissions of the Bank, which may have led to such negative publicity.

721. In a similar vein, the Tribunal finds that Respondent cannot be held responsible because customers with better credit rating could avail of loans sufficiently below the rate prescribed by the Law. Claimant itself has acknowledged that borrowers refinance their loans in normal market conditions. This is evident from the following extract of [REDACTED] cross-examination:

"A. [...] The clients [who] are with the CHF portfolio with a good credit history and a good rating, they were approached by, I would say, the market leaders in the banking sector in Montenegro, and those clients became offers which were substantially below the interest rates that we could offer, and other clients didn't have this opportunity. So the spread of market offer for the loan interest rates is quite wide.

⁹⁰⁵ Tr., Day 1, 202:15-203:09.

Q. Mm-hm. I think one of the things we talked about earlier was that in normal market conditions for normal borrowers, like you and I, we could refinance our loans; is that correct?

A. Yes.

Q. So when the borrowers were no longer sort of trapped in this very expensive product, the Swiss-franc loan, didn't that just re-establish normal market conditions, in that your borrowers could refinance their loan?

A. I don't understand your question.

Q. Well, what I'm trying to establish: you've just agreed that in normal market conditions, a borrower can refinance their loan.

A. Yes.

Q. And you've said that following the Law on Conversion, the borrowers for the Swiss-franc loans did just that: they just refinanced their loan with a different company. Wasn't that a right that they always had?

A. They always had the right to do that.”⁹⁰⁶

722. As for Claimant's last point, *i.e.*, that the Law on Conversion did not set a deadline for the Bank's customers to accept the offer to enter into new loan agreements for the Bank to be in compliance with the legislation, the Tribunal finds that Claimant has not adequately substantiated its case. Claimant's only two assertions are as below:

“393. The Law does not set a deadline for the Bank's customers to accept the offer to enter into new loan agreements in compliance with the Law. The Bank is therefore not able to reasonably plan the development of the remaining loan portfolio still indexed to the Swiss Franc.

...

395. The exchange rate between Euro and Swiss Franc had moved back into a corridor, which corresponds, more or less, to the exchange rate prior to the decision of the Swiss National Bank, in 2015, to allow for the floating of the Swiss Franc. Absent a deadline for borrowers to accept offer of the Bank to convert the loans the obligation of the Bank to, for example, recalculate CHF Loans which have been repaid in full prior to the enactment of the Law is perpetual. This fact amounts to a disproportionate measure directed against the Bank.”⁹⁰⁷

⁹⁰⁶ Tr., Day 1, 209:6-210:7.

⁹⁰⁷ Reply, at 393, 395.

723. Claimant however does not set out what actual impact this purported failure in the Law on Conversion had on its investment or what plans with respect to the remaining loan portfolio were actually affected.

724. As a final point, the Tribunal notes that it is not its task to decide whether or not the measure actually had its intended effect. What matters is whether the measure was reasonable when it was adopted. In *Philip Morris v. Uruguay*, it was held:

“409. In the end the Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects that were intended by the State, what matters being rather whether it was a ‘reasonable’ measure when it was adopted.”⁹⁰⁸

725. The Tribunal agrees with this view of the *Philip Morris* tribunal.

726. For all the reasons mentioned above, Respondent’s measures were reasonable when they were adopted. Claimant’s arguments on proportionality must therefore fail.

6. Whether the Law on Conversion and its Amendment were unreasonable or arbitrary

727. Claimant submits that Respondent’s conduct was unreasonable and arbitrary in violation of the FET standard in Article 2(2) of the BIT.

728. Claimant contends that an unreasonable measure is one that is unrelated to some rational policy, disproportionate, and adopted in bad faith.⁹⁰⁹ To examine whether a measure is unreasonable, Claimant proposes a two-prong test. The first step requires the Tribunal to assess whether the State’s conduct bears a reasonable relationship to some rational policy.⁹¹⁰ The second step requires the Tribunal to assess whether the measure that was taken was objectively suitable to deal with the situation.⁹¹¹

729. Similarly, Claimant submits that an arbitrary measure has been characterised as one that demonstrates “a willful disregard of due process of law”,⁹¹² an act which “shocks, or at

⁹⁰⁸ *Philip Morris v. Uruguay*, Award, at 409 (Exhibit RL-0094).

⁹⁰⁹ Reply, at 427-430 referring to *Saluka v. Czech Republic*, at 309 (Exhibit CL-0021); *Biwater Gauff v. Tanzania*, at 692 (Exhibit CL-0018); *Micula v. Romania*, Award, at 525 (Exhibit RL-0083); *Philip Morris v. Uruguay*, Award, at 409-410 (Exhibit RL-0094).

⁹¹⁰ Reply, at 402-407, 427-430; *Occidental v. Ecuador*, Award, at 163 (Exhibit CL-0130); *Saluka v. Czech Republic*, at 460 (Exhibit CL-0021); *Al-Bahloul v. Tajikistan*, at 251 (Exhibit CL-0153); *El Paso v. Argentina*, Award, at 322 (Exhibit CL-0131); *Biwater Gauff v. Tanzania*, at 692 (Exhibit CL-0018); *Micula v. Romania*, Award, at 525 (Exhibit RL-0083).

⁹¹¹ Reply, at 408-413; *AES v. Hungary*, at 10.3.1-10.3.36 (Exhibit RL-0133); *Micula v. Romania*, Award, at 825 (Exhibit RL-0083); *Electrabel v. Hungary*, Award, at 179 (Exhibit RL-0092).

⁹¹² *Elettronica Sicula S.p.A. (ELSI) (US v. Italy)*, Judgment, 1989 ICJ Reports 15, 20 July 1989; *Philip Morris v. Uruguay*, Award, at 390 (Exhibit RL-0094).

least surprises, a sense of judicial propriety”,⁹¹³ or an act that “affects investments [...] without engaging in a rational decision-making process”.⁹¹⁴

730. Having set out what it believes to be the applicable standard, Claimant advances the following reasons to justify why it considers Respondent’s conduct to be unreasonable or arbitrary:

- First, Respondent did not give a legitimate and/or reasonable reason justifying the promulgation of the Law on Conversion and its Amendment.⁹¹⁵
- Second, although the first iteration of the Law on Conversion and its Amendment proposed a sharing of the burden between the Bank, the borrowers and Respondent, this proposal was abandoned and replaced with a more “radical” and “punitive” legislation.⁹¹⁶
- Third, during the course of deliberations on the Bill amending the Law on Conversion, certain Members of Parliament made derogatory and hostile remarks against the Bank and called upon the Public Prosecutor to commence an investigation against the Bank.⁹¹⁷
- Fourth, the Montenegrin Parliament and the Central Bank were influenced by and pressured to adopt more punitive measures “driven by personal interests and biases” rather than public interest.⁹¹⁸
- Fifth, the fact that the Law on Conversion and its Amendment were retroactively applied to loans that were not only within the Bank’s portfolio but also those that had already been converted, assigned, repaid and/or terminated shows that the measure is unreasonable and arbitrary.⁹¹⁹

⁹¹³ *Elettronica Sicula S.p.A. (ELSI) (US v. Italy)*, Judgment, 1989 ICJ Reports 15, 20 July 1989; *Philip Morris v. Uruguay*, Award, at 390 (Exhibit RL-0094).

⁹¹⁴ *LG&E v. Argentina*, Decision on Liability, at 158 (Exhibit RL-0131); Claimant also refers to other decisions such as *Lauder v. Czech Republic*, at 232 (Exhibit CL-0144); *Enron v. Argentina*, Award, at 281 (Exhibit RL-0132); *Sempra v. Argentina*, Award, at 318 (Exhibit CL-0035); *Cargill v. Mexico*, at 293; *EDF v. Romania*, at 303 (Exhibit CL-0028); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, (ICSID Case No. ARB/10/23), Award, 19 December 2014, at 621; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, at 262-263 (Exhibit CL-0118); *British Caribbean Bank v. Belize*, at 282; *Cervin v. Costa Rica*, at 523 (Exhibit CL-0123), which prescribe similar standards.

⁹¹⁵ Memorial, at 217.

⁹¹⁶ Memorial, at 220.

⁹¹⁷ Memorial, at 222.

⁹¹⁸ Memorial, at 223.

⁹¹⁹ Memorial, at 226-227.

- Finally, Claimant contends that the Law on Conversion and its Amendment were unreasonable because they were dissimilar to the reasonable measures adopted in Serbia.⁹²⁰
731. Respondent does not dispute that the prohibition of unreasonable or arbitrary measures is an element of the FET standard. Respondent, however, considers Claimant to have misstated the legal thresholds that apply. Respondent also considers Claimant to have failed to prove its allegations on the facts.⁹²¹
732. Beginning with arbitrariness, Respondent states that the authorities cited by Claimant confirm that the threshold for arbitrariness is a high one. To satisfy this high threshold, Claimant would have to show that Respondent acted in a manner that was “capricious”, “shocks, or at least surprises a sense of judicial propriety” or “shows a willful disregard of due process of law”.⁹²² However, no such conduct is alleged by Claimant, nor could such an allegation be sustained on the facts.
733. Moreover, Respondent argues that the authorities cited by Claimant support the point that while the adopted measure “may not have been the best”, it will not be arbitrary if it responds to what the State believed and understood to be the best response in the circumstances.⁹²³ Accordingly, even if the Law on Conversion was deficient (which Respondent denies), it would not necessarily be arbitrary.
734. Shifting focus to the argument that the Law on Conversion is unreasonable, Respondent submits that the threshold issue to be considered is whether the measure in question was “reasonably tailored to the pursuit of a rational policy [...] and there was an appropriate correlation between that objective and the measure adopted to achieve it”.⁹²⁴ Referring to the devastating impact of the CHF Loan crisis and the need for urgent legislative intervention, Respondent contends that the Law on Conversion achieved its intended objective, *i.e.*, of rescheduling loans but allowing the Bank at the same time to obtain a commercially reasonable margin of lending.⁹²⁵
735. The Tribunal has considered the Parties’ positions. It is not controversial that protection from unreasonable and arbitrary measures forms part of the FET standard.⁹²⁶ The Parties do not seem to dispute this either. The Tribunal will therefore not dwell on this point but will proceed to address the more relevant questions, *i.e.*, what is the standard for unreasonable and/or arbitrary conduct and whether Respondent’s conduct was unreasonable and/or arbitrary.

⁹²⁰ Reply, at 431.

⁹²¹ Rejoinder, at 323.

⁹²² Rejoinder, at 326

⁹²³ Rejoinder, at 327; *LG&E v. Argentina*, Decision on Liability (Exhibit RL-0131); *Enron v. Argentina*, Award (Exhibit RL-0132).

⁹²⁴ Rejoinder, at 331; *Micula v. Romania*, Award (Exhibit RL-0083).

⁹²⁵ Rejoinder, at 332.

⁹²⁶ *Alghanim v. Jordan*, at 286; *CMS v. Argentina*, Award, at 290 (Exhibit RL-0047).

736. The Tribunal begins its analysis of this issue by first considering the standard against which Respondent's conduct is to be judged. Although Respondent claims that it contests the legal thresholds cited by Claimant, it appears to the Tribunal that the Parties are in agreement as to what the appropriate standard should be.

737. Both Parties agree that the test for unreasonableness of a measure is to check whether the measure was the product of a rational decision-making process and whether there was an appropriate correlation between the policy objective and the measure adopted to achieve it.⁹²⁷ The Tribunal shares this view, which has been endorsed and affirmed by several previous tribunals.

738. In *Biwater Gauff v. Tanzania*, for instance, it was held:

“693. Reasonableness requires that the State's conduct: ‘bears a reasonable relationship to some rational policy, whereas the standard of ‘non-discrimination’ requires a rational justification of any differential treatment of a foreign investor.’”⁹²⁸

739. In *AES v. Hungary*, it was held:

“10.3.7 There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.

10.3.8 A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.

10.3.9 Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.”⁹²⁹

740. Similar views have been voiced by the tribunals in *Micula v. Romania* and *Invesmart v. Czech Republic* as well.⁹³⁰

741. Just like for unreasonableness, both Parties also appear to agree on the relevant legal threshold for arbitrariness. It seems to be clear that a mere deficiency in the measure

⁹²⁷ Reply, at 402-413, 427-430; Rejoinder, at 331; *AES v. Hungary*, at 10.3.1-10.3.36 (Exhibit RL-0133); *Micula v. Romania*, Award, at 825 (Exhibit RL-0083); *Electrabel v. Hungary*, Award, at 179 (Exhibit RL-0092).

⁹²⁸ *Biwater Gauff v. Tanzania*, at 693 (Exhibit CL-0018).

⁹²⁹ *AES v. Hungary*, at 10.3.7-10.3.9 (Exhibit RL-0039).

⁹³⁰ *Micula v. Romania*, Award, at 825 (Exhibit RL-0083); *Invesmart v. Czech Republic*, at 460 (Exhibit RL-0123).

will not be sufficient to meet the standard of arbitrariness. Rather, the measure will have to be one that “shocks, or at least surprises a sense of judicial propriety” or “shows a willful disregard of due process of law”.⁹³¹

742. The Tribunal agrees with the Parties. The Tribunal also concurs with the view set out in *Philip Morris v. Uruguay*, referring to decision of the ICJ in the *ELSI* case.

“390. According to the international law standard set forth by the ICJ Chamber in the *ELSI* case, ‘arbitrariness’ is defined as ‘a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.’ As noted by the Respondent, the *ELSI* judgment is most commonly referred to by investment tribunals’ decisions as the standard definition of ‘arbitrariness’ under international law.”⁹³²

743. Having determined the applicable legal standards, the next task for the Tribunal is to assess whether Respondent’s conduct was unreasonable and/or arbitrary.

744. As identified in paragraph 730 above, Claimant sets out six reasons why it considers the measure to be unreasonable and arbitrary.

745. First, Claimant contends that the Law on Conversion and its Amendment are unreasonable because they are dissimilar to the reasonable measures adopted in Serbia. In the Tribunal’s opinion, this argument does not hold water.

746. In *Invesmart v. Czech Republic*, it was held:

“459. [...] A state should not be held to an obligation to act in accordance with international best practice. To read such an obligation into a BIT is untenable.”⁹³³

747. Similarly, in *Electrabel v. Hungary*, it was held:

“180. Scope of Discretion: Once a measure meets the test articulated above, a State has a wide scope of discretion to determine the exact contours of the measure. That requires a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests. Provided that there is an appropriate correlation between the policy sought by the State and the measure, the decision by a State may be reasonable under the ECT’s FET standard even if others can disagree with that decision. A State can thus be mistaken without being unreasonable. It is therefore no proof of unreasonableness, by itself, that other States have taken different decisions in regard to net stranded costs, as advocated by Electrabel, particularly in regard to Poland and Portugal. Moreover, the Tribunal is not convinced that the position of these two States was

⁹³¹ *Philip Morris v. Uruguay*, Award, at 390 (Exhibit RL-0094).

⁹³² *Philip Morris v. Uruguay*, Award, at 390 (Exhibit RL-0094).

⁹³³ *Invesmart v. Czech Republic*, at 459 (Exhibit RL-0123).

materially similar to Hungary so as to provide any useful benchmark of reasonableness in regard to Hungary in the present case.”⁹³⁴

748. The Tribunal agrees with the *Invesmart* and *Electrabel* tribunals. A State has the sovereign right to regulate and legislate as it deems fit, provided that the measure is reasonable and bears an appropriate correlation to the policy objective sought to be achieved. A BIT does not hold a State to the standards adopted by other States, or by international best practices.
749. In any event, the Tribunal is not convinced that the Serbian law is a useful comparator in the present case for two reasons. First, Claimant has not set out why the Serbian law should be used as a comparator. Claimant has discussed the features of the Serbian law such as the burden-sharing mechanism and the fact that it is prospectively applied, but Claimant has not explained to the Tribunal why the Serbian law is the most appropriate comparator in the present case. The second reason is that, unlike in Montenegro, the Serbian State itself had significant financial exposure to the CHF Loans.⁹³⁵
750. The more fundamental question therefore is whether Respondent’s measures were reasonable in their own right. The Tribunal has substantially dealt with most of those issues in the previous sections.
751. First, the Tribunal has addressed and rejected Claimant’s suggestion that Respondent did not give a legitimate and/or reasonable reason, justifying the promulgation of the Law on Conversion. In the sections on good faith and proportionality above (see paragraphs 600 to 614 and paragraphs 690 to 695), the Tribunal has found that the Law on Conversion was enacted in response to a pressing social need and in furtherance of a rational policy objective. It was not used as a ‘pretext’ as Claimant has sought to show.
752. Second, the Tribunal has considered and rejected Claimant’s suggestion that the first iteration of the Law on Conversion was abandoned and replaced with a more “radical” and “punitive” legislation. In the sections on good faith and proportionality above (see paragraphs 615 to 616 and paragraphs 705 to 721), the Tribunal has found that the second iteration of the Law on Conversion, which imposed the entire burden of the loan conversion on Claimant was a well-intentioned and proportionate response because it was offset by allowing the Bank to charge a higher rate of interest.
753. Third, the Tribunal has, in the section on good faith (see paragraphs 615 to 616 above), found that, although certain Members of Parliament may have made derogatory and hostile remarks against the Bank and called upon the Public Prosecutor to commence an investigation against the Bank, there was no evidence to suggest that there was any *mala fide* on Respondent’s part in promulgating the Law on Conversion and its

⁹³⁴ *Electrabel v. Hungary*, Award, at 180 (Exhibit RL-0092).

⁹³⁵ Rejoinder, at 114.

Amendment. Similarly, the Tribunal has also found (see paragraphs 608 to 612) that the Law on Conversion was not enacted for a purpose other than that for which it was created. The Law on Conversion was enacted to alleviate the financial distress of the CHF Loan borrowers.

754. Fourth, the Tribunal has, in its proportionality analysis (see paragraphs 700 to 711), considered and rejected Claimant’s contention that the retroactive application of the Law on Conversion and its Amendment was disproportionate. The Tribunal has considered and rejected Claimant’s contention that the broadening of the scope of the Law on Conversion to loans that had already been converted, assigned, repaid and/or terminated is disproportionate. The Tribunal has found that the Law on Conversion was enacted in furtherance of a rational policy objective and that it did not impose an excessive burden on Claimant.
755. Fifth, the Tribunal’s findings on Claimant’s contention that the Law on Conversion was discriminatory is set out in the non-discrimination section above (see paragraphs 672 to 685).
756. The Tribunal’s findings above are equally applicable in the present context.
757. In sum therefore, the Tribunal concludes that the Law on Conversion and its Amendment were not unreasonable or arbitrary. The Tribunal is satisfied that the Law on Conversion was the product of a rational decision-making process and that there was an appropriate correlation between the policy objective, *i.e.*, alleviating the financial distress of the CHF Loan borrowers, and the measure adopted to achieve it, *i.e.*, the Law on Conversion. The Tribunal is also satisfied that the Law on Conversion and its Amendment do not meet the high threshold of arbitrariness set out above.

X. WHETHER RESPONDENT FAILED TO PROVIDE CLAIMANT’S INVESTMENT FULL PROTECTION AND SECURITY (“FPS”) UNDER ARTICLE 2(2) OF THE BIT

A. CLAIMANT’S POSITION

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. RESPONDENT'S POSITION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. TRIBUNAL’S ANALYSIS

775. This Tribunal considers that, in line with a majority of tribunals, absent treaty language that indicates that the FPS standard also covers legal security, the FPS standard refers to the duty of due diligence of a State to ensure the physical protection of the investor and its property in the host State from acts inflicted by third parties.⁹⁶⁵ For instance, the *Ulysseas v. Ecuador* tribunal held:

“271. It is Claimant’s view that ‘full protection and security’ and ‘fair and equitable treatment’ can be considered together, ‘as both treatments require the State to provide stability and predictability’.

272. The Tribunal does not share this view. Full protection and security is a standard of treatment other than fair and equitable treatment, as made manifest by the separate reference made to the two standards by Article II (3)(a) of the BIT. This standard imposes an obligation of vigilance and

[REDACTED]

⁹⁶⁵ *Ulysseas v. Ecuador*, at 271-272 (Exhibit RL-0134); *Rumeli v. Kazakhstan* (Exhibit CL-0029); *Saluka v. Czech Republic* (Exhibit CL-0021); *El Paso v. Argentina*, Award (Exhibit RL-0049).

care by the State under international law comprising a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries.”⁹⁶⁶ (emphasis in the original)

776. In *Rumeli v. Kazakhstan*, the tribunal limited the FPS standard to protection from physical damage:

“668. The Arbitral Tribunal agrees with Respondent that the full protection and security standard in Article II(2) of the UK-Kazakhstan BIT must be construed in accordance with the accepted rules of treaty interpretation. It obliges the State to provide a certain level of protection to foreign investment from physical damage. In *AMT v. Zaire* and in the *Wena* case, ICSID tribunals have recognized that in international law, the full protection and security obligation is one of ‘due diligence’ and no more. More recently, in *Saluka*, the Tribunal also decided that ‘*the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force*’.”⁹⁶⁷ (emphasis in the original)

777. Lastly, in *El Paso v. Argentina*, the tribunal held that:

“522. The BIT requires that Argentina provide ‘full protection and security’ to El Paso’s investment. The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party. The case-law and commentators generally agree that this standard imposes an obligation of vigilance and due diligence upon the government. [...]”⁹⁶⁸ (emphasis added)

778. The Tribunal aligns itself with these views. There is nothing in the BIT that would indicate that “full protection” extends to more than physical protection. This distinguishes it with cases such as *Siemens v. Argentina*, wherein the Argentine-Germany BIT specifically qualified “security” by the word “legal”. This particular detail led to the tribunal’s conclusion that the treaty obligated the host State to provide security that is not limited physical security.⁹⁶⁹ In the present case, the BIT does not contain any such qualification to the “full protection” provided under Article 2(2). The fact that there are examples of intangible investments enumerated in the list of in Article 1(1), does not support expanding the FPS standard beyond physical security. This list

⁹⁶⁶ *Ulysseas v. Ecuador*, at 271-272 (Exhibit RL-0134).

⁹⁶⁷ *Rumeli v. Kazakhstan*, at 668 (Exhibit CL-0029).

⁹⁶⁸ *El Paso v. Argentina*, Award, at 522 (Exhibit RL-0049).

⁹⁶⁹ *Siemens v. Argentina*, at 303 (Exhibit CL-0037).

is not an exhaustive list, and many investments in physical form would also be included as investments within the chapeau of Article 1(1).

779. Moreover, the fact that FET and FPS, while found in the same provision, are referred to separately in the BIT (“Investments [...] and their returns shall at all times be accorded fair and equitable treatment and shall enjoy the full protection of the present Agreement.” (emphasis added)), supports the conclusion that the two standards are distinct. By application of the legal principle of *effet utile*, these two standards must have a different scope and role. In the case of *Electrabel v. Hungary*, the Tribunal found that “given that there are two distinct standards under the ECT, they must have, by application of the legal principle of ‘*effet utile*’, a different scope and role”.⁹⁷⁰ In *Mamidoil v. Albania*, the tribunal found that the FPS standard comprises a duty of due diligence, but does not oblige the State to prevent all types of injuries:

“819. The Tribunal first notes that the obligation to provide constant protection and security must not be confounded with the obligation to provide fair and equitable treatment. The distinction between the standards in treaties such as the ECT is of relevance. It would violate the principles of treaty interpretation under the Vienna Convention on the Law of Treaties to confuse the meaning of protection and security with that of a fair and equitable treatment.

820. The Tribunal concludes therefore that both claims have to be examined separately. The fact that the Tribunal rejected the FET claim does not imply the rejection of the claim for a violation of protection and security.

821. The Tribunal refers to a *jurisprudence constante* according to which the standard of constant protection and security does not imply strict liability but rather obliges States to use due diligence to prevent harassment and injuries to investors. The measure of due diligence is conditioned by the circumstances. The Tribunal further concurs with *Electrabel v. Hungary* that due diligence does not oblige the State to ‘prevent each and every injury’.”⁹⁷¹ (emphasis in the original)

780. Since there has been no suggestion in the present case that Respondent failed to protect Claimant’s investment from physical harm inflicted by third parties, the Tribunal concludes that no breach of the full protection and standard has occurred.
781. Even assuming that the Tribunal were to consider that FPS is not limited to physical security but also covers legal security, Claimant’s specifically alleged violations do not constitute a breach of the obligation to provide legal protection.

⁹⁷⁰ *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.83 (Exhibit RL-0135).

⁹⁷¹ *Mamidoil v. Albania*, at 810-821 (Exhibit RL-0138).

782. *Claimant's claim that disproportionate intervention of the legislature into the Bank's business violated its expectation to enjoy fair protection for its investment.* The Tribunal agrees with Respondent that this is a repetition of its argument on proportionality under the FET, and the Tribunal refers back to its analysis in paragraphs 688 to 725 above.
783. *Claimant's claim that Respondent failed to provide Claimant with legal protection against adverse action affecting its investment, including failing to provide Claimant with effective remedies to vindicate its rights against recalcitrant debtors.* The FPS standard, even if it can be said to include legal protection, does not oblige the state to “prevent each and every injury”⁹⁷² and would not support Claimant's general statement that Respondent is obligated to protect Claimant against adverse action affecting its investment.
784. Furthermore, the claim that Respondent failed to provide effective remedies to vindicate Claimant's right against recalcitrant debtors cannot be sustained based on factual evidence, as Claimant has not made specific allegations nor has it presented evidence showing that it was unable to enforce its rights against recalcitrant debtors. Before the Law on Conversion, the Bank enforced the loans against persons who had defaulted on their repayment obligations. After the recalculation of the loans as a result of the Law on Conversion, Claimant would have had access to the legal processes should the debtors have been unable or unwilling to pay in accordance with their agreed repayment plan.
785. *Claimant's claim that Respondent failed to maintain the general stability of the legal environment, in particular, that Respondent was not allowed to withdraw the protection of the law from existing transactions that had been entered into lawfully under existing regulations.* Claimant is repeating the same arguments it made to establish a violation of the FET standard. Claimant cites one case in support of this claim – *National Grid v. Argentina*. However, the case is inapposite. In that case, the tribunal found that Argentina breached the “protection and constant security” standard under Article 2(2) of the Argentina-UK BIT since it fundamentally changed the legal framework that had been used to solicit National Grid's investment. There was thus a specific assurance made that was subjected to extreme changes in the regulatory framework. In the present case, Claimant admits that no specific promise or assurance was made by Respondent and that it instead relied on the “legal order of Montenegro as it stood at the time when the investment was made”.⁹⁷³ It follows that no specific promise or assurance was breached by Respondent that may lead to a breach of legal protection – if it were required under the FPS standard, which the Tribunal does not think to be the case, unlike the factual milieu of *National Grid v. Argentina*. Moreover, as discussed in paragraph 665 above, it cannot be said that the Law on Conversion had the effect of transforming

⁹⁷² *Electrabel v. Hungary*, Decision on Jurisdiction and Liability, at 7.83 (Exhibit RL-0135); *Mamidoil v. Albania*, at 821 (Exhibit RL-0138); *El Paso v. Argentina*, Award, at 523 (Exhibit RL-0049).

⁹⁷³ Reply, at 313.

the entire regulatory framework under which Claimant was operating. The effect, if any, was confined to one product, namely the CHF Loans, which is just a small part of the overall legal framework in which the Bank operated.

786. Lastly, the FPS standard also cannot protect against the State's legislative and regulatory activity, as held in *AES Summit v. Hungary*:

“13.3.2. In the Tribunal's view, the duty to provide most constant protection and security to investments is a state's obligation to take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors. But the standard is certainly not one of strict liability. And while it can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.”⁹⁷⁴

787. Montenegro's legislative activity in passing the Law on Conversion and its Amendment thus cannot qualify as a breach of the obligation to provide FPS even if it negatively affected the Bank's activities, as long as it acted reasonably and with a view of objectively rational public policy goals. As explained in paragraphs 604 to 616 above and 690 to 695 above the Tribunal has found that it did act in this manner.

XI. WHETHER THE LAW VIOLATES THE BANK'S CONSTITUTIONALLY-GUARANTEED RIGHTS.



⁹⁷⁴ *AES v. Hungary*, at 13.3.2 (Exhibit RL-0039).



[REDACTED]

[REDACTED]

A. CLAIMANT'S POSITION

[REDACTED]

[REDACTED]

[REDACTED]

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B. RESPONDENT'S POSITION

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[REDACTED]

[REDACTED]

[REDACTED]

C. THE TRIBUNAL’S ANALYSIS

821. The Tribunal has been constituted under the BIT to rule on matters of international law and of treaty claims, and not as a supranational court to review decisions of a Constitutional Court. Therefore, the Tribunal will not take a view on the issue of whether Respondent’s acts were or were not in accordance with the Montenegrin Constitution or with domestic law, as the Constitutional Court is the judicial body empowered to determine such matters and it has made its determination in the Constitutional Court Decision.

¹⁰²⁸ Rejoinder, at 133-134.
¹⁰²⁹ Rejoinder, at 137.
¹⁰³⁰ Rejoinder, at 137.
¹⁰³¹ Rejoinder, at 138.
¹⁰³² Rejoinder, at 139.
¹⁰³³ Rejoinder, at 140; [REDACTED].

XII. WHETHER RESPONDENT IS IN BREACH OF FUNDAMENTAL PRINCIPLES OF EU LAW

A. CLAIMANT'S POSITION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. RESPONDENT'S POSITION

[REDACTED]

[REDACTED]

C. TRIBUNAL'S ANALYSIS

827. Considering that Claimant has failed to explain why a breach of the SAA would constitute a breach of the BIT, the Tribunal dismisses this claim. Moreover, the issue has been considered and decided by the Constitutional Court. The Tribunal has been constituted under the BIT to rule on matters of international law and of treaty claims, and not as a supranational court to review decisions of the Constitutional Court.

XIII. DAMAGES

828. Considering that the Tribunal has determined that Respondent committed no breach of the BIT, Claimant's claim for damages is therefore dismissed. In line with the principle of judicial economy, the Tribunal does not consider it necessary to set out the Parties' respective cases regarding damages.

XIV. COSTS

A. CLAIMANT'S POSITION

1. Legal principles

829. Claimant submits that Article 61(2) of the ICSID Convention grants the Tribunal wide discretion to determine the allocation of costs.¹⁰⁴⁸ Article 61(2) of the ICSID Convention states:

¹⁰⁴⁴ Counter-Memorial, at 238.

¹⁰⁴⁵ Counter-Memorial, at 239.

¹⁰⁴⁶ Counter-Memorial, at 139.

¹⁰⁴⁷ Counter-Memorial, at 139.

¹⁰⁴⁸ C-CS I, at 3, 5.

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

830. The ICSID Convention and the ICSID Rules are silent on the criteria that the Tribunal should adopt for the allocation of costs among the Parties. However, it is Claimant’s position that the principle of “costs follow the event” or “loser pays” has been well-established and should be applied by the Tribunal in the present case.¹⁰⁴⁹
831. Claimant contends that Montenegro breached its obligations under the BIT, which has caused Claimant to suffer damages. Thus, Claimant requests the Tribunal to order Respondent to bear all of the costs of the Tribunal and ICSID’s administrative costs, and reimburse it for its fees and expenses.¹⁰⁵⁰

2. Respondent’s conduct

832. According to Claimant, the above-stated request is also justified by Respondent’s conduct.
833. Claimant contends that Respondent, through its Central Bank, (a) approved the provisions in its financial statements in 2015 to provide for probable outflows due to the Law on Conversion and its Amendment, and (b) was aware of the necessary capital increases in 2015 and 2016 in order to keep the Bank’s capital above the statutory minimum. In fact, the Central Bank approved the additional subscription Claimant was constrained to make. Despite this, Respondent nevertheless challenged the necessity of the provisions and the capital increases. Respondent then opposed Claimant’s case on damages (in the form of compensation of the capital Claimant contributed) despite having approved the capital contribution. Respondent presented expert evidence that applied the wrong calculation method for provisions, and which based its assessment upon hypotheticals which were inapplicable or randomly chosen. Because of this, Claimant was constrained to submit its own evidence on damages and incur expenses for the same.¹⁰⁵¹

¹⁰⁴⁹ C-CS I, at 8-12; *Joseph Charles Lemire v. Ukraine*, (ICSID Case No. ARB/06/18), Award, 28 March 2011 (Exhibit CL-0163), at 380; *Ioannis Kardassopoulos v. Georgia*, (ICSID Case No. ARB/05/18), Award, 3 March 2010, at 692 (Exhibit CL-0164); *Deutsche Bank v. Sri Lanka*, at 588, 590 (Exhibit CL-0165).

¹⁰⁵⁰ C-CS I, at 6-7.

¹⁰⁵¹ C-CS I, at 14-18.

834. Claimant also submits that Respondent “challenged the jurisdiction of the Tribunal *mala fide*”¹⁰⁵² and presented a “frivolous”¹⁰⁵³ case that Claimant was not an investor in Montenegro, notwithstanding the fact that the Central Bank itself approved Claimant’s acquisition of the shares in the Bank. Thus, Claimant “had to use resources to prove facts which were plainly known to Respondent”.¹⁰⁵⁴
835. Claimant also submits that it conducted the proceedings efficiently, by foregoing the cross-examination of [REDACTED], and limiting further cross-examination of [REDACTED] during the Hearing.¹⁰⁵⁵

3. Comments on Respondent’s costs submission

836. In answer to Respondent’s criticism that Claimant is merely seeking the reconsideration of the decisions of the Constitutional Court, Claimant maintains that it initiated the case on valid grounds, based on Respondent’s breach of its obligations under the BIT and the consequential damages it suffered. Claimant was never a party to the proceedings before the Constitutional Court, and in any event, its case in the arbitration stems from Respondent’s breaches of international law.¹⁰⁵⁶
837. Claimant reiterates its submission that Respondent was well aware of Claimant’s investments into the Bank, as its own Central Bank had approved Claimant’s acquisition of the Bank’s shares.¹⁰⁵⁷
838. Claimant also denies that it had been compensated by HETA for the capital contributions it made to the Bank as necessitated by the Law on Conversion and its Amendment.¹⁰⁵⁸
839. With regard to its quantum case, Claimant submits that it set forth its case clearly that its losses consisted of the capital contributions that it was constrained to make in order to keep the Bank’s capital above the statutory minimum. Respondent’s quantum experts then summarily dismissed the capital contributions as not comprising economic losses. However, the only losses discussed by Respondent’s experts were the losses of the Bank, rather than Claimant’s losses. Despite the irrelevance of this approach, Claimant was constrained to respond by hiring its own quantum experts. The use of Respondent’s experts was thus a “waste of time and money and served only to compel Claimant to hire a quantum expert to address the matters that BRG had raised”.¹⁰⁵⁹

¹⁰⁵² C-CS I, at 20.

¹⁰⁵³ C-CS I, at 21.

¹⁰⁵⁴ C-CS I, at 23.

¹⁰⁵⁵ C-CS I, at 24.

¹⁰⁵⁶ C-CS II, at 8-10.

¹⁰⁵⁷ C-CS II, at 12-16.

¹⁰⁵⁸ C-CS II, at 17-19.

¹⁰⁵⁹ C-CS II, at 20-25.

840. Lastly, Claimant denies Respondent’s claim that it was successful in relation to many substantive interim applications, as the result of these applications have largely been mixed. Moreover, it denies that it unreasonably withheld documents from Respondent, as it was not in possession or control of those documents. Claimant states that it in fact had to engage in extensive negotiations and correspondence with counsel for AI Lake and HETA to obtain documents it was ordered to produce by the Tribunal.¹⁰⁶⁰

4. Claimant’s costs

841. On these bases, after setting forth its costs in each phase of the proceedings, Claimant requests an order that Respondent bear all of its costs, comprising the following:¹⁰⁶¹

- a. Specht & Partner Legal Fees: EUR 1,080,000.00
- b. Expenses and Disbursements: EUR 471,219.67
- c. Tribunal and institutional costs: USD 25,000.00 (Registration Fee) and USD 350,000 (Advance payment for costs).

842. Claimant submits that its costs are “reasonable in view of the length of the proceedings, hearing, and the issues in dispute”.¹⁰⁶²

B. RESPONDENT’S POSITION

1. Legal principles

843. Respondent agrees with Claimant that Article 61(2) of the ICSID Convention and the ICSID Rules grant the Tribunal broad discretion to assess costs. However, previous decisions of investment tribunals show that two approaches have been adopted when apportioning costs: (a) apportioning costs in equal shares and ordering each party to bear its own costs, and (b) applying “costs follow the event” such that “the losing party bears the costs of the proceedings, including those of the other party, or that the parties share in the costs proportionately to their success or failure”.¹⁰⁶³ Respondent submits that based on recent studies and practice of ICSID tribunals,¹⁰⁶⁴ the Tribunal should start with the “cost follows the event” approach, and then consider other factors relevant to the exercise of its discretion, such as:

“a) the parties’ respective requests for relief concerning the allocation of costs;

¹⁰⁶⁰ C-CS II, at 26-28.

¹⁰⁶¹ C-CS II, at 31.

¹⁰⁶² C-CS I, at 27.

¹⁰⁶³ R-CS I, at 5-7; *Orascom v. Algeria*, at 583 (Exhibit RL-0022).

¹⁰⁶⁴ The ICSID Convention, Regulations and Rules. A Practical Commentary. Fouret, Gerbay, Alvarez Ed, 2019, at 6.124-6.131(Exhibit RL-0149).

- b) the outcome of the parties' respective claims and defences and applications [...];
- c) the complexity or novelty of issues raised in the arbitration proceedings;
- d) the existence of special reasons or circumstances, such as, for example, 'procedural misconduct [...]; and
- e) the reasonableness of the parties' legal costs."¹⁰⁶⁵

844. According to Respondent, examples of special circumstances include:

- i. The extent to which a party has contributed to the costs of the arbitration and whether that contribution was reasonable and justified;
- ii. Whether a party has put forward unreasonable or frivolous claims; and
- iii. The procedural conduct of the parties, and in particular whether such conduct delayed the proceedings or increased costs unnecessarily."¹⁰⁶⁶

2. Respondent is entitled to its costs

845. Based on the principles described above, Respondent submits that Claimant should pay Respondent's costs in full.¹⁰⁶⁷
846. First, Respondent maintains that Claimant has failed to discharge its burden to satisfy the Tribunal's jurisdiction. Claimant's Memorial contained scant analysis of the jurisdictional issues by reference to the facts, and throughout the proceedings, Claimant's positions constantly changed. For example, it was only in the Reply that Claimant argued that it has been an investor in Montenegro since 31 December 2012 as a result of the CKTA.¹⁰⁶⁸ At the end of the Hearing, Claimant put forth a new case based on a theory of "legal successor" as the basis of its investment.¹⁰⁶⁹
847. Second, Claimant's case on the merits was a rehashing of the case before the Constitutional Court, which effectively requests the Tribunal to review the judgment and determine whether Respondent breached the Constitution of Montenegro. Moreover, Claimant's case was not properly evidenced, as it only relied on [REDACTED], an expert on Montenegrin law and not a witness of fact. Thus, the evidence presented by Respondent through the testimony of [REDACTED] was not controverted.

¹⁰⁶⁵ R-CS I, at 10; *PNG Sustainable Development Program Ltd v. Independent State of Papua New Guinea*, (ICSID Case No. ARB/13/33), Award, 5 May 2015, at 406 (Exhibit RL-0155).

¹⁰⁶⁶ R-CS I, at 11, fn. 11-12.

¹⁰⁶⁷ R-CS I, at 12.

¹⁰⁶⁸ R-CS I, at 18-19.

¹⁰⁶⁹ R-CS I, at 20-21.

848. Third, Claimant's case on quantum was advanced on the basis of capital contributions and not actual loss. Respondent further points out that Claimant had already been compensated in full by HETA, and thus, the case should not have been filed in the first place. Claimant had unreasonably resisted the production of various documents to conceal that it had already been compensated. Respondent thus incurred substantial cost to obtain unredacted versions of these documents. Had the information been made available at an earlier stage, Respondent states that it would have applied for a preliminary determination of this issue, thereby avoiding significant costs.¹⁰⁷⁰

849. Based on the foregoing, Respondent submits that Claimant should be ordered to pay Respondent's costs.

3. Comments on Claimant's costs submission

850. According to Respondent, Claimant's complaints on Respondent's case reflect its misunderstanding of the legal and factual issues of the case.

851. First, with regard to quantum, Claimant argued that Respondent acted in bad faith in resisting Claimant's claims since the latter was aware that Claimant had to make capital contributions to the Bank. Respondent clarifies that its case was that (a) capital contributions are not a measure of loss, and (b) Claimant has not shown that the Law on Conversion caused the Bank's capital adequacy ratio to fall below the statutory requirement. Respondent's case was not based on hypotheticals, but on legal principles to determine whether Claimant suffered any loss caused by the Law on Conversion. The onus was on Claimant to prove its loss, and it failed to do so.¹⁰⁷¹

852. Second, with regard to jurisdiction, Claimant argued that Respondent acted in bad faith by denying that Claimant is an investor in Montenegro, having approved Claimant's acquisition of its shares in the Bank. Respondent clarifies that such approval is irrelevant as to whether Claimant is a qualifying investor. Moreover, Respondent indicates that it does not allege that Claimant was a party to the Constitutional Court proceedings, but that the relevant question is whether the Constitutional Court had finally determined the alleged breaches of the Constitution, which Claimant has advanced as the basis of its claim on the merits.¹⁰⁷²

853. Third, Respondent denies that Claimant conducted the proceedings efficiently by deciding to forgo the cross-examination of certain witnesses. In the case of [REDACTED], he had already prepared for and was in attendance at the Hearing. Thus, Claimant's belated decision not to cross-examine him did not save on any costs, but instead resulted in wasted costs.¹⁰⁷³

¹⁰⁷⁰ R-CS I, at 24-30.

¹⁰⁷¹ R-CS II, at 12-13.

¹⁰⁷² R-CS II, at 14.

¹⁰⁷³ R-CS II, at 15.

854. Respondent also makes the following observations about Claimant's costs:

- a. Claimant's submissions provide inadequate details about the work undertaken or types of tasks done by the fee earners. Having failed to do so, Claimant breached the Tribunal's directions in P.O. No. 7 to provide "other details to prove that the claimed amount under the lump sum arrangement is reasonable and proportional, such as the identity and position of the lawyers involved, the standard or indicative hourly fee for each lawyer, the types of tasks they undertook by reference to the different stages of the proceedings, and other relevant information".¹⁰⁷⁴ Thus, any costs awarded in Claimant's favour should be significantly discounted.¹⁰⁷⁵
- b. [REDACTED] expert fees are unreasonable and inflated, amounting to four times the fees of [REDACTED] and [REDACTED]. Thus, Respondent submits that only a fourth (or a maximum of a third) of [REDACTED] fees should be recoverable.¹⁰⁷⁶
- c. Claimant has claimed a total of EUR 100,000 for Ms. Laura Steinberg, who is described as external counsel. Claimant failed to explain who she is and the role she may have performed in the case. Half of the amount was charged for preparation for and attending the Hearing, but Ms. Steinberg never attended the same. Claimant has also not shown why engaging an external lawyer was necessary considering the sufficiently large team at Specht & Partners.¹⁰⁷⁷
- d. Claimant claims EUR 61,893 for fees for foreign lawyers in Podgorica, without explaining what advice was procured from them. It was also not clear why they were necessary, considering that Claimant had engaged a Montenegrin law expert, [REDACTED]. The fees thus appear to be duplicative and unjustified, and cannot be considered to be reasonable and proportionate enough to be recoverable.¹⁰⁷⁸

4. Respondent's costs

855. On these bases, Respondent requests that the Tribunal deny Claimant's claim for costs, and order Claimant to pay Respondent's legal costs and arbitration costs within 14 days of the issuance of the Award, plus interest accruing at a rate of Libor + 4% compounded on a monthly basis from the date of the award to the date of payment of costs.¹⁰⁷⁹ After Respondent set forth its costs in each phase of the proceedings, its costs total the following:

- a. Legal costs: EUR 1,595,258.94

¹⁰⁷⁴ P.O. No. 7, at 16.

¹⁰⁷⁵ R-CS II, at 18.

¹⁰⁷⁶ R-CS II, at 19.

¹⁰⁷⁷ R-CS II, at 20.

¹⁰⁷⁸ R-CS II, at 21.

¹⁰⁷⁹ R-CS II, at 31.

b. Arbitration costs: USD 350,000.00.¹⁰⁸⁰

C. TRIBUNAL'S ANALYSIS

856. The Tribunal notes that Article 61(2) of the ICSID Convention provides as follows:

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

857. Article 61(2) of the ICSID Convention confers the Tribunal significant discretion in the allocation of costs. The Tribunal has taken note of the Parties' common position that costs should follow the event. The Tribunal agrees that the allocation of costs should be done on the basis of this principle.

858. There are several elements to consider when allocating costs in this case.

859. First, in the present Award, the Tribunal has dismissed Respondent's objections on jurisdiction and admissibility. The Tribunal has further concluded that Claimant has failed to establish liability and, as a result, has not awarded Claimant any damages. Claimant was thus the winning Party on jurisdiction and admissibility, but the losing Party for purposes of liability and quantum.

860. Second, the Tribunal has taken into consideration the amounts claimed by the Parties for their legal representation as well as their fees and disbursements. In this respect, the Tribunal notes that Claimant's legal costs amount to EUR 1,551,219.67,¹⁰⁸¹ while Respondent's legal costs amount to EUR 1,595,258.94.¹⁰⁸² The Tribunal finds the Parties' costs reasonable in light of the complexity of this case.

861. Third, the Tribunal notes Claimant paid USD 25,000 as Registration Fee. All other costs of the arbitration, including the fees and expenses of the Tribunal and the Assistant of the President, ICSID's administrative fees and direct expenses, amount to USD 746,400.52, as set out in the paragraph below.

862. The below expenses have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share in the costs of the arbitration amounts to USD 373,200.26. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

¹⁰⁸¹ C-CS II, at 31 (Specht & Partner Legal Fees and Expenses and Disbursements).

¹⁰⁸² R-CS II, at 31.

Arbitrators' fees and expenses	
Bernard Hanotiau	USD 233,496.70
Brigitte Stern	USD 99,703.17
Pierre-Yves Tschanz	USD 71,298.24
Assistant's fees and expenses	USD 25,147.01
ICSID's administrative fees	USD 210,000.00
Direct expenses	USD 106,755.40
Total	<u>USD 746,400.52</u>

863. Fourth, the Tribunal has noted the Parties' respective arguments in relation to the other Party's conduct during the proceedings but finds that none of these constitutes procedural misconduct such as to affect the allocation of costs based on costs follow the event.
864. Bearing in mind all of the considerations above, and applying the principle that costs should follow the event to the particular circumstances of this case, the Tribunal decides that Claimant bears its own costs of the arbitration and legal costs and shall reimburse Respondent 70% of Respondent's share in the costs of the arbitration and 70% of Respondent's legal costs. Therefore, Claimant shall reimburse Respondent USD 261,240.18 for Respondent's share in the costs of the arbitration and EUR 1,116,681.26 for Respondent's legal costs.
865. Claimant shall make the above payments within 30 days of the present Award.
866. The Tribunal considers that the orders above are sufficient and reflect an appropriate allocation of costs in this arbitration, taking into account all the relevant circumstances. The Tribunal, exercising its discretion under Article 61(2) of the ICSID Convention, considers that an order for interest on the above sums is not warranted.

XV. DECISION

867. For all the reasons developed in this Award, the Arbitral Tribunal decides as follows:
- (a) Finds that it has jurisdiction over Claimant's claims;
 - (b) Finds that Claimant's claims are admissible;
 - (c) Finds that Respondent has not acted in breach of the BIT;
 - (d) Dismisses Claimant's claims for damages;

- (e) Orders Claimant to reimburse Respondent USD 261,240.18 for Respondent's share in the costs of the arbitration within 30 days from the present Award;
- (f) Orders Claimant to reimburse Respondent EUR 1,116,681.26 for Respondent's legal costs within 30 days from the present Award; and
- (g) Dismisses all other claims.



Mr. Pierre-Yves Tschanz
Arbitrator

Professor Brigitte Stern
Arbitrator

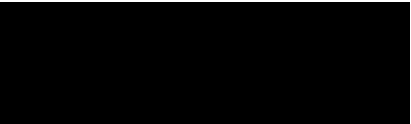
Date: 23 NOV 2021

Date:

Professor Bernard Hanotiau
President of the Tribunal

Date:

Mr. Pierre-Yves Tschanz
Arbitrator



Professor Brigitte Stern
Arbitrator

Date:

Date: 23 NOV 2021

Professor Bernard Hanotiau
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Date:

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Arbitrator

Professor Brigitte Stern
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Date:

Date:



Professor Bernard Hanotiau
President of the Tribunal

Date: 23 NOV 2021