IN THE MATTER OF AN ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES (1976) (the "UNCITRAL Arbitration Rules")

BETWEEN

MR OLEG VLADIMIROVICH DERIPASKA

Claimant

and

MONTENEGRO

Respondent

STATEMENT OF CLAIM

15 July 2017

Arbitral Tribunal

Jean Kalicki (Presiding Arbitrator)

Professor Zachary Douglas QC (Arbitrator)

Professor Brigitte Stern (Arbitrator)

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I INTRODUCTION

A. Executive Summary

1.1 This Statement of Claim is submitted by Oleg Vladimirovich Deripaska (the "**Claimant**") in accordance with Article 18 of the UNCITRAL Arbitration Rules 1976 (the "**UNCITRAL Arbitration Rules**") and the Tribunal's directions set out in its Procedural Order No. 1 of 3 May 2017 ("**PO1**") and Procedural Order No. 2 of 7 June 2017 ("**PO2**").

1.2 As set out in this Statement of Claim, the State of Montenegro (the "**Respondent**" or "**Montenegro**") has violated its treaty obligations by unlawfully depriving Mr Deripaska of the value of his substantial investment in the largest company in Montenegro, the aluminium smelting business Kombinat Aluminijuma Podgorica, A.D. ("**KAP**"), and its associated bauxite mine business Rudnici Boksita AD Nikšić ("**RBN**").

1.3 Specifically, in order to raise urgently needed funds for KAP and RBN (which are critical to Montenegro's economy), Montenegro solicited money from Mr Deripaska, sold interests in KAP and RBN to him, and promised to further support him once he had invested. Yet once Mr Deripaska had invested several hundred million euros, Montenegro reversed course, withdrew its support, seized control of these businesses, and transferred ownership of them to a well-connected Montenegrin businessman.

1.4 Montenegro's blatant expropriation of Mr Deripaka's investment – in violation of repeated commitments made by Montenegro to Mr Deripaska and in breach of Montenegro's treaty obligations – was unlawful and without compensation. Today, as a result of Montenegro's actions, Mr Deripaska has nothing to show for the hundreds of millions of euros that he invested in good faith in these Montenegrin businesses.

1.5 Mr Deripaska's claims in this arbitration arise under the Agreement between the Government of the Russian Federation and the Federal Government of the Republic of Yugoslavia for the Promotion and Reciprocal Protection of Investments of 11 October 1995 (the "**Treaty**").[1]

[1] **Exhibit C-1**, Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia for Promotion and Mutual Protection of Investments, dated 11 October 1995 (the "**Treaty**").

1.6 The Treaty constitutes a binding legal instrument in force between the Russian Federation and Montenegro, pursuant to which the two states assume mutual obligations to provide full and unconditional legal protection to investments made in the territory of either party by a national of the other.

1.7 As a Russian investor who has made an investment within the meaning of the Treaty in the territory of Montenegro, Mr Deripaska is entitled to the protections afforded to an investor under the Treaty. In particular, Montenegro is obliged by the Treaty to do the following with respect to an investment made by an investor:

(a) encourage such investment (Article 2(1));

(b) guarantee in accordance with its legislation full and unconditional legal protection of the investment (Article 2(2));

(c) ensure in its territory fair and equitable treatment of the investments (Article 3(1));

(d) preclude the application of discriminatory measures, which could hinder the management and disposal of the investments (Article 3(1));

(e) ensure that the standards of fair and equitable treatment afforded to that investment are not less favourable than the treatment accorded to the investments and investment activities of its own nationals or to investors of any third state (Article 3(2)); and

(f) refrain from expropriating the investment, except when such measures are (i) taken in the public interest, (ii) in a manner prescribed by the law, (iii) are not discriminatory, and (iv) are accompanied by payment of prompt and adequate compensation (Article 4).

1.8 As set out in detail in this Statement of Claim, Mr Deripaska invested hundreds of millions of euros in KAP and RBN in the subsequent restructuring and capitalisation of those businesses and their facilities.

1.9 Both before and after Mr Deripaska invested in KAP and RBN, Montenegro – through numerous government officials, including its prime minister, Milo Đukanović – repeatedly

made commitments to Mr Deripaska about the support that Montenegro would provide in respect of KAP and RBN.

1.10 Notwithstanding this, once Montenegro had sold KAP and RBN to Mr Deripaska for significant consideration, Montenegro reneged on its commitments to Mr Deripaska and instead engaged in a series of unfair, inequitable and ultimately expropriatory acts that were intended to, and did, create a hostile operating environment for those companies, including:

(a) failing to meet Mr Deripaska's legitimate expectation of obtaining a reliable and affordable long-term source of energy for KAP's smelter plant by, among other things, denying him the promised opportunity to purchase the Pljevlja power plant;

(b) starving KAP of funds by abusing its power to prevent Mr Deripaska from loaning money to KAP after the coming into force of the parties' Settlement Agreement (as defined below) in 2010;

(c) preventing KAP from complying with its obligations to international lenders, causing it to breach its covenants with OTP Bank and miss the deadline for payments;

(d) refusing to settle its own debts with KAP;

(e) preventing KAP from raising its own funds by blocking the sale of unwanted non-core assets;

(f) failing reasonably to cooperate on the restructuring of KAP and RBN, including (i) the restructuring of KAP's external debt, and (ii) the reduction of KAP and RBN's respective workforces;

(g) denying KAP the full benefit of electricity subsidies that Mr Deripaska and KAP had bargained for from Montenegro;

(h) abusing its powers as a shareholder in KAP and the veto power of its appointee to the KAP board of directors to obstruct KAP's management, including by:

(i) unreasonably withholding its consent to KAP's 2009 financial statements;
(ii) vetoing KAP's 2011 business plan; and
(iii) preventing KAP from carrying out an orderly shutdown of the smelter;

(i) failing to prevent Montenegro's state-owned monopoly energy supplier, Elektroprivreda Crne Gore AD Nikšić ("**EPCG**"), from reducing and ultimately terminating its supply of energy to KAP's smelting plant;

(j) declaring a "Failure Event" and attempting to wrest Mr Deripaska's shareholding in KAP away from him, based on KAP's arrears on its electricity bills, after having recognised the need to address KAP's power arrears but done nothing to assist; and

(k) engaging in negotiations with KAP's lender Deutsche Bank without KAP's knowledge or consent, including payment on KAP's behalf, without KAP's knowledge or consent, of an unjustified EUR 1 million "restructuring fee" to Deutsche Bank.

1.11 In February 2012, following the erosion of the value of Mr Deripaska's investment in KAP by Montenegro's acts, the parliament of Montenegro, which was controlled by the then prime minister Milo Đukanović, directed the government of Montenegro to "***terminate cooperation with CEAC***" and to "***take over control of KAP***."[2] This constituted a parliamentary directive to expropriate Mr Deripaska's remaining investment in KAP.

1.12 A further parliamentary resolution followed in June 2012, again exhorting the government "as soon as possible, ***to continue with activities*** in order to realise the key request by the Parliament of Montenegro ***concerning termination of cooperation with CEAC***, in the manner deemed most efficient by the Government."[3]

1.13 In April 2013, parliament once more concluded that "***the transfer of CEAC's shares to Montenegro*** and termination of the agreement ***can only be done***, in the most efficient and cost-effective manner, ***without compensation on any grounds,*** or burdening the state budget and citizens of Montenegro."[4]

1.14 Montenegro proceeded to execute parliament's directive to expropriate KAP. It did so through the following mechanism:

[2] **Exhibit C-10**, Conclusions of the Parliament of Montenegro on Tasking the Government of Montenegro to Terminate Cooperation with CEAC and Take Over the Control of KAP, In the Most Efficient Manner, Based on Law and Agreement (the "**February 2012 Conclusion**"), dated 29 February 2012 (emphasis added).
[3] **Exhibit C-133**, Conclusions of the Parliament of Montenegro, dated 8 June 2012 (the "**June 2012 Resolution**") (emphasis added).
[4] **Exhibit C-145**, Parliamentary Resolution, dated 30April 2013 (the "**April 2013 Resolution**") (emphasis added).

(a) creating, through the conduct described at 1.9 above, the conditions which placed KAP in default under its loan with Deutsche Bank, permitting Deutsche Bank to accelerate the loan and demand immediate repayment from KAP;

(b) paying off the Deutsche Bank loan itself, and then demanding that KAP reimburse it for more than EUR 23 million, money which it knew KAP did not have (and which Montenegro would not allow Mr Deripaska to provide to KAP);

(c) having caused KAP to incur this debt towards Montenegro, opportunistically and in abuse of right, filing a petition for KAP's bankruptcy;

(d) acquiring various debts that had been incurred by KAP, and in the process, increasing its claims in KAP's bankruptcy from EUR 7,400,000 to EUR 148,100,000, thereby making Montenegro KAP's largest single creditor;[5]

(e) using this influence to ensure, in abuse of its position and in disregard of the Montenegrin Law on Bankruptcy, as published in the Official Gazette of Montenegro, No. 1/2001, dated 11 January 2011 (the "**Bankruptcy Law**"), that Montenegro and its state organs (the Commercial Court in Podgorica (the "**Commercial Court**"), the Appellate Court of Montenegro (the "**Appellate Court**"), the Supreme Court of Montenegro (the "**Supreme Court**"), the Constitutional Court of Montenegro (the "**Constitutional Court**"), the state-controlled entity EPCG, and the state-owned company Montenegro Bonus D.O.O. Cetinje ("**Montenegro Bonus**")) were in a position to take effective control of KAP and all aspects of the bankruptcy process; and

(f) exercising this control to deny Mr Deripaska any opportunity to protect his investment through the bankruptcy process, including procuring the sale of KAP and RBN out of insolvency at an undervalue to the same well-connected Montenegrin businessman who had managed KAP before Mr Deripaska invested hundreds of millions of euros in it.

1.15 After forcing KAP into bankruptcy, Montenegro continued abusively to exercise its powers to harass Mr Deripaska's representatives in Montenegro. Among other things, it arrested KAP's former CFO, Mr Dmitry Potrubach, on spurious allegations that he had been engaged in the

[5] **Exhibit C-167**, Montenegro Registration of Claims in KAP's Bankruptcy Proceedings ("**Montenegro Registration of Claims**"), dated 6 August 2013.

theft of electricity. In reality, it was Montenegro itself, not KAP or Mr Potrubach, who was responsible for the unlawful taking of electricity from the European grid. Montenegro subjected Mr Potrubach to imprisonment, followed by seven months during which he was prohibited from leaving Podgorica pending the outcome of the criminal investigation. Despite the absence of any *prima facie* case against him, Mr Potrubach was subjected to public humiliation and reputational damage as a result of Montenegro's decision to court publicity for the criminal investigation against him.

1.16 Mr Deripaska has received no compensation from Montenegro for the loss of his investment, nor for any of the unfair and inequitable measures to which his investment was subjected. He has also received no funds from the bankruptcy proceedings, even though his companies were major creditors of KAP, and he is unlikely to receive any funds from the bankruptcy proceedings owing to the significant undervalue at which KAP's assets have been sold.

1.17 Montenegro, through its actions summarised above, has failed to comply with both its general and specific obligations under the Treaty. In particular, Montenegro has: (a) breached its obligation to provide Mr Deripaska's investment with fair and equitable treatment; and (b) unlawfully expropriated Mr Deripaska's investment without compensation.

1.18 Mr Deripaska repeatedly has attempted to resolve this dispute amicably with Montenegro, but these efforts have proven to be futile. Accordingly, Mr Deripaska now seeks from the Tribunal: (a) a declaration that Montenegro has violated its obligations under the Treaty; and (b) monetary damages, costs and interest.

B. The Parties and their Representatives

1. Mr Deripaska

1.19 The Claimant is Oleg Vladimirovich Deripaska, a national of the Russian Federation. His permanent address is 30 Rochdelskaya St., Moscow 123022, Russian Federation.

1.20 Mr Deripaska is the owner of En+ Group ("**En+**"), a Jersey incorporated holding company that holds interests in metals, mining, energy, and logistics businesses in the Russian Federation and around the world. Via En+, Mr Deripaska is the controlling owner of one of the largest

aluminium producers in the world, United Company RUSAL plc ("**RUSAL**"). Also via En+, Mr Deripaska made and held his Investment (as defined below) in CEAC Holdings Limited, a company incorporated under the laws of the Republic of Cyprus ("**CEAC**").

1.21 Mr Deripaska is represented by Boies Schiller Flexner (UK) LLP and Egorov Puginsky Afanasiev & Partners. Both firms have full authorisation to act for Mr Deripaska in this matter. All communications to Mr Deripaska in relation to this matter should be directed to:

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2. <u>Montenegro</u>

1.22 The Respondent is Montenegro.

1.23 Montenegro is represented in these proceedings by:

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ul. Jasna 26, Warsaw, Poland

Attention of:
Jelena Bezarević Pajić
Vanja Ticaand

Attention of:
David A Pawlak LLC

Tanja Šumar

C. Procedural Background

1.24 Mr Deripaska issued his Notice of Arbitration on 5 December 2016.[6] In his Notice of Arbitration, he appointed Professor Zachary Douglas QC as his party-appointed arbitrator, pursuant to Articles 3(4) and 7 of the UNCITAL Arbitration Rules.

1.25 Montenegro acknowledged the Notice of Arbitration by way of a letter sent by its legal representatives on 4 January 2017. In this letter, Montenegro appointed Professor Brigitte Stern as its party-appointed arbitrator, pursuant to Article 7 of the UNCITRAL Arbitration Rules.

1.26 On 10 February 2017, the party-appointed arbitrators confirmed the appointment of Ms Jean Kalicki as presiding arbitrator. Ms Kalicki confirmed her willingness to act in that capacity in a message to the parties of 13 February 2017. The Tribunal's Terms of Appointment were agreed to on 20 March 2017.

1.27 Pursuant to the Terms of Appointment and following consultation with the Parties, the Tribunal confirmed appointment of the Permanent Court of Arbitration in The Hague to act as administrator of the Arbitration.

1.28 The Parties were able to resolve in correspondence the proposed procedural directions for conduct of the Arbitration, in consultation with the Tribunal. Accordingly, the Tribunal issued Procedural Order No. 1 ("**PO1**") without a hearing. In order to accommodate certain minor amendments to the proposed procedural timetable that were agreed among the parties, the Tribunal issued Procedural Order No. 2 ("**PO2**").

D. Procedural Context

1.29 The matters in dispute in this Arbitration relate to Montenegro's breach of its obligations under the Treaty to protect and safeguard Mr Deripaska's investment in Montenegro.

1.30 Certain of the factual matters set out at in this Statement of Claim may separately constitute breaches by Montenegro and/or by entities under its control against those entities through

[6] Notice of Arbitration, dated 5 December 2016, ("**Notice of Arbitration**").

which Mr Deripaska holds his investment. Since Mr Deripaska made his initial investment, certain of those entities have brought proceedings seeking redress for alleged breaches of one or more such obligations. Those proceedings are as follows:

(a) first, on 27 November 2007, CEAC initiated arbitration under the Share Purchase Agreement dated 30 November 2005 between, *inter alia*, Montenegro, En+ and CEAC (the **"SPA**") alleging breach of the SPA (the "**First UNCITRAL Arbitration**").[7] CEAC's claim was brought against the Fund for Development of the Republic of Montenegro, the Republic Fund for Pension and Disability Insurance, the Bureau for Employment of the Republic of Montenegro and the Agency of Montenegro for Restructuring of the Economy and Foreign Investments under the SPA, and against Montenegro as a party with separate obligations under the SPA. CEAC's claims consisted principally of allegations that the Sellers and Montenegro had breached various warranties (principally related to the company accounts) and had failed to comply with contractual disclosure obligations in the SPA. As explained below, CEAC settled the First UNCITRAL Arbitration via a Settlement Agreement concluded between the parties on 16 November 2009 and which came into force on 26 October 2010 (the "**Settlement Agreement**");[8]

(b) second, on 12 November 2013, CEAC and En+ together issued a Notice of Arbitration under the Settlement Agreement, alleging breach by Montenegro of the contractual obligations it owed to CEAC and En+ under the terms of that agreement (the "**Second UNCITRAL Arbitration**"). Montenegro subsequently brought counterclaims against CEAC and En+ in these proceedings. The tribunal in the Second UNCITRAL Arbitration issued a Final Award on 12 January 2017 that largely dismissed all parties' claims under the Settlement Agreement;

(c) third, as detailed at sections III(L) and V(G) below, CEAC and En+ have commenced numerous actions in the Courts of Montenegro in connection with the conduct of the bankruptcy of KAP;

[7] **Exhibit C-51**, Notice of Arbitration, dated 27 November 2007 (the "**First UNCITRAL Notice of Arbitration**").
[8] **Exhibit C-5**, Settlement Agreement Between the Fund for the Development of the Republic of Montenegro, Republic Fund for Pension and Disability Insurance, Bureau for Employment of the Republic of Montenegro, CEAC, En+, KAP and RBN (the "**Settlement Agreement**"), dated 16 November 2009.

(d) fourth, on 11 March 2014, CEAC filed a Request for Arbitration with the International Centre for Settlement of Investment Disputes ("**ICSID**"), alleging that Montenegro breached obligations owed to CEAC, a company incorporated in Cyprus, under the Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments of 23 December 2005 (the "**Cyprus–Montenegro BIT**").[9] In an award dated 26 July 2016, the tribunal in that arbitration dismissed CEAC's claims on the basis that the tribunal lacked jurisdiction.[10] The tribunal's decision was based on its construction of the Cyprus-Montenegro BIT, leading it to conclude that CEAC did not have a "seat" in Cyprus within the scope of that treaty, meaning that it could not constitute a Cypriot investor with standing to bring a claim under the treaty. On 24 November 2016, CEAC submitted a request to ICSID for annulment of that award. This annulment application is pending; and

(e) fifth, CEAC has also initiated proceedings in the National Court of Nicosia in Cyprus against Montenegro, Mr Veselin Perišić, the bankruptcy administrator in KAP's insolvency proceedings, and Montenegro Bonus, seeking damages for loss suffered by CEAC in relation to KAP.

1.31 Each of the above claims concerns the enforcement of rights and obligations specific to the context in which they were raised. The First and Second UNCITRAL Arbitrations concerned the rights of CEAC and/or En+ arising under contract. The various claims before the Montenegrin Courts concerned rights under Montenegrin law to be afforded to CEAC and/or En+ as recognised creditors of KAP and RNB. CEAC's claim under the Cyprus-Montenegro BIT concerned the asserted rights of CEAC arising under that instrument, as a matter of international law.

1.32 Other than pursuant to the Notice of Arbitration in this case, Mr Deripaska has not commenced any other proceedings for relief in respect of breaches by Montenegro of its obligations to him arising under the Treaty.

[9] **Exhibit C-207**, Request for Arbitration (the "**CEAC Request for Arbitration**"), dated 7 March 2014.
[10] **Exhibit C-254**, Final Award (the "**CEAC Final Award**"), dated 26 July 2016.

E. The Evidence

1.33 This Statement of Claim is accompanied by a bundle of factual exhibits numbered C-1 to C-297 and a bundle of legal exhibits numbered CLA-1 to CLA-53.

1.34 This Statement of Claim is also accompanied by witness statements from Mr Deripaska, Mr Dmitry Potrubach (the former CFO of KAP), Mr Alexei Kuznetsov (the former chair of KAP's board of directors), Mr Vyacheclav Krylov (a former executive director and, later, chair KAP's board of directors) and Mr Yakov Itskov (one of Mr Deripaska's key negotiators during privatisation of KAP and RBN and, subsequently, chair of KAP's board of directors from 2005 to 2006).

1.35 This Statement of Claim also is accompanied by an expert report of Professor Vladimir Pavić and Professor Miloš Živković of the University of Belgrade Faculty of Law. Professor Pavić teaches in the fields of Private International Law, International Commercial Law, Competition Law and Foreign Investment Law and has specialist knowledge of the laws of Serbia and other successor states to the Federal Republic of Yugoslavia, including matters of Montenegrin law. Professor Živković teaches in the field of civil and contract law, and has written extensively on abuse of rights.

II JURISDICTION

A. Jurisdiction Ratione Personae

1. Montenegro

2.1 At the time of Mr Deripaska's initial investment in Montenegro in 2005, his investment was made within the territory of the State Union of Serbia and Montenegro, which was the successor state (at that time) to the Federal Republic of Yugoslavia. As a matter of international law, the State Union of Serbia and Montenegro was a state party to the Treaty and assumed all obligations of the Federal Republic of Yugoslavia under the Treaty.

2.2 At all times since its secession from the State Union of Serbia and Montenegro in 2006, Montenegro has been a party to the Treaty. Relevantly:

(a) Mr Deripaska made his initial investment within the territory of the State Union of Serbia and Montenegro, prior to Montenegro's accession;

(b) on 3 June 2006, the year following Mr Deripaska's initial investment, Montenegro seceded from the State Union of Serbia and Montenegro and formed an independent state;

(c) on that same date, the Republic of Serbia became the successor state to the State Union of Serbia and Montenegro as a matter of customary international law; and

(d) prior to the secession of Montenegro, the State Union of Serbia and Montenegro was a state party to the Vienna Convention on the Law of Succession of States in Respect of Treaties, which stipulates that in the event of secession of a state, both the seceding state and the successor state shall inherit the treaties of the predecessor state. Consistent with this principle, Montenegro's parliament issued a Decision on 8 June 2006 confirming its inheritance of all treaty obligations of the State Union of Serbia and Montenegro and the intention of Montenegro to abide by all international obligations under such treaties.[11]

[11] *See* **Exhibit C-18**, Diplomatic Note from the Ministry of Foreign Affairs of the Republic of Montenegero to the Ministry of Foreign Affairs of the Russian Federation (the "**Montenegrin Diplomatic Note**"), dated 4 August 2006.

2.3 On 4 August 2006, shortly after its independence, the Ministry of Foreign Affairs of Montenegro wrote to the Ministry of Foreign Affairs of the Russian Federation stating:

> "… in accordance with item 3 of the Decision of Assembly of the Republic of Montenegro on declaration of the independence of the Republic of Montenegro dated June 8, 2006, the Republic of Montenegro is a state-successor to the State Union of Serbia and Montenegro with regard to international treaties and agreements of the State Union of Serbia and Montenegro. In this regard, the Republic of Montenegro confirms its readiness to observe all treaties and agreements that have been effective between the Russian Federation and the State Union of Serbia and Montenegro." [12]

2.4 On 16 August 2006, the Ministry of Foreign Affairs of the Russian Federation responded to the Ministry of Foreign Affairs of the Republic of Montenegro, stating in relevant part that:

> "Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Ministry of Foreign Affairs of the Republic of Montenegro and in connection with the note of the Ministry No 03/04-1414 of 4 August 2006 respectfully informs that the Russian side takes into consideration the readiness of the Republic of Montenegro as a successor of the State Union of Serbia and Montenegro to exercise powers and discharge obligations arising out of all international treaties concluded between the Russian Federation and the State Union of Serbia and Montenegro."[13]

2.5 At all material times since Montenegro's independence, both Montenegro and the Russian Federation have manifested a common understanding that all mutual treaties entered into force between Russia and the State Union of Serbia and Montenegro, including the Treaty, remain fully in force as between them.

2. <u>Mr Deripaska</u>

2.6 Article 1(1) of the Treaty defines an investor ("**инвестор**") as follows:

> "1..The term "investor" shall mean:
>
> a) any natural person having citizenship of the Contracting Party;

[12] **Exhibit C-18**, Montenegrin Diplomatic Note, dated 4 August 2006.

[13] **Exhibit C-19**, Diplomatic Note from the Ministry of Foreign Affairs of the Republic of the Russian Federation to the Ministry of Foreign Affairs of the Republic of Montenegro (the "**Russian Diplomatic Note**"), dated 16 August 2006.

b) any legal person constituted under the law of the Contracting Party and with a location in the territory of that Contracting Party."[14]

2.7 Mr Deripaska is a natural person who is a citizen of the Russian Federation and is therefore an investor within the meaning of Article 1(1) of the Treaty.

B. Jurisdiction Ratione Materiae

2.8 Article 1(2) of the Treaty defines investment ("**капиталовложения**") as follows:

> "2. The term "investments" shall mean all kinds of assets which are invested by the investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation and in particular:
>
> - movable and immovable property, as well as related property; rights, including mortgages;
>
> - monetary funds as well as shares, stocks and other forms of participation;
>
> - claims to money invested for the purpose of creating economic value or services having an economic value;
>
> - copyrights, rights to invention, industrial samples, trademarks, or service marks, trade names, as well as technology and know-how;
>
> - rights conferred by law or under contract to undertake economic activity, including, in particular, the right to exploration, development and exploitation of natural resources."[15]

2.9 Mr Deripaska has made relevant investments within the meaning of Article 1(2) in the territory of Montenegro. The nature, extent and circumstances of Mr Deripaska's investment are set out in full at Section III below. Without limitation, Mr Deripaska's investments include:

(a) his indirect shareholdings in KAP and RBN;

(b) his debt interest in KAP and RBN (by way of shareholder loan or otherwise); and

[14] **Exhibit C-1**, the Treaty, Art. 1(1).
[15] **Exhibit C-1**, the Treaty, Art. 1(2).

(c) his contribution of funds for the purpose of purchasing KAP, funding its operations, and investing in its restructuring.

2.10 Each of Mr Deripaska's investments was made within the territory of Montenegro and in accordance with Montenegrin law.

C. Consent to Arbitration

2.11 Article 8 of the Treaty provides as follows:

> "[d]isputes between one Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including disputes concerning the amount, terms and procedure for payment of compensation shall, as far as possible, be settled through negotiations.
>
> If a dispute cannot thus be settled within a period of six months from the time that it arose, it shall be submitted to:
>
> The competent court or arbitral body of the Contracting Party in the territory in which the investments were made; or
>
> An ad hoc arbitration tribunal established in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL). The award of the arbitration tribunal shall be final and binding on both parties to the dispute. Each Contracting Party shall undertake to execute such an award in conformity with its respective legislation."[16]

2.12 Montenegro has therefore consented that Mr Deripaska's claims be resolved by means of *ad hoc* arbitration under the UNCITRAL Arbitration Rules, on condition only that the dispute between the parties is not first settled within a period of six months from the time that it arose.

2.13 The facts relevant to the Parties' negotiations to settle the matters in dispute are detailed at Section III(F) below. The evidence demonstrates that all attempts at negotiation proved to be futile. The dispute that forms the subject-matter of this Arbitration arose prior to 5 June 2016 (i.e., six months before Mr Deripaska filed his Notice of Arbitration). Accordingly, when the Notice of Arbitration was issued on 5 December 2016, more than six months had elapsed during which Montenegro had notice of the matters in dispute and Mr Deripaska, through

[16] **Exhibit C-1**, the Treaty, Art. 8.

his representatives, had been engaged in efforts to resolve matters through negotiation. It follows that the requirements of Article 8 set out above have been satisfied.

2.14 Aside from the express requirements set out in Article 8, the Treaty does not impose any other condition to commencement of arbitration by an investor, nor does any other such condition arise under applicable law.

D. Montenegro's Jurisdictional Objections

2.15 Montenegro has intimated in correspondence that it may argue that the Tribunal lacks jurisdiction to resolve the claims pursued in this arbitration.[17] Pursuant to Article 21(3) of the UNCITRAL Arbitration Rules (set out in full below), Montenegro is entitled to raise a plea in relation to jurisdiction at any time until service of its Statement of Defence, which is due on 31 October 2017. Although counsel for Mr Deripaska have asked for an indication of the nature of Montenegro's planned jurisdictional objections, Montenegro has declined to do so.

2.16 For the reasons set out above, Mr Deripaska submits that the Tribunal has jurisdiction in this Arbitration. Mr Deripaska reserves the right to respond to any submissions that Montenegro may make on the question of jurisdiction and to expand on the above submissions accordingly. Mr Deripaska does not attempt here to anticipate or pre-empt the arguments that Montenegro may make regarding the Tribunal's jurisdiction.

2.17 In the event that Montenegro does raise jurisdictional objections, the Tribunal is competent to resolve such objections, pursuant to Article 21 of the UNCITRAL Arbitration Rules, which provides as follows:

> "Article 21
>
> 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> 2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules

[17] Montenegro's position was first reserved in its acknowledgement of Mr Deripaska's Notice of Arbitration. *See* Letter from Slaven Moravčević to Boies, Schiler & Flexner (UK) LLP and Egorov Puginsky Afanasiev & Partners, dated 4 January 2017, at pp. 2-3.

shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award." [18]

[18] **Exhibit CLA-4**, United Nations Commission on International Trade Law UNCITRAL Arbitration Rules 1976 (the "**UNCITRAL Arbitration Rules**"), Art. 21.

III STATEMENT OF FACTS

A. Background

3.1 The aluminium smelting plant at Podgorica (or Titograd, as the city was then named) was established by the government of Yugoslavia in the late 1960s. It entered operation in 1971, with a production capacity of 120,000 tonnes of aluminium per annum.

3.2 The KAP plant was established with two capabilities. The first was a refinery to process raw bauxite into alumina powder. The second was a number of electrolysis cells (or "pots") to perform the smelting of alumina powder into finished aluminium. The plant was therefore capable of taking raw bauxite ore and turning out finished aluminium. A railway connection was established to link the plant with a substantial bauxite mine at Nikšić, approximately 50km to the north-west.

3.3 Over time, the KAP plant became a very significant employer in Montenegro and a major contributor to Yugoslavia's exports. Both prior to, and throughout the period of, Mr Deripaska's ownership, KAP was Montenegro's largest employer, contributing a significant proportion of Montenegro's GDP. At the time of Mr Deripaska's investment, it was estimated that KAP represented up to half of Montenegro's industrial output and 80% of its exports.[19] Montenegro's Central Bank estimated that aluminium produced at KAP represented 41.8% of Montenegro's exports in 2006 and 52.6% of Montenegro's exports in 2007.[20] As such, it held then (and continues to hold) huge political and financial significance for Montenegro and its government.

3.4 The KAP plant was significantly impacted by the political and economic instability that followed the dissolution of the Former Republic of Yugoslavia, as well as the sanctions imposed on Yugoslavia and its successor states during this time. Parts of the plant underwent periodic shutdowns of activity, leading to a reduction in productivity, under-investment, and a growing need to overhaul the plant. The plant also struggled with an excessively large workforce, a legacy of its days as a stated-owned employer under socialist

[19] **Exhibit C-52**, Report of the European Parliament Directorate General of External Policies: "*The Russian Economic Penetration in Montenegro*", dated 4 December 2007, at p. 9.
[20] **Exhibit C-52**, Report of the European Parliament Directorate General of External Policies: "*The Russian Economic Penetration in Montenegro*", dated 4 December 2007, at p. 9.

rule. By the early 2000s, the plant fell substantially short of the productivity standards of modern aluminium smelting and was uncompetitive on global markets.

3.5 It was evident that if KAP was going to survive, it needed significant new investment and restructuring. In April 2001, KAP entered into a significant debt restructuring agreement with its creditors, including Glencore, Standard Bank, EPCG, RBN (the company operating the bauxite mine that supplied KAP), and Vektra d.o.o. (a Montenegrin company that had assumed control of KAP's anode plant under contract). By this time, KAP had liabilities of hundreds of millions of euros to a variety of lenders, trade creditors, and other state agencies.

3.6 Despite its refinancing efforts, KAP remained in serious need of investment and finance. An article in London's Financial Times of 1 July 2003 described KAP in the following terms:

> "[t]he colossus of Montenegrin industry ***lies in a pitiful state of disrepair***, 10kms outside the capital.
>
> Fine white powder, calcinated aluminium, drifts around the filthy factories and empty lots of Kombinat Aluminijuma Podgorica (KAP). Red bauxite dust, too, is spilled everywhere beneath the heavily rusted structures. Workers take breaks in the yards, reclining in the shade, the very picture of socialist indifference in the state-owned plant.
>
> Yet within, 2,800 workers still push machines to full capacity, churning out the materials that account for half of Montenegro's gross domestic product and more than 80 per cent of exports." [21]

3.7 The same article went on to note the importance of KAP to Montenegro's economy:

> "[o]ne can hardly over-estimate the importance to this small economy of KAP's anticipated privatisation later this year.
>
> The aluminium complex, built in 1971, sits at the top of a chain of other big enterprises. These are the nearby bauxite mines, the state power utility for which KAP is by far the largest client, the railways and freight handlers that transport KAP's products and exports from the Adriatic port of Bar."[22]

[21] **Exhibit C-35**, Financial Times Special Report on Montenegro (the "**Financial Times Special Report**"), dated 1 July 2003, (emphasis added).
[22] **Exhibit C-35**, Financial Times Special Report.

B. Privatisation of KAP and RBN

3.8 The decision to privatise KAP was formally adopted by the Council of the Montenegrin Government on 21 January 2003.[23]

3.9 Around this time, Mr Deripaska became aware of Montenegro's intention to solicit foreign investment in KAP. The government of Montenegro actively courted Mr Deripaska as a potential investor in KAP. Mr Deripaska was alerted to the opportunity to invest in KAP by Mr Milan Rochen, at the time Serbia and Montenegro's Ambassador to Russia (and who subsequently became Foreign Minister of Montenegro).[24]

3.10 Mr Deripaska joined an Intergovernmental Delegation to Serbia and Montenegro where the possibility of Mr Deripaska investing in KAP was discussed.[25] The KAP plant appeared to be a good fit for Mr Deripaska's strategy to develop the metallurgic capacity of his business, which included the Basic Element Group, United Company RUSAL, and En+ Group Limited in Central and Eastern Europe.[26]

3.11 Mr Deripaska quickly learned of KAP's significant structural challenges, including its high debt levels, severe overstaffing, and outdated technology.[27] Despite this, a number of features of the KAP project gave Mr Deripaska confidence that the plant could be turned into a commercial success, including KAP's integrated production of alumina and aluminium, its connection with the RBN bauxite mine, its proximity to the Port of Bar, its receipt of discounted electricity from state-owned EPCG, and its enjoyment of duty-free imports into the European Union.[28]

3.12 Mr Deripaska was also reassured by Montenegro's apparent enthusiasm for attracting foreign investment. He was informed by Mr Đukanović during his initial visit that Montenegro required significant investment as it moved towards independence.[29] The significance of KAP to the Montenegrin economy also led Mr Deripaska to believe that

[23] *See* **Exhibit C-5**, Settlement Agreement, Recitals.
[24] **CWS – 1**, Oleg V. Deripaska Witness Statement ("**Deripaska WS**"), at para. 7.
[25] **CWS - 1**, Deripaska WS, at paras. 8-10.
[26] **CWS - 4**, Yakov Yuryevich Itskov Witness Statement ("**Itskov WS**"), at para.10.
[27] **CWS - 1**, Deripaska Witness Statement, at para. 10; **CWS-4**, Itskov Witness Statement at para.10.
[28] **CWS - 4**, Itskov Witness Statement, at para.9; **CWS - 1**, Deripaska WS, at para. 10.
[29] **CWS - 4**, Itskov Witness Statement, at para.9; **CWS - 1**, Deripaska WS, at para. 9a.

Montenegro would provide a hospitable climate for his investment, in order to support KAP's ongoing viability.[30]

3.13 Mr Rochen put Mr Deripaska in touch with a number of Montenegrin officials, including Montenegrin Prime Minister Milo Đukanović.[31] Thus began a series of meetings between Mr Deripaska and his representatives and Montenegrin officials. Mr Deripaska met personally with Mr Đukanović on a number of occasions to discuss his contemplated investment in KAP and RBN.[32]

3.14 Other members of Mr Deripaska's negotiating team included Mr Yakov Itskov (Director General of CJSC Soyuzmetallresurs, a member of the Basic Element Group), Ms Olga Tartakovskaya (Chief Financial Officer of CJSC Soyuzmetallresurs) and Ilya Ivanov (the officer formally in charge of the KAP investment team at the Basic Element Group).[33]

3.15 Montenegro's delegation was headed by Mr Bronimir Gvozdenović, the Montenegrin Deputy Prime Minister, Branko Vujović, director of Montenegrin Agency for Economic Restructuring and Foreign Investment, and Zoran Bechirović, a prominent Montenegrin entrepreneur. It was made clear to Mr Deripaska and his team that the most important person in the negotiations from the Montenegrin side was Prime Minister Đukanović. It was understood that Prime Minister Đukanović would make all of the key decisions in respect of KAP's privatisation.[34]

3.16 From the start of the negotiations, a number of key issues emerged as prominent points of discussion:

(a) the amounts to be invested in KAP and RBN after privatisation, and the focus of that capital investment;

(b) the importance of settling relations with KAP's creditors, and achieving a restructuring of KAP's unsustainable debts;

[30] **CWS - 4**, Itskov WS, at para.37; **CWS - 1**, Deripaska WS, at para. 22-24.
[31] **CWS - 1**, Deripaska WS, at para. 7.
[32] **CWS - 4**, Itskov WS, at paras.16–17; **CWS - 1**, Deripaska WS, at para. 9.
[33] **CWS - 4**, Itskov WS, at para.15; **CWS - 1**, Deripaska WS, at para. 13.
[34] **CWS - 4**, Itskov WS, at para.16; **CWS - 1**, Deripaska WS, at para. 9.

(c) the need to reduce KAP's workforce to a sustainable level, while balancing KAP's social obligations as a major employer in Montenegro; and

(d) the need to secure an agreement on a guaranteed long-term source of affordable electricity for KAP.[35]

3.17 On the latter issue, discussions centred primarily around Montenegro's intention to privatise the coal-fired thermal power plant at Pljevlja ("**TPP Pljevlja**"), which belonged to EPCG. TPP Pljevlja had been listed, along with KAP and RBN, in Montenegro's Program for Restructuring of Companies and Supporting Institution Development of June 2003.[36] Montenegro indicated its intention to privatise TPP Pljevlja, together with a blocking shareholding (31.1117%) of the coal mine Rudnik Uglja A.D ("**RUP**"), once the privatisation of KAP and RBN was complete.[37] It was understood by both sides that if KAP's investor did not also acquire TPP Pljevlja, KAP would instead require an alternative long-term source of electricity at a sustainable and reasonable price.[38]

1. Montenegro's Privatisation Strategy

3.18 In June 2004, Montenegro issued its draft privatisation strategy for KAP.[39] This document was the result of consultation by Montenegro with potential investors in KAP including Mr Deripaska, and it set out Montenegro's understanding of the key parameters for any successful privatisation process. Among other matters, the privatisation strategy document:

(a) explained that Montenegro's objectives through the privatisation process were, *inter alia*:

(i) "***Survival and long-term development of KAP***";

(ii) "***Survival and long-term development of associated businesses***";

(iii) "Addressing of social issue", meaning a desire "to preserve to the extent possible the level of employment" and "to secure a certain minimum level of social commitments by the incoming investor";

[35] **CWS - 4**, Itskov WS, at para.19.
[36] **Exhibit C-21**, Government of the Republic of Montenegro, Program for Restructuring of Companies & Supporting of Institution Development (the "**Restructuring Program**"), dated June 2003.
[37] **CWS - 4**, Itskov WS, at paras.19–22, and 29.
[38] **CWS - 4**, Itskov WS, at paras.23 -24 and 27.
[39] **Exhibit C-2**, Government Privatisation Strategy Document (draft) (the "**Privatisation Strategy Document**"), dated June 2004.

(iv) "***Settlement of the obligations*** of the [debt restructuring of 2001]", acknowledging that "[t]he complex debt situation of KAP result[s] primarily from the past economic sanctions on the former Yugoslavia…";

(v) "Addressing environmental issues"; and

(vi) "***Attracting foreign investment***", meaning a hope that the privatisation of KAP would act "as a catalyst for other investments of foreign investors in Montenegro";[40]

(b) set out a clear and comprehensive understanding of the concerns and expectations of potential investors based, in part, on actual discussions with potential investors in the plant. The list of matters acknowledged to be of critical concern to investors included the following:

(i) "Control of management decisions"

(ii) "Return potential";

(iii) "Purchase of bauxite", with recognition that "[i]nvestors that were familiar with the situation often understood common ownership of KAP and [RBN] as the most convenient option";

(iv) "Supply of electricity", recording that "***[a]dequate conditions for the purchase of electricity, representing one of the highest cost items of KAP, are essential for the long-term development of the company. The investors stressed the fact KAP will be competing with its products on the world-wide market and cost should therefore be competitive. It is crucial to secure not only a favourable price level but also this price to be applied for longer period of time***";

(v) "Employment and social aspects", meaning an ability to take reasonable steps to rationalise the workforce of KAP (noting that "KAP and the bauxite mine [R]udnici Boksita are overstaffed employing over 4900 employees", and that "there is a significant amount of redundant labor");

(vi) resolving KAP's debt situation (noting that "[t]he debt issue has a specific position […] because of the heavy indebtedness of KAP", and that while investors might be in a stronger position than Montenegro to directly negotiate a debt settlement, "[t]he complex debt situation of KAP resulting primarily from the past economic sanctions on the former Yugoslavia requires

[40] **Exhibit C-2**, Privatisation Strategy Document.

an active approach of the Government of Montenegro in debt restructurings with the Major Creditors"); and

(vii) "Long-term visibility", including a concern to have long-term "visibility of the price of key inputs (power, bauxite)";[41] and

(c) addressed the critical issue of electricity pricing, noting that:

(i) "It is important to provide KAP's Buyer with electricity supply under competitive [sic] prices for longer period of time"; and

(ii) "Potential investors see an adequate addressing of electricity issue for KAP through building of new power plant or through provision of electricity supply through long term contract. In case of construction of new source of electricity, the Buyer will need to provide an interim electricity supply." [42]

2. Negotiations for acquisition of KAP, RBN and TPP Pljevlja

3.19 On 9 August 2004, Montenegro issued an official Public Invitation in the Metal Bulletin to tender for shares in KAP.[43]

3.20 On 12 October 2004, RUSAL was designated by Montenegro as a "Qualified Tender Participant".[44] The eligibility criteria for qualification as a Qualified Tender Participant had been set out in the Privatisation Strategy and included an adequate track-record in the aluminium industry and a demonstration of solvency.[45]

3.21 On 22 December 2004, the Council of the Montenegrin Government adopted the decision to privatise its shareholding in RBN.[46] From this point onwards, the acquisition of Montenegro's shareholding in RBN was always discussed together with the acquisition of KAP. As Mr Itskov explains in his witness statement, KAP and RBN naturally formed a single package, with the mining interest at RBN offering the benefit of a dedicated supply of bauxite for use in production by KAP.[47]

[41] **Exhibit C-2**, Privatisation Strategy Document (emphasis added).
[42] **Exhibit C-2**, Privatisation Strategy Document.
[43] *See* **Exhibit C-3**, KAP SPA, Recital F.
[44] *See* **Exhibit C-3**, KAP SPA, Recital D.
[45] **Exhibit C-2**, Privatisation Strategy Document.
[46] *See* **Exhibit C-4**, RBN SPA, Recital A.
[47] **CWS - 4**, Itskov WS, at para.13; **CWS - 1**, Deripaska WS, at paras. 23-25.

3.22 On 24 December 2004, EPCG passed a decision to initiate the procedure for the sale of TPP Pljevlja pursuant to a public tender.[48] As Mr Deripaska and Mr Itskov explain in their witness statements, the sale of TPP Pljevlja to Mr Derispaska was, like the sale of the RBN shares, treated by all parties at the time as an integral part of the KAP privatisation.[49]

3.23 Over the winter months of 2004 and 2005, Mr Deripaska was personally involved in both:

(a) Discussions and negotiations with Montenegro concerning the possible terms of the privatisation agreement. These discussions included meetings in Moscow and in Montenegro, including meetings on board Mr Deripaska's yacht. Securing of electricity supply was a key part of those discussions.[50]

(b) With the permission of Montenegro, direct discussions and negotiations with KAP's existing creditors concerning the terms and conditions on which those creditors might accept restructuring of their debt following acquisition of KAP by Mr Deripaska.[51]

3.24 On 20 January 2005, RUSAL submitted a formal bid to acquire KAP to the Montenegrin Tender Commission (defined below).[52] On 15 April 2005, the Tender Commission confirmed its approval of RUSAL's bid and invited RUSAL to enter into discussions in order to agree a suitable sale and purchase agreement.[53] The Montenegrin Privatisation Council gave its approval for the sale to RUSAL on 25 July 2005, endorsing the decision of the Tender Commission.[54]

C. The Acquisition of KAP and RBN Shares

3.25 An Agreement for the Sale and Purchase of the Funds' Shares in KAP (the "**KAP SPA**") was concluded on 27 July 2005.[55]

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[48] *See* **Exhibit C-45**, Draft Pljevlja SPA, Recital B.
[49] **CWS - 4**, Itskov WS, at paras.21-22; **CWS - 1**, Deripaska WS, at para. 22.
[50] **CWS - 1**, Deripaska WS, at para. 20.
[51] **CWS - 1**, Deripaska WS, at para. 45.
[52] *See* **Exhibit C-3**, KAP SPA, Recital F.
[53] *See* **Exhibit C-3**, KAP SPA, Recital D.
[54] *See* **Exhibit C-3**, KAP SPA, Recital E.
[55] **Exhibit C-3**, Agreement for the Sale and Purchase of the Funds' Shares in Kombinat Aluminijuma Podgorica A.D., by Public Tender Between Fund for the Development of Montenegro, Republic Fund for Pension and Disability Insurance, Bureau for Employment for the Republic of Montenegro, the Government of the Republic of Montenegro, Salamon Enterprises Limited and Eagle Capital Group Limited (the "**KAP SPA**"), dated 27 July 2005.

3.26 The signatories to the KAP SPA were:

(a) Salamon Enterprises Limited as "Buyer". Salamon Enterprises was a company that had been incorporated in 2004 in Cyprus, wholly owned by RUSAL.[56] Subsequent to the transaction on 1 August 2007, Salamon Enterprises was renamed CEAC Holdings Limited.[57] For the sake of clarity, this entity is referred to in this Statement of Claim only as CEAC;

(b) Eagle Capital Group Limited, as guarantor of CEAC's obligations. Mr Deripaska beneficially owned Eagle Capital Group Limited, which was the primary vehicle for his international aluminium investments. Eagle Capital has since been renamed En+. For the sake of clarity, this entity is referred to in this Statement of Claim only as En+;

(c) three state agencies that owned the shares to be sold under the KAP SPA (respectively, the Fund for Development of the Republic of Montenegro, the Republic Fund for Pension and Disability Insurances, and the Bureau for Employment of the Republic of Montenegro (together, the **"Government Funds"**)); and

(d) the Government of the Republic of Montenegro.

3.27 Under the terms of the KAP SPA, CEAC acquired 65.4394% of the issued shares in KAP from the Government Funds. CEAC agreed to pay EUR 48.5 million in consideration for the shares.

3.28 Pursuant to the KAP SPA, Montenegro (either in its own capacity, or via the Government Funds) made the following commitments or promises:

(a) various representations and warranties concerning matters such as KAP's accounts and financial performance, environmental conditions, and the accuracy of information provided to CEAC in connection with the sale;

(b) an indemnity in CEAC's favour in respect of any environmental liabilities; and

[56] **Exhibit C-38**, Salamon Enterprises Limited Certificate, dated 29 August 2005.
[57] **Exhibit C-34**, Salamon Enterprises Limited to CEAC Holdings Limited Certificate of Change of Name.

(c) a guarantee concerning energy prices and volumes of delivery, covering the period to the end of 2010.[58]

3.29 CEAC and/or En+ made commitments or promises in respect of matters such as:

(a) an undertaking by CEAC to meet a minimum investment programme of EUR 55 million in KAP, underwritten by a EUR 10 million performance bond;

(b) an undertaking by CEAC to commit at least EUR 20 million to an Environmental Programme for KAP;

(c) agreement by CEAC to ensure that KAP repaid debts owed to Montenegro; and

(d) agreement by CEAC to repay up to USD 10.6 million owed by KAP to international creditors.[59]

3.30 As such, Mr Deripaska, through CEAC and/or En+, made a substantial initial investment pursuant to the KAP SPA, which included:

(a) payment of a purchase consideration of EUR 48.5 million;

(b) agreement to fund the repayment of KAP's debts to Montenegro;

(c) agreement to meet USD 10.6 million in liabilities to international creditors; and

(d) a commitment to invest EUR 75 million in plant upgrades at KAP.

3.31 As part of this transaction, Montenegro agreed to put in place a preferential electricity tariff, which is set out at Clause 8.5 of the KAP SPA. That electricity price guarantee was premised on Montenegro's ability to procure that EPCG, as a state-owned company, would sell electricity to KAP at prices stipulated by the government. Clause 8.5.2 of the KAP SPA provided for the circumstances in which EPCG was to be privatised during the term of the electricity subsidy, in which circumstances Montenegro would either (i) pay directly to KAP the difference between the guaranteed price and the price in fact charged by EPCG, or (ii) compel any new owner of EPCG to meet the agreed prices and volumes.

[58] **Exhibit C-3**, KAP SPA.
[59] **Exhibit C-3**, KAP SPA.

3.32 The effect of Clause 8.5 was that KAP was guaranteed to receive from EPCG:

(a) in the period to 31 December 2006, a maximum volume of 1,204,762 MWh, at a fixed price of EUR 20.44 per MWh;

(b) in 2007 and 2008, a maximum volume of 1,204,762 MWh, at a formula price. The formula price was to be calculated according to the following formula (the "**Electricity Price Formula**"):

> "[Electricity Price] = PC + BK, where:
>
> PC – is 24,39 USD for MWh converted in EUR under the European Central Bank's ("ECB") average exchange rate on the date of invoice issuance. If conversion rate is lower than 20,44 EUR, price of 20,44 EUR for MWh shall be applied.
>
> BK – energy price correction in case of positive deviation of primary aluminium price from the reference value of 1.550 USD/t.
>
> BK should be calculated according to the following:
>
> BK = ((LME – 1.550) x 0.024) x (srk(USD)) where:
>
> **LME – is average primary aluminium price at** London Metal Exchange in the month for which invoicing of the energy delivery is carried out;
>
> **srk(USD) – average USD exchange rate** according to ECB's exchange rate list on the date of invoicing;
>
> BK higher or equal to 0,00 EUR
>
> Obtained BK represents amount in EUR";[60] and

(c) in the period from 1 January 2009 until 31 August 2010, a maximum guaranteed volume of 903,570 MWh, at a price to be established using the Electricity Price Formula.

3.33 The effect of the Electricity Price Formula was, therefore, to set a guaranteed price for the majority of KAP's electricity demands for the relevant period, at a price that would only inflate in direct proportion with any increase in the spot sale price for aluminium. This guaranteed price was, however, only a temporary measure, with the Electricity Price Formula

[60] **Exhibit C-3**, KAP SPA, cl. 8.5 (emphasis in original).

set to expire in 2010. No express provision was made in the KAP SPA for how, or on what terms, KAP would receive electricity after that date.

3.34 On 17 October 2005, CEAC entered into a separate Agreement for the Sale and Purchase of the Shares of the Company Rudnici Boksita AD Nikšić (the "**RBN SPA**").[61] Pursuant to the RBN SPA, CEAC agreed to acquire 32.0455% of shares in RBN for consideration of EUR 6 million. CEAC additionally agreed to underwrite EUR 4 million by way of further investment in RBN's bauxite mine, and also to supply a performance bond of EUR 1 million.

3.35 On or around 20 November 2005, CEAC made various on market purchases of shares in RBN. These shares, when aggregated with the shares that CEAC had agreed to acquire under the RBN SPA, were sufficient to give CEAC a 58.72% shareholding in RBN at closing.

3.36 Closing occurred under both the KAP SPA and the RBN SPA on 30 November 2005, at which point Mr Deripaska assumed control of KAP.

D. Planned Privatisation of TPP Pljevlja

3.37 Mr Deripaska and Mr Itskov describe in their witness statements the repeated commitments made to them by Montenegro concerning the planned privatisation and sale to Mr Deripaska of the coal-fired power plant at Pljevlja, together with permission to carry out further investment in both the existing unit and to develop a new unit (together with privatisation of an interest in the coal mine at Rudnik Uglja Pljevlja). As Mr Deripaska explains, the Pljevlja plant formed part of a single package with KAP and RBN. Montenegro's prime minister, Mr Đukanović, acknowledged the central importance of TPP Pljevlja to the KAP deal and repeatedly assured Mr Deripaska that TPP Pljevlja would be sold to him.[62]

3.38 As noted above, on 24 December 2004, EPCG had passed a decision to initiate the procedure for the sale of TPP Pljevlja pursuant to a public tender.[63]

[61] **Exhibit C-4**, Agreement for the Sale and Purchase of the Shares of the Company Rudnici Boksita AD Nikšić, by Public Tender Between the Fund for the Development of the Republic of Montenegro, Republic Fund for Pension and Disability Insurance, Bureau for Employment of the Republic of Montenegro, the Government of Montenegro, Salamon Enterprises Limited and EN+ Group (the "**RBN SPA**"), dated 17 October 2005.
[62] **CWS - 1**, Deripaska WS, at paras. 23-24.
[63] **Exhibit C-45**, Draft Pljevlja SPA, Recital B.

3.39 On 30 May 2005, Montenegro commenced the process to privatise TPP Pljevlja, together with a 31.1117% blocking shareholding in Rudnik Uglja, the holding company for the coal mine at Rudnik, which supplied coal to the plant. Montenegro's Agency of Montenegro for Economic Restructuring and Foreign Investment (the "**Tender Commission**") published a public invitation for interested investors to participate in the tender.[64]

3.40 On 16 December 2005, the Tender Commission announced a reissuing of the tender on revised terms.[65] A number of prospective investors accepted the tender documents, including the CEZ Group (Czech Republic), Contour Global (USA), and En+.[66]

3.41 En+ submitted a binding offer on 31 May 2006 to acquire the plant on the following terms:[67]

(a) a purchase price of EUR 45 million for TPP Pljevlja;

(b) a further investment of up to EUR 195 million in TPP Pljevlja (which included investment in upgrading the existing unit, as well as construction of a brand new 225 MWh unit);

(c) a purchase price of EUR 5 million for the 31.1117% blocking shareholding in Rudnik Uglja;

(d) a further investment of up to EUR 79 million in Rudnik Uglja; and

(e) a guaranteed level of electricity supply to EPCG (1,000 GWh) for a certain period of time, after expiry of which (in conformity with Montenegro's plan to liberalise the electricity market), all generated electricity would be supplied to KAP and other consumers on the open market at freely negotiated prices.

[64] **CWS - 4**, Itskov WS, at para.24. *See* **Exhibit C-24**, Public Invitation for Participation in a Public Tender Process for the Sale of Thermal Power Plant "Termoelektrana" Pljevlja as Assets of ECPG and Sale of Shares in Coal Mine "Rudnik uglja" A.D., Pljevlja, (the "**Pljevlja Public Invitation**"), Undated; *See* **Exhibit C-25** Instructions to Tender Participants Concerning the Sale of "Termoelektrana Pljevlja" Pljevlja as Assets of EPCG and Shares of "Rudnik Uglja" Pljevlja, (the "**Pljevlja Instructions to Tender**") dated 20 May 2005.

[65] **CWS - 4**, Itskov WS, at para.29. *See* **Exhibit C-28** Public Invitation for participation in a public tender process for the sale of: Thermal Power Plant 'Termoele Ktrana' Pljevlja As Assets of EPCG and Sale of Shares in Coal Mine RBN.

[66] **CWS - 1**, Itskov WS, at para.29.

[67] **Exhibit C-31**, En+ Tender Proposal for Themral Power Plant 'Pljevlja' as Assets of EPCG & Shares in Coal Mine 'Rudnik uglja' A.D., Pljevlja (the "**En+ Tender Proposal**"), dated 31 May 2006.

3.42 Although there were, as noted above, a number of other bidders in the privatisation, Mr Deripaska made the most competitive submission and it was never in doubt that he would prevail in the tender.[68] On 16 June 2006, En+ was duly determined by a Report of the Tender Commission to be the winning bidder. The Tender Commission's Report was subsequently adopted by the Montenegrin Privatisation Council on 30 June 2006.[69]

3.43 Following its Report, the Tender Commission invited Mr Deripaska to enter into detailed contract negotiations, with a view to concluding a sale and purchase agreement in respect of the power plant. Over the course of 2006 and early 2007, the parties exchanged detailed draft sale and purchase agreements.[70]

3.44 On 3 July 2007, however, the Privatisation Council decided to annul the tender.[71]

3.45 On 6 July 2007, the Secretary of the Tender Commission formally informed En+ by letter that the sale would not proceed and that the power generating facility at Pljevlja would remain in the ownership of EPCG.[72] The State would also retain ownership of the blocking shares in the Rudnik mine that were to be sold with the power plant.

3.46 The annulment of the TPP Pljevlja tender and privatisation process constituted a very serious setback for Mr Deripaska's investment in KAP and RBN. Without the promised opportunity to acquire TPP Pljevlja as a guaranteed source of affordable electricity, Mr Deripaska and KAP were entirely at the mercy of Montenegro and EPCG to provide a long-term electricity supply for KAP on affordable terms.

3.47 When informed that the TPP Pljevlja privatisation process had been annulled, Mr Deripaska went to Montenegro to seek an explanation from Mr Đukanović.[73] In response, Mr Đukanović gave Mr Deripaska further assurances about Montenegro's commitment to

[68] **CWS – 1**, Deripaska WS, at para. 34.
[69] *See* **Exhibit C-45**, Draft Pljevlja SPA, Recital D.
[70] **Exhibit C-45**, Draft SPA for Pljevlja, dated 26 March 2007.
[71] **Exhibit C-33,** letter from Privatisation Council of the Government of Montenegro No. 02-226, dated 6 July 2007.
[72] **Exhibit C-33,** letter from Privatisation Council of the Government of Montenegro No. 02-226, dated 6 July 2007.
[73] **CWS – 1** Deripaska WS, at para. 38.

ensuring suitable power supplies to KAP. He also indicated that TPP Pljevlja would still be sold to Mr Deripaska, once the political mood had shifted.[74]

E. KAP Operations: November 2005 To November 2009

3.48 Mr Deripaska's team assumed control of KAP in November 2005. Mr Itskov was appointed as Chairman of KAP's board of directors and set about implementing the modernisation programme that would return KAP to a competitive standard.[75]

1. CEAC's discovery of Montenegro's misrepresentations

3.49 As described by Mr Deripaska and Mr Itskov in their witness statements, Mr Deripaska quickly realised that the operational and financial circumstances at KAP were significantly worse than Montenegro had represented.

3.50 As an initial matter, Mr Deripaska uncovered undisclosed liabilities and contractual complications related to KAP's plant for the manufacture of anodes. Mr Deripaska's team discovered that there were significant undisclosed liabilities of KAP to a company, Vektra D.o.o., which exercised effective control over the anode plant located on KAP's site. The anode plant was central to the operation of KAP. Any smelting plant relies on a steady supply of carbon anodes in large volumes. The plant for fabrication of anodes for KAP was located on site. Unbeknownst to Mr Deripaska, however, KAP had entered into an agreement in 2000, pursuant to which it had subcontracted running of the anode plant to Anotech (a company incorporated in the British Virgin Islands). KAP agreed that it would pay Anotech a set price for purchase of anodes from the plant. It seems that Anotech initially subcontracted running of the anode plant to Vektra and subsequently, in 2003, assigned the contract to Vektra altogether.[76]

3.51 As recorded in the report of KAP's auditors of 28 February 2008, the relationship between KAP and Vektra gave rise to significant issues that Mr Deripaska had to resolve, including:[77]

(a) accrued historic liabilities of KAP to Vektra in respect of supply of anodes in prior periods (for which KAP had failed to make payment);

[74] **CWS – 1** Deripaska WS, at para. 38.
[75] **CWS – 1**, Itskov WS, at para.39.
[76] **Exhibit C-53**, KAP Annual Audit Report for 2007, dated 28 February 2008, at Section 39.
[77] **Exhibit C-53**, KAP Annual Audit Report for 2007, dated 28 February 2008, at Section 39.

(b) an ongoing obligation of KAP to pay Vektra for the supply of anodes at substantial cost pursuant to the terms of the agreement; and

(c) a lack of control of KAP over its own facilities.

3.52 In order to resolve these problems, Mr Deripaska was forced to engage Vektra in a negotiation to terminate the relevant agreements and to resume direct control over the anode plant and its employees. Contrary to his expectations, Mr Deripaska was required to find significant funds in order to settle KAP's accrued liabilities to Vektra. He was also required to engage Vektra in a negotiation that resulted in termination of the contract between Vektra and KAP, which was concluded on 29 December 2006.[78] In order to secure full control of KAP's operations, Mr Deripaska had to find additional consideration to pay Vektra. He regarded himself as having been "held to ransom" in that regard.[79] Even subsequent to the termination by agreement, Vektra and KAP were engaged in litigation to resolve their mutual liabilities to each other.[80]

3.53 Vektra was controlled by or otherwise associated with a prominent Montenegrin businessman named Veselin Pejović.[81] As set out further below, Mr Pejović – now acting through a different company, Uniprom d.o.o. – ultimately assumed control of KAP's assets some ten years later, following KAP's bankruptcy in 2013. As Mr Deripaska explains in his witness statement, he was surprised and disappointed, having "paid off" Mr Pejović at the time that he acquired KAP, only to discover a decade later that Mr Pejović achieved control of KAP (but with the benefit of Mr Deripaska's substantial investments) for less than the price of resolving KAP's liabilities to Vektra.[82]

3.54 KAP, under Mr Deripaksa's new management, procured a series of studies in order to develop a proper understanding of the situation of the company and the areas where the most urgent reform was required.[83] To that end:

[78] **Exhibit C-43**, KAP-Vektra Termination Agreement, dated 29 December 2006; **Exhibit C-263**, Protocol on Termination of Vektra Management Agreement.
[79] **CWS – 1**, Deripaska WS, at para. 58.
[80] **Exhibit C-53**, KAP Annual Audit Report for 2007, dated 28 February 2008, at Section 39.
[81] **CWS – 1**, Deripaska WS, at para. 30(a).
[82] **CWS – 1**, Deripaska WS at para. 56-67.
[83] **CWS – 4**, Itskov WS, at paras.40-41.

(a) American Appraisal (UK) Limited, a valuation consultancy, was appointed to carry out an appraisal and valuation of KAP's assets.[84] American Appraisal noted significant areas of obsolescence and the need for significant investment in upgrading the smelting facilities;

(b) RSK ENSR Group, an environmental consultancy, was appointed to conduct a qualitative and quantitative assessment of KAP's environmental failings. It concluded that "the aluminium processing activities [at KAP] [are] having a serious negative environmental impact" with the "potential to materially affect the health of on-site workers and the quality and amenity of surrounding environmental receptors and the environment." RSK ENSR concluded that the remedial costs associated with these environmental failings was between EUR 53.5 and 66.9 million; and

(c) Deloitte, the accountancy firm, was retained to conduct an audit of KAP's books and records and accounts from prior periods. Deloitte concluded that Montenegro had substantially misstated KAP's financial position prior to sale and that there were significant liabilities that had not been disclosed.

3.55 These reports confirmed Mr Deripaska's understanding that KAP faced substantially greater difficulties than he had been led to believe. The underlying problems with KAP were multiplied by a lack of cooperation from Montenegro on the work needed to reform KAP. As Mr Itskov explains in his witness statement, despite its earlier promises during the parties' pre-investment negotiations, Montenegro resisted proposed labour reforms and rationalisation of the business.[85] Montenegro also showed a willingness to interfere in the conduct of KAP's business and to exert illegitimate pressure in its affairs. For example, in or around April 2006, Mr Milan Rochen – now Montenegro's Minister of Foreign Affairs – pressured Mr Deripaska to remove Mr Itskov from his role leading KAP.[86]

3.56 Having made a full assessment of the condition of KAP, on 24 May 2006, CEAC notified the Government Funds and Montenegro of the results of its enquiry and its belief that Montenegro had breached the KAP SPA by, *inter alia*:

[84] **Exhibit C-40**, American Appraisal report, dated May 2006.
[85] **CWS – 4**, Itskov WS, at paras. 42 and 44.
[86] **CWS – 4**, Itskov WS, at para. 43.

(a) breaching representations and warranties given in the KAP SPA in relation to the value of KAP's assets;

(b) breaching an obligation to ensure that, at Closing, KAP retained working capital in the amounts specified in the KAP SPA;

(c) breaching its obligation to disclose all material litigation in the company; and

(d) committing other similar breaches in respect of RBN.

3.57 Following service of the notice of breach, CEAC made several attempts to initiate negotiations with Montenegro to reach an agreed solution. Having received no satisfactory response to its complaints, CEAC issued a further notice of dispute on 5 October 2007.[87]

3.58 On 27 November 2007, CEAC issued a notice of arbitration, thereby commencing the **First UNCITRAL Arbitration**.[88] Mr Deripaska explains that he felt fortified to take a "tougher stance" with Montenegro regarding its failings, in circumstances when the sale of TPP Pljevlja had been withdrawn.[89]

3.59 At this time, KAP required a significant injection of cash in order to meet its ongoing liabilities, to fund upgrades and to meet its high production costs in the interim. On 11 March 2008, in order to meet its increasing cash shortfall, KAP entered into a shareholder loan agreement with CEAC, pursuant to which CEAC committed to lend sums up to USD 390 million to KAP.[90] This contribution of funds was in addition to the specific commitments that CEAC had made to finance KAP's Investment Programme and Environmental Programme.

3.60 During 2008, Montenegro took various steps that further compounded KAP's cash position. In particular, Montenegro failed to meet its obligation under the KAP SPA to waive, in the proper amount, debts owed by KAP to the State prior to Mr Deripaska's acquisition of KAP. This was the subject of extensive correspondence throughout 2008, during which time Montenegro dragged its heels in meeting its obligations. The urgency for a solution

[87] **Exhibit C-51**, CEAC Notice of Dispute, dated 5 October 2006.
[88] **Exhibit C-51**, First UNCITRAL Notice of Arbitration.
[89] **CWS – 1**, Deripaska WS, at para. 42.
[90] **Exhibit C-54**, Loan Agreement & Agreement to Amend the Loan Agreement between CEAC and KAP (the "**Loan Agreement**"), dated 11 March 2008.

increased during the second half of 2008, as global aluminium prices fell by more than half as the global financial crisis developed.[91]

2. CEAC and Montenegro's negotiations

3.61 CEAC's filing of the First UNCITRAL Arbitration finally succeeded in bringing Montenegro to the negotiating table. Starting in December 2008, representatives from CEAC and Montenegro met to consider the various options available to remedy the difficulties faced by KAP. As Mr Potrubach, the former CFO of KAP, explains in his witness statement, by the end of December 2008, KAP had negative working capital of some EUR 58 million and total negative equity of EUR 220 million.[92] In addition, without the support that Mr Deripaska's acquisition of TPP Pljevlja would have afforded, KAP would be left without a guaranteed source of affordable electricity in 2010. By 2009, KAP was struggling to make its payments to EPCG, until a deal was struck in March 2009 whereby KAP granted EPCG aluminium inventories worth nearly EUR 3 million.[93]

3.62 CEAC was open to negotiation with Montenegro regarding suitable structures that could achieve the common objective of rescuing KAP and setting it on a path to future productivity, while also settling the First UNCITRAL Arbitration. Those discussions revealed several tensions about the attitude of CEAC and Montenegro as to how to achieve those objectives.[94] In particular, Montenegro took the position that:

(a) levels of employment at KAP should be maintained at higher levels than those proposed by CEAC. Mr Potrubach explains in his witness statement that KAP was continuing to pay hundreds of employees who did no productive work at all;[95]

(b) the nature and structure of any future energy supply agreement with EPCG, including the price for delivery of energy, should be more limited in scope than that required by KAP; and

(c) high annual production targets for KAP must be maintained.[96]

[91] **Exhibit C-60**, LME Spot Price Chart for Aluminium, 1 Jan.2008 to 31 Dec.2008.
[92] **CWS – 2**, Dmitry Potrubach Witness Statement ("**Potrubach WS**"), at para.13.
[93] **CWS – 2**, Potrubach WS, at para.17.
[94] **Exhibit C-57**, Minutes of Meeting held on 13 December 2008; **Exhibit C-58**, Minutes of Meeting held on 16 December 2008; **Exhibit C-59**, Minutes of Meeting held on 19 December 2008.
[95] **CWS – 2**, Potrubach WS, para.18.

3.63 The negotiations between CEAC and Montenegro continued throughout 2009, with the parties developing the concept of a structure whereby Montenegro would take equity in KAP, in return for giving further commitments to contribute to the support of the business.[97] As Mr Deripaska and Mr Potrubach explain in their witness statements, Mr Deripaska and CEAC regarded a solution by such means as the least bad option, under the circumstances in which KAP now found itself. Mr Deripaska explains that, by the time he directed CEAC to enter into the Settlement Agreement, he was starting to regard KAP as a "distressed asset".[98] Mr Potrubach describes the logic of such an arrangement as to "reset the relationship between CEAC and the Montenegro."[99]

F. 2009 Settlement Agreement and Restructuring of KAP

1. The June 2009 MoU

3.64 On 2 June 2009, En+ and Montenegro concluded a Memorandum of Understanding (the "**June 2009 MoU**"), which recorded their common intention to "pursue joint efforts in order to achieve a comprehensive operational and financial restructuring of KAP and RBN", based around the following principles:[100]

(a) CEAC would transfer 50% of its KAP shares to the Montenegro;

(b) CEAC would be given a right to repurchase those shares on specific conditions;

(c) Montenegro would issue a sovereign guarantee in respect of up to EUR 135 million of existing and new debts of KAP to lenders;

(d) Montenegro would put in place new electricity price subsidies, back-dated to 1 January 2009 and lasting until 31 December 2012; and

(e) En+ would waive certain liabilities owed to it by KAP and RBN.

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[96] **Exhibit C-59**, Minutes of Meeting held on 19 December 2008; **Exhibit C-62**, Letter from CEAC to Montenegro, dated 21 January 2009; **Exhibit C-61**, Letter from Montenegro Agency for Restructuring to CEAC, dated 19 January 2009.

[97] *See*, for example, **Exhibit C-61**, Letter from Montenegro Agency for Restructuring to CEAC, dated 19 January 2009; **Exhibit C-62**, Letter from CEAC to Montenegro Agency for Restructuring, dated 21 January 2009.

[98] **CWS – 1**, Deripaska WS, at para. 48.

[99] **CWS – 2**, Potrubach WS, at para. 27.

[100] **Exhibit C-65**, Memorandum of Understanding on Mutual Cooperation and General Settlement Between the Government of Montenegro and En+ Group Ltd (the "**June 2009 MoU**"), dated 2 June 2009.

3.65 The June 2009 MoU precipitated negotiation by CEAC and Montenegro of detailed terms for a settlement, with drafts of a proposed settlement agreement exchanged in July, August and September 2009.[101]

3.66 In accordance with the June 2009 MoU and in preparation for conclusion of an eventual settlement agreement in accordance with its objectives, Montenegro took various administrative and legislative actions. This included conclusion of a short agreement on 14 September 2009 between Montenegro and EPCG, setting out the proposed mechanics for invoicing by EPCG of any subsidies to be paid by Montenegro.[102]

3.67 On 6 November 2009, KAP delivered a detailed restructuring model (the "**Restructuring Concept 2009**") to the Montenegrin Ministry of Economy.[103]

2. <u>The Settlement Agreement</u>

3.68 The Settlement Agreement was finally concluded between Montenegro, CEAC, En+, the Government Funds, KAP and RBN on 16 November 2009.[104] The Settlement Agreement broadly reflected the heads of terms set out in the June 2009 MoU. The Settlement Agreement began by recognising in its recitals that:[105]

(a) "the Parties are aware that the Companies have certain liquidity problems, that the Companies need to be restructured and that their accrued debts must be rescheduled. The Parties expect these problems to be resolved within two years from the Closing Date, particularly due to the assistance of the SoM. ***The SoM's primary goal is to support the financial recovery of the Companies so that they can once again fulfil their important role within the Montenegrin economy, their obligations to EPCG, other suppliers, banks and institutions and their employees as well as their environmental obligations timely and regularly***";

(b) "RBN, KAP and KAP's subsidiaries will reduce their work forces substantially in order to reduce costs and they are aiming at obtaining one of several separate facilities

[101] **Exhibit C-67**, Letter from Vjaceslav Krilov to Branko Vujović, dated 1 September 2009.
[102] **Exhibit C-69**, Subsidies Realisation Agreement Between the Government of Montenegro and EPCG (the "**Subsidiaries Realisation Agreement**"), dated 14 September 2009.
[103] **Exhibit C-70**, Letter from Vjaceslav Krilov to Branko Vujović, dated 6 November 2009.
[104] **Exhibit C-5**, Settlement Agreement.
[105] **Exhibit C-5**, Settlement Agreement, Recitals.

from a bank in order to fund severance payments to employees made redundant and for other labour related expenses…"; and

(c) "it is for the reasons set out in [the passage reproduced above at (a)], that the SoM intends to subsidise KAP's electricity supply and to issue state guarantees to KAP in the aggregate amount of up to EUR 135,000,000 (in words: one hundred thirty-five million Euro) as security for the Loans."

3.69 Pursuant to its terms, the parties agreed, *inter alia*, that:

(a) the KAP SPA and RBN SPA would be terminated; [106]

(b) CEAC would agree to transfer 50% of its shareholding in KAP and RBN to Montenegro; [107]

(c) CEAC would be granted a right to buy back all of the shares transferred to Montenegro, at market prices, on condition that at the time of exercising that right:

(i) all state guarantees provided by Montenegro had been released;[108]
(ii) any amounts paid by Montenegro had been reimbursed;[109]
(iii) the supply agreement with EPCG had come to an end, with no outstanding liabilities of KAP to EPCG;[110] and
(iv) KAP had either concluded a new agreement to purchase electricity from EPCG at a regulated price, or had entered into a new electricity purchase agreement with another provider;[111]

(d) Montenegro would issue sovereign payment guarantees, up to the value of EUR 63,320,000, to guarantee KAP's indebtedness to international lenders;[112]

(e) Montenegro would agree to grant a new electricity subsidy for 2009–2012 – to the extent that actual energy prices charged to KAP by EPCG exceeded the prices

[106] **Exhibit C-5**, Settlement Agreement, cl. 17.
[107] **Exhibit C-5**, Settlement Agreement, Recital L.
[108] **Exhibit C-5**, Settlement Agreement, cl. 2.1(a).
[109] **Exhibit C-5**, Settlement Agreement, cl. 2.1(b).
[110] **Exhibit C-5**, Settlement Agreement, cl. 2.1(c) and (d).
[111] **Exhibit C-5**, Settlement Agreement, cl. 2.1(e).
[112] **Exhibit C-5**, Settlement Agreement, cl. 4.1.

derived from a formula in the Settlement Agreement, Montenegro would make payments to meet that difference, up to a total amount of:[113]

(i) EUR 15 million in 2009;

(ii) EUR 20 million in 2010;

(iii) EUR 18 million in 2011; and

(iv) EUR 7 million in 2012;

(f) for a total amount of EUR 60 million from 2009-2012; Montenegro would be granted a right to call on all of CEAC's remaining shares in KAP, in the following circumstances:

(i) in the event that Montenegro had paid out amounts under its guarantees that exceeded EUR 40 million and it had not been reimbursed by KAP for those amounts;[114] or

(ii) upon occurrence of a Failure of Restructuring, within the meaning specified in clause 28.1 and upon exercise by Montenegro of its call right in accordance with the procedure specified under Clause 28;[115]

(g) agreement by En+ to pay down amounts owed by KAP to certain international lenders; and

(h) agreement that CEAC and En+ would withdraw their claims in the First UNCITRAL Arbitration, on the following terms:

> "as per Closing CEAC on the one hand and the SoM and the Parties 1-3 (i.e. the Government Funds) on the other hand waive any rights or claims they may have had against each other and asserted in the Arbitration Proceedings. This waiver shall include any claim regardless of whether such claim is accepted or disputed, known or unknown, due or not yet due."[116]

3.70 As set out in the Recitals to the Settlement Agreement, Montenegro entered into the settlement and assumed a role as a shareholder of KAP for the sovereign purpose of working to safeguard an asset with "an important role within the Montenegrin economy", to secure KAP's obligations to other key parties in that economy (including KAP's employees), as well

[113] **Exhibit C-5**, Settlement Agreement, cl. 11.3.
[114] **Exhibit C-5**, Settlement Agreement, cl. 10.3.
[115] **Exhibit C-5**, Settlement Agreement, cl. 28.
[116] **Exhibit C-5,** Settlement Agreement, cl 27.1.

as in the interests of environmental protection. Montenegro's assumption of a shareholding role was approved by Parliament.[117] Montenegro agreed to provide electricity subsidies and state guarantees for the benefit of KAP expressly in support of those public purposes.[118]

3.71 As Dmitry Potrubach, KAP's former CEO, explains in his witness statement, CEAC and KAP were concerned that, under the terms of the Settlement Agreement, Montenegro's electricity subsidies were due to taper off, and ultimately expire, at the end of 2012. The chairman of KAP's board, Mr Krylov, had made clear to Montenegro, and particularly to Minister of Economy Mr Vujović, that without a guaranteed long-term electricity supply, there was a serious risk that KAP's restructuring plan would fail. However, as Mr Potrubach explains, Montenegro led CEAC to believe that, while it was presently willing only to bind itself to providing €60 million in subsidies, it would consider in good faith providing further support, if it were needed in the future, through a separate agreement.[119]

3.72 Closing of the Settlement Agreement was conditional on the conclusion of further agreements, several of which were not concluded for a substantial period after the Settlement Agreement was concluded. The two most important of these were the requirement that EPCG and KAP enter into a new energy supply agreement, and that CEAC and Montenegro enter into a shareholders agreement.

3. <u>The EPCG Framework Agreement</u>

3.73 The Framework Agreement on KAP Energy Supply (the "**EPCG Framework Agreement**") was concluded on 23 February 2010 by EPCG, KAP and Montenegro. Relevant terms of this agreement included:

(a) Guarantee of volumes of electricity supply by EPCG to KAP of:

(i) 1300 GWh in 2010;

(ii) 1500 GWh in 2011; and

(iii) 1800 GWh in 2012.

[117] **Exhibit C-5**, Settlement Agreement, Recital D.
[118] **Exhibit C-5**, Settlement Agreement, Recital J.
[119] **CWS – 2**, Potrubach WS, at para. 39.

(b) Agreement of a price formula for calculation of the price to be paid by KAP. This formula was a modification of the Electricity Price Formula previously agreed under the KAP SPA, save for some modifications by reference to changes in aluminium spot prices. It remained the case that KAP would pay a fee of USD 24.39 per MWh, or a greater amount depending on the application of a formula, by reference to aluminium spot prices.[120]

(c) It was agreed that, to the extent that Montenegro's Energy Regulatory Agency set a price for supply of electricity to KAP that exceeded the price derived by application of the (modified) Electricity Price Formula, then Montenegro would pay to EPCG the amount of any difference, up to an aggregate amount of subsidy, reflecting the terms of the Settlement Agreement, of:[121]

(i) EUR 15 million in 2009;
(ii) EUR 20 million in 2010;
(iii) EUR 18 million in 2011; and
(iv) EUR 7 million in 2012;

for a total amount of EUR 60 million.

(d) KAP would be liable to pay EPCG in respect of any difference between the Electricity Price Formula and the regulated price, to the extent that the above subsidies were exhausted (in each year or in total).[122]

4. <u>The KAP Shareholders' Agreement</u>

3.74 On 26 October 2010, CEAC and Montenegro entered into a shareholders agreement in respect of KAP ("**KAP Shareholders Agreement**"). The KAP Shareholders Agreement included the following material terms:

(a) transfer by CEAC of 50% of its shares in KAP and RBN to Montenegro for nominal cash consideration;[123]

[120] **Exhibit C-76**, Framework Agreement between EPCG, KAP and the State of Montenegro, ("**EPCG Framework Agreement**"), dated 23 February 2010, at cl. 4.
[121] **Exhibit C-76**, EPCG Framework Agreement, cl. 4.2.
[122] **Exhibit C-76**, EPCG Framework Agreement, cl. 4.4.
[123] **Exhibit C-6**, Annex 3 to the Settlement Agreement, KAP Shareholders' Agreement (the "**KAP SHA**"), dated 26 October 2010, cl. 2.

(b) a pooling agreement, whereby CEAC and Montenegro agreed, in respect of certain significant aspects of KAP's governance, to exercise their voting rights at meetings of KAP's general assembly and all other powers of control only by prior written agreement, including to:[124]

(i) "do or permit or suffer to be done any act or thing whereby the Company may be wound up (whether voluntarily or compulsor[il]y), unless the Company must be wound up pursuant to compulsory provisions of Montenegrin law or pass decisions on the restructuring, liquidation or bankruptcy of the Company";

(ii) "sell, transfer, lease[,] assign or otherwise dispose of assets whose value exceeds 10% of the total book value of assets of the Company as per the last audited financial statements of the Company";

(iii) "adopt an employees['] redundancy program which regulates the programme of the work forces of the Company or its subsidiaries, or which provides for minimum severance payments to employees made redundant"; and

(iv) "enter into any contract or transaction, except in the ordinary and proper course of its business on arm's length terms whose amount does not exceed €5.000.000 (in words: five million Euros)"; and

(c) an agreement as to the composition of the board of directors and various controls on conduct of KAP's affairs, including the right of Montenegro to appoint a member to KAP's board of directors. Importantly, Montenegro's appointee to the KAP board was granted a right of veto against certain actions of the company, including:[125]

(i) "acquisition, sale, restructuring or operation of the Subsidiaries and the alumina plant including, but not limited to[,] the remuneration of its employees, payments or settlements of its debts, proposing and adopting of business plans for the Company, any of the Subsidiaries and/or the alumina plant, as well as decisions on their closing and/or winding up";[126]

(ii) "increase or reduction of the annual and monthly production of the Company, closing of existing or opening of new production lines and units, including the

[124] **Exhibit C-6**, the KAP SHA, cl. 4.1.
[125] **Exhibit C-6**, the KAP SHA, cl. 5.1.
[126] **Exhibit C-6**, the KAP SHA, cl. 5.1(c).

reduction of the current product variety and introduction of new products in the Company and its subsidiaries";[127]

(iii) "acquisition, sale, transfer, lease, assignment, pledge or other disposal or encumbrance of the whole or any part of the business, undertaking, or assets of the Company or its Subsidiaries, if the value of such disposal or encumbrance exceeds EUR 5,000,000.00 (in words: Euro five million). This limit refers also to the aggregated amount of all the above activities not approved by the SoM";[128]

(iv) "approval of any contracts or transactions of the Company is its value exceeds EUR 5,000,000… unless the value of respective transaction/s is set out in the Company's annual business plans approved in advance by the SoM in writing";[129] and

(v) "borrowing or raising money (except loans set out in the Settlement Agreement), the extension of loans, granting of any form of guarantee or surety for payment of third party's obligations (including CEAC and any company affiliated to CEAC or En+) by the Company".[130]

5. Closing of the Settlement Agreement

3.75 The Closing Certificate under the Settlement Agreement was issued on 26 October 2010.[131]

3.76 En+ expressed optimism that the Settlement Agreement would result in a new chapter in KAP's history. On 27 October 2010, En+ issued a press release in which the CEO of CEAC, Mr Krylov, remarked that:

> "[w]e are making our joint effort to implement the Settlement Agreement with the Government of Montenegro, and we are getting closer to our common key purpose, which is envisaging the Montenegrin largest company's recovery and long-term stable and profitable outlook. The way we've gone, the momentum we've gained and the environment of mutual trust are guarantees that we'll be able

[127] **Exhibit C-6**, the SHA, cl. 5.1(d).
[128] **Exhibit C-6**, KAP SHA, cl. 5.1(f).
[129] **Exhibit C-6**, KAP SHA, cl. 5.1(g).
[130] **Exhibit C-6**, KAP SHA, cl. 5.1(h).
[131] **Exhibit C-84**, Settlement Agreement Closing Certificate (the "**Closing Certificate**"), dated 26 October 2010.

> to implement our plans and make KAP a European leader of the aluminium industry."[132]

3.77 Mr Krylov's remarks hinted at the acute difficulties that KAP nevertheless faced. Throughout 2010, while the Settlement Agreement was being implemented, KAP remained beset by very significant difficulties. On 14 January 2010, in accordance with the Settlement Agreement, En+ had paid USD 41.4 million to international lenders by way of prepayment of KAP's debts.[133] En+ and CEAC also waived around USD 27.8 million and EUR 40 million of debt under the terms of the Settlement Agreement.[134] Nevertheless, even between the signing of the Settlement Agreement in November 2009 and its closing in October 2010, KAP required additional, repeated injections of cash by CEAC in order to maintain solvent operations, for a total of around EUR 12 million.[135]

3.78 KAP also took on new borrowing from international lenders, including Deutsche Bank and VTB Bank Austria, with Montenegro providing state guarantees of KAP's liabilities under those facilities.[136] Moreover, as Mr Potrubach describes in his witness statement, the terms of the Settlement Agreement left a predicted "cash gap" of some EUR 28 million in KAP's budget between 2009 and 2012.[137] In an effort to improve liquidity, KAP's board sought other initiatives, including exploring the sale of non-core assets of the business.[138]

6. <u>The Deutsche Bank Loan Facility</u>

3.79 KAP's loan with Deutsche Bank (the "**Deutsche Bank Loan Facility**"), with Montenegro providing a state guarantee, was executed in June 2010.[139] Under this facility, KAP was entitled to draw down a total of EUR 22 million. The purpose of the facility, as recorded in the Settlement Agreement, was to provide a new working capital account for KAP.[140]

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[132] **Exhibit C-87**, En+ Press Release, 'En+ Group And Government of Montenegro Go On With KAP Turnaround', dated 27 October 2010.
[133] **Exhibit C-17**, Loan Agreement between En+ and KAP (the "**En+ Loan Agreement**"), dated 18 June 2010.
[134] **Exhibit C-5**, Settlement Agreement, cl. 13.3.
[135] **CWS - 2**, Potrubach WS, at para.49.
[136] **Exhibit C-79**, Guarantee Between Montenegro, KAP and Deutsche Bank ("**Deutsche Bank Guarantee**"), dated 25 June 2010; **Exhibit C-77**, KAP Board Minutes, 10 June 2010; **Exhibit C-80**, Amendment and Restatement Agreement between KAP and VTB Bank (the "**VTB Facility Agreement**"), dated 14 July 2010; **Exhibit C-83**, Guarantee Between Montenegro and VTB Bank (Austria) ("**VTB Guarantee**"), dated 25 October 2010.
[137] **CWS - 2**, Potrubach WS, at para. 38.
[138] **Exhibit C-82**, KAP Board Minutes, dated 1 October 2010.
[139] **Exhibit C-48**, Eur 22,000,000 Facility Agreement between KAP & Deutsche Bank (the "**Facility Agreement**"), dated 25 June 2010.
[140] **Exhibit C-5**, Settlement Agreement, Recital H.

3.80 The Deutsche Bank Loan Facility contained strict default provisions. The terms on which KAP would be held to have defaulted under the loan facility included:

(a) non-payment on the due date of any amount payable under the loan facility;

(b) any Financial Indebtedness of KAP or any subsidiary, or any External Indebtedness of Montenegro as guarantor, not paid when due ("cross-default");

(c) non-compliance with any provision of the loan facility, including:

(i) submission of a business plan for the following year within 90 days of 15 January of each calendar year;[141]

(ii) submission of audited financial statements within 180 days of the end of each financial year, and unaudited financial statements within 60 days of the end of each half of the financial year;[142] and

(iii) submission of a Compliance Certificate with each set of financial statements setting out in reasonable detail computations as to compliance with the loan facility's financial covenants;[143] and

(d) carrying out any form of restructuring with respect to KAP's external debt obligations.[144]

3.81 Any default under the Deutsche Bank Loan Facility had to be notified by KAP promptly upon becoming aware of its occurrence.[145] In the event of a default, Deutsche Bank was entitled to accelerate the loan, and declare all or part of the principal, together with accrued interest, immediately due and payable.[146]

3.82 The Deutsche Bank Loan Facility also provided that neither KAP nor its subsidiaries could borrow or raise money (except permitted loans set out in the Settlement Agreement), nor

[141] **Exhibit C-48**, the Facility Agreement, cl. 18.4.
[142] **Exhibit C-48**, the Facility Agreement, cl. 18.1(a).
[143] **Exhibit C-48**, the Facility Agreement, cl. 18.2(a).
[144] **Exhibit C-48**, the Facility Agreement, cl. 21.17(a).
[145] **Exhibit C-48**, the Facility Agreement, cl. 18.8(a).
[146] **Exhibit C-48**, the Facility Agreement, cl. 21.20.

could they request the extension of loans or grant any form of guarantee or surety, without Montenegro's prior written consent.[147]

G. Privatisation of EPCG: 2009

3.83 At around the same time that CEAC and Montenegro were negotiating the terms of the Settlement Agreement, Montenegro also was finalising a process to part-privatise EPCG. That process had commenced with a public bid process in 2008, following Montenegro's termination of the privatisation process for the TPP Pljevlja plant. Montenegro sought bidders with an interest in acquiring a minority shareholding position in EPCG, subject to certain rights.

3.84 It was reported that seven bidders expressed an interest in acquiring equity in EPCG, with Montenegro targeting receipts of EUR 300 million in return for a 22% share.[148] Mr Deripaska did not direct his companies to participate in the bid process to acquire equity in EPCG. KAP's requirement was for guarantees of volume supply and price security. While those requirements would have been met by the acquisition of a captive power plant, they were not satisfied by taking a minority holding in the state-owned electricity company.

3.85 The successful bidder in the EPCG auction process was A2A S.p.A ("**A2A**"). A2A is an Italian utilities company that is majority owned and controlled by the municipalities of Brescia and Milan. In its public statements, A2A explained its objective in investing in EPCG in the following terms:

> "[i]n 2009 A2A chose to invest in Montenegro on the basis of two fundamental industrial objectives.
>
> To acquire new capacity from renewable sources, in particular hydropower, and to safeguard a geographic area that is becoming more and more integrated into the Italian and European system, thanks to the interconnection between Italy and Montenegro by a 1000 MW undersea cable that Terna is realising. Hydropower has always been one of the main strengths of A2A (about 2 GW installed), and in Italy there are no significant opportunities for new large-scale plants of this kind. Montenegro is already a major hydropower producer (almost 670 MW, equal to ¾ of the installed capacity in the country) ***and has great potential for further development (estimated at 1.3 hydroelectric GW***).

[147] **Exhibit C-48**, the Facility Agreement.
[148] **Exhibit C-55**, *SEENews* 'Seven Companies Bid to Consult Privatisation of 22% of Montenegro's Power Monopoly', dated 2 September 2008.

> On the basis of the objectives stated at European level furthermore, Italy had to import 12 billion kilowatt-hours of energy from renewable sources. The Italian government stated at the time that 6 would have to be derived from the Balkans."[149]

3.86 A2A and Montenegro concluded a Sale and Purchase Agreement (the "**EPCG SPA**"), Subscription Agreement, Shareholders Agreement and Management Agreement on 3 September 2009, pursuant to which, *inter alia*:[150]

(a) A2A agreed to pay EUR 96.2 million to Montenegro as consideration for the sale of shares representing 22% of the shares in EPCG;

(b) the parties agreed certain principles that would guide the conduct of EPCG's business, including that EPCG would:

(i) "be managed in a way that allows the protection of public interest as well as maximization of the profit to be distributed to shareholders…";[151] and

(ii) "deal with its shareholders and their respective Affiliates on an arm's length basis";[152]

(c) A2A was given the right to appoint a number of members to EPCG's board of directors;[153] and

(d) a number of "reserved matters" were identified, constituting matters that EPCG would be prevented from taking without the consent of both A2A and Montenegro.

3.87 A2A has informed its shareholders that its acquisition of a share in EPCG "involved a total investment of approximately EUR 436 million, comprising the shares purchased from Montenegro, the capital increase planned for EPCG, the shares acquired from minority shareholders following the tender and the operations performed during the process of the tender itself."[154] Through a combination of the shares acquired directly from Montenegro, and on market purchase of additional shares, A2A obtained a holding of 43.7% of the issued shares of EPCG.

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[149] **Exhibit C-273**, A2A Public Statement (emphasis added).
[150] **Exhibit C-68**, Share Purchase Agreement between Montenegro and A2A S.p.A., dated 3 September 2009 ("**EPCG SPA**"), dated 3 September 2009.
[151] **Exhibit C-68**, EPCG SPA, cl. 10.2.1.
[152] **Exhibit C-68**, EPCG SPA, cl. 10.2.3.
[153] **Exhibit C-68**, EPCG SPA, cl. 10.3.2.
[154] **Exhibit C-273**, A2A Public Statement.

H. KAP Operations: November 2009 To November 2011

3.88 Upon Closing of the Settlement Agreement, Montenegro appointed Mr Radomir Mitrović, KAP's former General Director, to KAP's board of directors. In addition, Montenegro subsequently seconded an employee to KAP's finance department, Ms Vesna Cvijević, who reported to Montenegro's appointed director.[155] Montenegro thereby assumed its ability to exercise a significant measure of control over KAP's governance, in accordance with the terms of the KAP Shareholders Agreement.

1. Montenegro wrongfully obstructed KAP's governance

3.89 Almost immediately, substantial differences of opinion emerged between CEAC and Montenegro that made conduct of KAP's affairs difficult. For example:

(a) at the KAP shareholders' meeting held on 30 November 2010 – just weeks after the Settlement Agreement came into force – Montenegro refused to approve KAP's 2009 financial statements. Montenegro's purported rationale for doing so was that the financial statements made provision for an environmental reserve to address KAP's future environmental liabilities. KAP's management had always taken the position that the financial accounts needed to make provision for these environmental liabilities, and KAP's board of directors had approved the 2009 financial statements in August 2010. KPMG, who had audited KAP's 2009 financial statements, had agreed. Montenegro, however, refused to approve the statements. Montenegro's behaviour, illogical at the time, was rendered even more incomprehensible when, at the following year's shareholders' meeting held on 31 October 2011, Montenegro continued to withhold its approval of KAP's 2009 financial statements, but approved KAP's 2010 financial statements – which made the very same provision for environmental liabilities;[156]

(b) on 22 December 2010, KAP requested Montenegro's consent in accordance with the requirements of the Deutsche Bank Loan Facility for KAP to raise additional finance

[155] **CWS – 2**, Potrubach WS, para.48; **Exhibit C-89**, Minutes from KAP Shareholders Meeting Held on 30 November 2010 (the "**November 2010 Minutes**"), dated 30 November 2010.
[156] **CWS – 2**, Potrubach WS, at para.100-103.

by way of further shareholder loans from CEAC.[157] KAP requested Montenegro's consent both (a) to ratify the loans which had been made by CEAC between signing and closing of the Settlement Agreement (which, by January 2011, amounted to approximately EUR 12 million); and (b) to permit KAP to borrow further funds from CEAC up to its previous level of debt to CEAC of around EUR 75.5 million (KAP's debt to CEAC had decreased from around EUR 75.5 million to around EUR 35 million as a result of CEAC's agreement to forgive a portion of KAP's debt under the Settlement Agreement).[158] CEAC was ready and willing to make these further shareholder loans to KAP.[159] Montenegro, however, declined to grant its consent to both these requests. Even after KAP, at Montenegro's request, provided both a breakdown of how the further funds would be applied,[160] and an independent report from KPMG,[161] Montenegro failed, without explanation, to provide its consent; and

(c) at a meeting of KAP's Board of Directors on 23 December 2010, Montenegro's appointee to KAP's board, Mr Mitrović, refused to approve KAP's proposed business plan for 2011 to 2015, ostensibly on the basis that he had not been involved in its preparation and wanted to review its details.[162] KAP permitted Mr Mitrović time to revise the business plan, and it was presented again, with only minor amendments, at a subsequent board meeting of 25 February 2011. Mr Mitrović, however, despite having been given the opportunity to review and revise the business plan, maintained his opposition to its adoption.[163] At the same meeting, Montenegrin Ministers Kujović and Bušković indicated that Montenegro did not intend to take the business plan under consideration, with Deputy Minister of Economy Kujović indicating to KAP's board that Montenegro was prepared to "request the resignation of the Chairman of the Board of Directors and the Executive Director, and that it will contact Oleg Deripaska using diplomatic channels (Montenegro-Russia

[157] **Exhibit C-90**, Letter from Leonid Krylov to Igor Luksic, dated 22 December 2010; *see* also **CWS – 5** Vyacheclav Gennadyevich Krylov Witness Statement ("**Krylov WS**"), para. 20.
[158] *See* Section III(H) above.
[159] **CWS – 2**, Potrubach WS, at paras.50 and 56.
[160] **Exhibit C-95**, Letter from Boris Bušković to Leonid Krilov, dated 18 January 2011.
[161] **Exhibit C-267**, KPMG Report on Conducted Agreement Procedures, dated July 2011.
[162] **Exhibit C-92**, Minutes of the KAP Board of Directors held on 23 December 2010 ("**23 December 2010 Meeting Minutes**"); **CWS – 5**, Krylov WS, para.20.
[163] **CWS – 2**, Potrubach WS, at para.105.

Intergovernmental Committee, presided over by M. Rocen and S. Shoygu) and request from him the dismissal of Krylov."[164]

3.90 Montenegro's obstruction of KAP's governance had, as Montenegro must have known, serious consequences. In particular, Montenegro's refusal to approve KAP's financial statements and business plan constituted events of default under the Deutsche Bank Loan Facility. On 12 May 2011, KAP was compelled, in accordance with its notification obligations, to write to Deutsche Bank notifying KAP's default.[165]

2. Montenegro prevented KAP from improving its liquidity

3.91 As Mr Potrubach describes in his witness statement, the early months of 2011 were a time of desperate cash flow shortage for KAP.[166] KAP urgently needed to raise new liquidity from CEAC in order to meet its obligations to EPCG and to international creditors, yet Montenegro prevented KAP from receiving any further injection of funds. The dilemma faced by KAP is well illustrated by the record of the board meeting of 25 February 2011, where, in the absence of an approved business plan and action plan for restructuring, the KAP board had to make difficult choices about the priority of payments. The KAP board resolved that, in order for KAP to continue operating, current payments aimed at maintaining production had to be prioritised over repayment of KAP's loan obligations.[167]

3.92 One immediate result of KAP's difficult financial situation concerned repayments to OTP Bank. On 7 February 2011, two payments to OTP Bank fell due, with a value of EUR 83,333 and EUR 602,222 respectively. On 28 February 2011, a further payment of EUR 675,665 fell due.[168] Without Montenegro's consent for CEAC to loan money to KAP, KAP did not have the liquidity to make these payments. While OTP Bank had indicated it would accept a postponement of these payments if Montenegro similarly agreed, Minister of Finance Milorod Katnić Minister of Economy Vladimir Kavarić insisted that KAP should make the payments.[169]

[164] **Exhibit C-7**, Minutes of a Meeting of the Board of Directors held on 25 February 2011 ("**25 February 2011 Meeting Minutes**").
[165] **Exhibit C-8**¸Letter from Leonid Krylov to Franz-Josef Ewerhardy and Gwen Blumhoff, dated 12 May 2011.
[166] **CWS – 2**, Potrubach WS, paras.49,56.
[167] **Exhibit C-7**, 25 February 2011 Meeting Minutes.
[168] **Exhibit C-98**, Cancellation of the Demands for Payment ("**Cancellation**"), dated 11 March 2011.
[169] **CWS – 2**, Potrubach WS, at para. 53.

3.93 Only once Montenegro realised that KAP's failure to pay would trigger a default under the OTP bank loan did it change its attitude, and instead insist that KAP split its request for consent to receive EUR 800,000 to make the OTP payments from its broader request to accept funds from CEAC.[170] Montenegro then approved KAP's request to receive EUR 800,000, but the delay engendered by this process caused KAP to miss the deadline for making payment to OTP Bank. This led to a technical default on the OTP bank loan and a cross-default on KAP's other loans, including the Deutsche Bank Loan Facility. Although payment was made by KAP on 4 March 2011,[171] KAP was required to notify its other lenders, including Deutsche Bank, of the fact that it had defaulted.[172]

3.94 Thus, by March 2011, less than a year after the signing of the Deutsche Bank Loan Facility, KAP had already incurred three separate defaults thereunder, all of them the direct result of Montenegro's deliberate obstruction of KAP's governance. When KAP sought a waiver from Deutsche Bank of these events of default, it received only a conditional waiver from Deutsche Bank on 31 May 2011.[173]

3.95 KAP's financial position was further hampered by Montenegro's failure to meet its own obligations in two key respects:

(a) First, ***Montenegro refused to repay a debt of some EUR 1.5 million that it had owed to KAP since before Mr Deripaska's investment in KAP.*** Under the KAP SPA, CEAC and Montenegro had agreed that certain of KAP's debts – including a debt to chemical supplier Sinochem should be paid off by CEAC, up to a ceiling of USD 10.6 million, and that Montenegro would cover the balance. Notwithstanding this agreement, money had been taken from KAP's accounts to pay Sinochem, in the sum of approximately EUR 5 million. Of the approximately EUR 5 million taken from KAP's accounts, CEAC owed KAP around EUR 3.5 million, and Montenegro owed around EUR 1.5 million. At KAP's request, CEAC had settled its debt. Montenegro, however, refused to meet its share;[174] and

[170] **CWS – 2**, Potrubach WS, at para.54.
[171] **Exhibit C-98**, Cancellation.
[172] **Exhibit C-97**, Letter from Leonid Krylov to Franz-Josef Ewerhardy and Gwen Blumhoff, dated 1 March 2011.
[173] **Exhibit C-296**, Letter from Deutsche Bank to KAP, dated 31 May 2011.
[174] **CWS – 2**, Potrubach WS, at paras.57-59.

(b) Second***, Montenegro refused to pay the full amount of energy subsidy that it had committed to pay under the Settlement Agreement***. In particular, it asserted that it was only obliged to pay the subsidy on a VAT gross basis, meaning that it ceased to pay any subsidy once the total amount paid (including VAT) reached the agreed cap. Thus, in respect of electricity bills for 2009, Montenegro paid only EUR 12.8 million in actual subsidy, asserting that the balance of its EUR 15 million obligation was met by payment of VAT (to itself) in the amount of EUR 2.2 million. As Mr Potrubach describes in his witness statement, Montenegro's position was illogical, was not supported by the wording of the Settlement Agreement or the EPCG Framework Agreement, and smacked of bad faith.[175] Montenegro's failure to pay the full subsidies meant that KAP spent the last part of each year paying for electricity at a wholly unsustainable rate of EUR 40 MWH or more.[176]

3.96 In addition, Montenegro refused to permit KAP even to raise its own funds by selling off non-core assets, as had been anticipated by the Settlement Agreement. While some of KAP's non-core assets could not be sold because there were no interested buyers, Montenegro took active steps to block the sale of two assets which could have raised much-needed funds for KAP:

(a) First, **Montenegro refused its consent for KAP to sell off scrap metal from its inoperative alumina production site**, with an estimated value of EUR 8 million. Until 2009, KAP had produced its own alumina – a material used in the manufacturing of aluminium – onsite at the smelter. In July 2009, however, KAP had switched to buying alumina on the open market, due to the extremely high cost of raw materials.[177] The shutdown of alumina production left KAP with alumina scrap at its worksite for which it had no use. KAP wished to sell off this scrap metal to raise funds, yet Montenegro, without reasonable explanation, objected to KAP doing so. As Mr Potrubach recounts, it appears that Montenegro wished to force KAP to restart alumina production onsite, but this was an economically unrealistic

[175] **CWS – 2**, Potrubach WS, at paras.82-83; **CWS – 3,** Alexey Kuznetsov Witness Statement ("**Kuznetsov WS**"), at para.22.
[176] **Exhibit C-233**, Wood MacKenzie Electricity Report, Figure 1; **CWS – 3,** Kuznetsov WS, at para.11.
[177] **CWS – 2**, Potrubach WS, at para.61.

proposition.[178] Montenegro also later prevented KAP even from pledging the alumina scrap to VTB Bank as collateral;[179]

(b) Second, ***Montenegro, acting through its appointee to the KAP board – by this time, Mr Nebojsa Dozić – refused its consent for KAP to sell a commercial property in Podgorica*.** KAP had no use for this property, and again wished to sell it off to raise funds. In order to do so, KAP had attracted a potential buyer, and obtained a valuation of the property from a third-party appraiser. Yet Mr Dozić refused to approve the sale, claiming that the proposed purchase price was too low and that a second appraisal from a third-party appraiser was required.[180] As Mr Potrubach recounts in his witness statement, it was not commercially reasonable for KAP to engage a second appraiser, yet Mr Dozić insisted the property could not otherwise be sold, and thereby thwarted the sale.[181]

3.97 Thus, by mid-2011, just six months after the coming into force of the Settlement Agreement, as a result of Montenegro's conduct, KAP had incurred three defaults with Deutsche Bank, missed three OTP Bank repayments, failed to approve a business plan, was starved of cash, had been refused the full benefit of its electricity subsidies, was in arrears to EPCG, and, consistent with the strategy identified at the board meeting of 25 February 2011, was being forced to make difficult decisions about which of its creditors to stretch and by how much. All of these short-term difficulties could have been resolved by injections of further cash by CEAC, payment by Montenegro of its obligations, and even by KAP raising its own funds. Instead, Montenegro's conduct had harmed KAP on multiple fronts, by preventing it from:

(a) receiving funds through loans from CEAC;

(b) receiving funds through repayment of Montenegro's own debt; and

(c) raising funds itself through asset sales.

[178] **CWS – 2**, Potrubach WS, at para.62.
[179] **CWS – 2**, Potrubach WS, at para.63.
[180] **Exhibit C-141**, Email from Nebojsa Dozić to Goran Martinović *et al*, dated 31 December 2012.
[181] **CWS – 2**, Potrubach WS, at para.64.

3. Montenegro obstructed planned reductions in KAP and RBN's workforces

3.98 Another key objective under the Settlement Agreement was to carry out a significant reduction in KAP and RBN's workforces.[182] In accordance with the Restructuring Concept 2009, CEAC aimed to reduce KAP's workforce from around 2,000 employees to around 1,000 employees, and at RBN from around 1,200 employees to around 300.[183] In addition, the 600 or so employees at KAP's defunct subsidiaries, employed on "garden leave", needed to be made redundant. The ultimate aim was to reduce staff by around 2,500, leaving a total workforce of around 1,300 employees.[184]

3.99 While Montenegro had accepted the need for these reductions in principle, in practice it proved reluctant to accept the necessary changes. KAP had a budget for its redundancy programme that was based on an average redundancy payment of around EUR 10,000 per employee, significantly more than KAP was required to pay under Montenegrin legislation. After the signing of the Settlement Agreement, Montenegro insisted, however, that redundancy payments should be made at a much higher average rate of around EUR 14,000 per employee – an almost 50% increase in the size of redundancy settlements – claiming that this was required to comply with the terms of KAP's collective agreement.[185]

3.100 Montenegro's demands were impossible for KAP to meet under its budget. To pay 2,500 workers at an average rate of EUR 14,000 – 15,000 per employee would have cost KAP around EUR 35 million. This was money which KAP simply did not have. While Montenegro exercised significant influence with the unions who represented KAP's workers, and could have worked to negotiate an affordable redundancy scheme, Montenegro refused to assist. The result was that KAP could not afford to complete its redundancy programme. In total, only around 1,200 employees were made redundant, rather than the target of 2,500. Without the ability to make the necessary reductions in workforce levels, KAP and RBN remained much too heavily staffed to be competitive.[186]

[182] **CWS – 3**, Kuznetsov WS, at para.12-14.
[183] **CWS – 2**, Potrubach WS, at para.71; **Exhibit C-72**, Restructuring Concept 2009, at p.17.
[184] **CWS – 2**, Potrubach WS, at para.77.
[185] **CWS – 2**, Potrubach WS, at para.79.
[186] **CWS – 2**, Potrubach WS, at paras.79-80.

4. Montenegro refused to engage on KAP's debt restructuring

3.101 With the assistance of Houlihan Lokey, an investment bank, CEAC and En+ made repeated proposals to Montenegro as to how KAP could be restructured for the long-term. These proposals set out a range of viable scenarios, which included combinations of debt-to-equity swaps, further rationalisation of KAP's costs, and securing long-term energy supply agreements. Such proposals were presented:

(a) in April 2011;[187]

(b) in June 2011;[188]

(c) in April 2012;[189]

(d) in November 2012;[190] and

(e) in February 2013.[191]

3.102 Despite its intransigence in correspondence and via KAP's board, Montenegro initially responded positively to the proposal to secure a new restructuring of KAP. On 10 June 2011, Montenegro and En+ entered into a new Memorandum of Understanding (the "**June 2011 MoU**").[192] The June 2011 MoU:

(a) noted in its recitals "the importance of securing the short term stability and long term viability of [KAP]";[193]

(b) committed Montenegro to "accelerate the full disbursement of remaining 2011 electricity subsidies as provided for in the Settlement Agreement by 30 June 2011 with the aim of securing a rescheduling of outstanding and future principal payments due to OTP Group until 31 October 2011";[194]

[187] **Exhibit C-100**, Houlihan Lokey / En+ Presentation, dated 20 April 2011.
[188] **Exhibit C-266**, Houlihan Lokey / En+ Presentation, dated June 2011.
[189] **Exhibit C-271**, KAP Term Sheet (Draft) ("**April Draft KAP Term Sheet**"), dated April 2012.
[190] **Exhibit C-137**, Short Review of KAP's Further Scenarios ("**KAP Short Review**"), dated November 2012.
[191] **Exhibit C-143**, Short Review of KAP's Further Scenarios ("**February KAP Short Review**"), dated 5 February 2013.
[192] **Exhibit C-103**, Memorandum of Understanding between the Government of Montenegro and En+ Group, dated 10 June 2011 ("**June 2011 MoU**").
[193] **Exhibit C-103**, June 2011 MoU, Recitals.
[194] **Exhibit C-103**, June 2011 MoU, cl. 1.

(c) committed KAP to try to agree a standstill agreement with EPCG;[195] and

(d) committed En+ to extend a loan of at least EUR 4.1 million to KAP so KAP could meet its liabilities to VTB.[196]

3.103 The June 2011 MoU concluded with a mutual commitment in the following terms:

> "[b]oth parties to use their best efforts to ensure KAP's long-term operational viability and financial solvency by agreeing terms no later than 31 October 2011 on:
>
> (a) a financial restricting of the Company's indebtedness to Deutsche Bank, OTP Group and VTB Bank;
>
> (b) an introduction of measures to reduce the Company's expenditures for electricity consumption until at least 31 December 2011."[197]

3.104 KAP was also engaged throughout this period in extensive correspondence keeping its creditors informed of developments and KAP's restructuring plans.[198] This correspondence was made in the belief that Montenegro was committed to the pursuit of restructuring, as it had agreed in the June 2011 MoU.

3.105 As Mr Potrubach recounts, however, soon after the signing of the June 2011 MoU, Montenegro simply stopped engaging on plans for KAP's restructuring. When KAP's management tried to reach out to Montenegrin representatives to recommence discussions, they were simply ignored.[199]

3.106 The same pattern repeated itself in 2012 and 2013, when Montenegro's officials claimed to be willing to engage in restructuring negotiations, yet failed to engage seriously with the proposals.[200] Following the proposal presented by CEAC and En+ in April 2012, for instance, Montenegro's representatives at Schönherr returned the written term sheet with only "certain minor, mostly typography, amendments", noting that the proposal was only subject

[195] **Exhibit C-103**, June 2011 MoU, cl. 2.
[196] **Exhibit C-103**, June 2011 MoU, cl. 3.
[197] **Exhibit C-103**, June 2011 MoU, cl. 6.
[198] **Exhibit C-104**, Letter from KAP to VTB Bank, dated 20 June 2011; **Exhibit C-107**, Letter from KAP to VTB Bank, dated 18 October 2011; **Exhibit C-108**, Email from D.Potrubach to VTB Bank, dated 24 October 2011.
[199] **CWS – 2**, Potrubach WS, at para.71.
[200] **CWS – 3**, Kuznetsov WS, at paras. 29-31.

to the approval of Montenegro's "competent authorities".[201] Yet just one month later, on 31 May 2012, Schönherr wrote again summarily to notify CEAC and En+ that:

> "Please be informed that, following extensive discussions, the Government of Montenegro ('GoM') failed to reach a positive resolution on the terms and conditions set out under the last version of the draft Term Sheet pertaining to the Restructuring." [202]

3.107 Similarly, in 2013, as Mr Potrubach recounts, Montenegro had again expressed a strong interest in reaching agreement on KAP's restructuring, with Prime Ministerial Advisor for Energy and Industrial Development, Mr Ranko Milović, calling Mr Potrubach on weekends asking for figures and details.[203] As late as June 2013, the Minister of Economy, Vladimir Kavarić, was writing to CEAC in respect of the most recent restructuring model presented by CEAC and En+, noting that "[a]bout model we will review it and get back to you… As you know we are always trying to save KAP, but it is not easy to bridge the gap among all stakeholders (GoM, CEAC, EPCG, Unions, Parliament, etc".[204] Yet just one week later, instead of continuing to discuss KAP's restructuring, Montenegro filed for KAP's bankruptcy.

I. Respondent's Purported Call On Claimant's Shares In KAP: November 2011 To March 2012

3.108 On 3 November 2011, Montenegro's lawyers, Schönherr, wrote to CEAC giving notice that Montenegro considered that CEAC was in breach of Clause 21.2(l) of the Settlement Agreement. Montenegro asserted that CEAC had failed to pay more than three months of electricity bills to EPCG. On that premise, Montenegro declared that a Failure Event within the meaning of the Settlement Agreement had occurred.[205]

3.109 As Mr Potrubach and Mr Kuznetsov explain in their witness statements, by the end of 2011 KAP had made significant progress in reducing its costs and was even making an operational profit on aluminium sold.[206] There had been considerable hope in the summer of 2011 that Montenegro was committed to the process of restructuring, as agreed under the June 2011 MoU, but there had been prolonged silence from Montenegro during the autumn of 2011 in respect of CEAC's proposals. Nevertheless, the notice of a Failure Event was not expected by

[201] **Exhibit C-126**, Email from J. Bezarević to G. Martinović *et al*, dated 18 April 2012.
[202] **Exhibit C-132**, Email from J. Bezarević to G. Martinović *et al*, dated 31 May 2012.
[203] **CWS – 2**, Potrubach WS, at paras.95-96.
[204] **Exhibit C-147**, Email from V. Kavarić to E. Mironova, dated 7 June 2013.
[205] **Exhibit C-110**, Letter from S. Moravčević to CEAC, dated 3 November 2011.
[206] **CWS – 2**, Potrubach WS, para.66; **CWS – 3**, Kuznetsov WS, at paras.17-18.

CEAC or En+, and marked the first of a number of increasingly aggressive steps taken by Montenegro against Mr Deripaska and his investments in Montenegro.

3.110 CEAC responded to the Failure Event notice by way of a letter of 1 December 2011, in which CEAC confirmed that it was in negotiations with EPCG seeking postponement of KAP's payment obligations.[207] On 9 January 2012, Schönherr followed up with a further letter, this time requiring CEAC to present a plan of remedial actions and also to make default payments of EUR 1,000 per day.[208]

3.111 At around the same time, KAP pressed Montenegro to pay the full amount of electricity subsidies that it had committed to, without deduction of VAT amounts. KAP sought confirmation from Montenegro that it would agree to remedy this mistreatment of prior periods by making available a total of EUR 12,779,883 by way of electricity subsidies for 2012.[209]

3.112 During February 2012, CEAC and Schönherr exchanged correspondence concerning Montenegro's notification of a Failure Event and its threat to invoke the consequences of Clause 28.4 of the Shareholders Agreement by placing a call on CEAC's shares in KAP.[210] At the same time, however, as noted above, En+ and Montenegro were engaged in the negotiation of possible terms for a restructuring of KAP that would see CEAC engage in a debt-to-equity swap and the dilution of KAP's minority shareholders.[211]

3.113 On 29 February 2012, the situation worsened significantly for Mr Deripaska when Montenegro's parliament adopted a Conclusion stating:

> "***[t]he Parliament of Montenegro***, considering that the foreign partner breached key contractual obligations, ***tasks the Government of Montenegro***, pursuant to the law or the agreement, ***to terminate cooperation with CEAC*** in the most efficient manner possible, **and *take control at KAP***."[212]

[207] **Exhibit C-112**, Letter from A. Kuznetsov to Fund for Development of Montenegro *et al*, dated 1 December 2011.
[208] **Exhibit C-116**, Letter from S. Moravčević to V. Krylov and A. Kuznetsov, dated 9 January 2012.
[209] **Exhibit C-118**, Letter from Y. Moiseev to V. Kavarić, dated 12 January 2012.
[210] **Exhibit C-11**, Letter from S. Moravčević to Y. Moiseev, dated 16 February 2012; **Exhibit C-122**, Letter from A. Kuznetsov to S. Moravčević, dated 23 February 2012.
[211] **Exhibit C-123**, Email from A. Kuznetsov to V. Kavarić, dated 27 February 2012.
[212] **Exhibit C-10**, the February 2012 Resolution (emphasis added).

3.114 The following day, 1 March 2012, Schönherr gave notice to CEAC requiring it to deliver up all of its remaining shares in KAP to Montenegro.[213] Pursuant to Clause 28.4.2 of the Shareholders Agreement and the associated Transfer Agreement entered into by Montenegro and CEAC pursuant to it, Montenegro set a fourteen-day deadline for delivery up of the shares. Schönherr followed up with a subsequent letter on 22 March 2012 that reiterated the demand that the shares be transferred and gave notice that Montenegro intended to proceed to enforce the share pledge that CEAC had granted over its shares in KAP, pursuant to the Settlement Agreement.[214]

3.115 As explained by Mr Potrubach, CEAC did not believe that Montenegro was justified in issuing its call on CEAC's shares in KAP and refused to comply with that demand.[215] By this stage, KAP had very significant debt liabilities to both CEAC (together with En+) and Montenegro, and whatever the restructuring arrangement that would ultimately be concluded, Mr Deripaska, through CEAC, remained committed to working together with Montenegro to secure KAP's future.

J. KAP Operations: March 2012 To June 2013

3.116 Despite Montenegro's Failure Event notice and subsequent share call, CEAC remained a shareholder of KAP and it maintained its appointees on KAP's board of directors. CEAC continued to effect overall day-to-day management of KAP.

1. Montenegro's secret negotiations with Deutsche Bank

3.117 However, unbeknownst to CEAC or En+, Montenegro had entered into negotiations with Deutsche Bank during 2011 concerning a possible new structure for refinancing Deutsche Bank's EUR 22 million facility to KAP.[216] In the overall scheme of KAP's liabilities, this debt to Deutsche Bank was relatively small, but along with KAP's larger liabilities, it was in need of sensible restructuring. KAP had, as noted above, committed several acts of default under the Deutsche Bank loan in early 2011, both due to late payments by KAP to OTP Bank, as a result of Montenegro's failure timely to approve the loan of funds from CEAC, and then again when KAP was unable to deliver a business plan and compliance certificate to Deutsche Bank

[213] **Exhibit C-12**, Letter from Slaven Moravčević to Aleksey Kuznetsov, dated 1 March 2012.
[214] **Exhibit C-13**, Letter from Slaven Moravčević to Aleksey Kuznetsov, dated 22 March 2012.
[215] **CWS – 2**, Potrubach WS, at paras.127-132.
[216] **CWS – 2**, Potrubach WS, at para.111.

because Montenegro had prevented KAP from doing so. Apart from these events, however, KAP had made every required payment to Deutsche Bank on time and in full.

3.118 That Montenegro had entered into secret, unilateral discussions with Deutsche Bank came as a great surprise to CEAC, En+ and KAP.[217] Montenegro had been discussing terms for restructuring the loan – of which KAP, not Montenegro, was the obligor – without KAP's knowledge or consent. Moreover, KAP could not simply renegotiate the terms of one loan without the knowledge or consent of its other lenders. Unilateral negotiation was strictly prohibited under KAP's loan agreements with OTP Bank and VTB Bank.[218] Montenegro's conduct placed KAP at risk of a serious default under its loans with those lenders.

3.119 After months in which Deutsche Bank had failed to respond to KAP's requests for waiver of the acts of default engendered by Montenegro, on 22 December 2011, after having engaged in furtive negotiations with Montenegro, Deutsche Bank wrote to KAP stating that it was willing to waive KAP's acts of default only if KAP accepted a restructuring proposal under which Montenegro would become the primary obligor under the Deutsche Bank Loan Facility.[219] On 24 January 2012, Montenegro and Deutsche Bank presented KAP with a restructuring proposal on these terms.[220]

3.120 For reasons explained by Mr Potrubach in his witness statement, this proposal was not viable.[221] For KAP to enter into a new loan arrangement with Montenegro without consulting other its creditors would have triggered a series of cross-defaults. Even more significantly, as Mr Potrubach explains, for KAP to have entered into any new loan at this time – when it had been unable to agree a restructuring plan with Montenegro, and was struggling to meet its existing debt – would have placed KAP and its board of directors at risk of personal liability for entering into a loan KAP would be unable to service.[222] CEAC was also very concerned by the proposal that Deutsche Bank be paid a EUR 1 million "restructuring fee" in return for the restructuring of the loan, and that this added liability would be passed

[217] **CWS – 2**, Potrubach WS, at para.111.
[218] **Exhibit C-80**, the VTB Facility Agreement, cl. 20.1; **Exhibit C-73**, Montenegro Bonus Loan Facility Agreement between KAP and OTP Bank (the "**Montenegro Bonus Loan Facility Agreement**"), dated 20 November 2009, cl. 8.6.
[219] **Exhibit C-120**, Email from Dmitry Potrubach to Dragan Darmanovic and Boris Buskovic, dated 31 January 2012.
[220] **Exhibit C-113**, Letter from Johannes Philippi and Franz-Josef Ewerhardy to Viacheslov Krylov, dated 22 December 2011.
[221] **CWS – 2**, Potrubach WS, at para.113; **CWS – 3**, Kuznetsov WS, at para.35.
[222] **CWS – 2**, Potrubach WS, at para.113.

to KAP. The requested payment seemed disproportionate to the size and significance of the proposed restructuring, and its purpose was never adequately explained or justified.[223] In light of these concerns, CEAC was obliged to refuse to consent to the proposed structure.

2. Deutsche Bank accelerates its loan

3.121 On 23 March 2012, as a result of KAP's inability to agree to the proposed restructuring plan, Deutsche Bank issued a notice of acceleration of its EUR 22 million facility.[224] The four grounds of default cited by Deutsche Bank were:[225]

(a) KAP's failure to pay instalments to OTP Bank on time in February 2011;

(b) KAP's failure to deliver a business plan for 2011;

(c) KAP's failure to deliver a compliance certificate by June 2011; and

(d) KAP's commencement of negotiations with other creditors, including Montenegro, OTP Bank, CEAC, VTB Bank and EPCG, without notifying Deutsche Bank.

3.122 The invocation of these four events was very unfair to KAP. Of the four cited grounds, one was false (KAP had not commenced negotiations with other creditors – indeed, it was Deutsche Bank who had been negotiating in secret with Montenegro), and the other three were all the direct result of Montenegro's conduct. It was Montenegro that had:

(a) refused to approve CEAC's loan to KAP in time for the OTP Bank payments to be made on time;

(b) acting through its appointed director Mr Mitrović, vetoed the adoption of KAP's 2011 business plan; and

(c) withheld its approval of KAP's 2009 financial statements, preventing KAP from issuing a compliance certificate.

[223] **CWS – 2**, Potrubach WS, at para.114.
[224] **Exhibit C-15**, Letter from Astrid Breyer-Simski and Franz-Josef Ewerhardy to Aleksey Kuznetsov, dated 23 March 2012.
[225] **Exhibit C-15**, Letter from Astrid Breyer-Simski and Franz-Josef Ewerhardy to Aleksey Kuznetsov, dated 23 March 2012.

3.123 The effect of the Deutsche Bank notice was that KAP was required to make immediate repayment of that amount to Deutsche Bank. In circumstances where it continued to be prevented by Montenegro from raising any finance from CEAC or En+, KAP could not meet Deutsche Bank's demand for repayment and did not pay by the date specified.

3.124 On 2 April 2012, having not received payment from KAP, Deutsche Bank wrote to Montenegro demanding payment of the default amount under the State guarantee put in place by Montenegro pursuant to the Settlement Agreement.[226] Montenegro made payment to Deutsche Bank under the guarantee on 5 April 2012 and promptly demanded that KAP reimburse it for the amount, inclusive of the restructuring fee element.[227]

3. Discovery of the "restructuring fee" payment

3.125 After the Deutsche Bank loan was paid by Montenegro, it was revealed that Montenegro had already paid the "restructuring fee" to Deutsche Bank in December 2011. Indeed, Deutsche Bank and Montenegro had been negotiating the payment of this "restructuring fee" even before Deutsche Bank had notified KAP of its conditional waiver of KAP's acts of default on 22 December 2011:[228]

(a) as early as November 2011, Deutsche Bank had sent Minister of Finance Milorad Katnić an undated letter (on which KAP and CEAC were not copied) proposing that Montenegro pay Deutsche Bank EUR 1 million "in connection with" the proposed restructuring;[229]

(b) on 25 November 2011, Minister Katnić had signed and returned the letter (again not copying KAP or CEAC), requesting only that Montenegro's payment of the restructuring fee be delayed until 20 December 2011;[230] and

(c) on 22 December 2011 – the same day that Deutsche Bank first sent notice of its conditional waiver to KAP demanding that it restructure the loan or face acceleration – Deutsche Bank had sent a further signed letter to Minister Katnić

[226] **Exhibit C-124**, Letter from Deutsche Bank to Montenegro Ministry of Finance, dated 2 April 2012.
[227] **Exhibit C-131**, Letter from Boris Buškcvić to Yuri Moiseev and Aleksey Kuznetsov, dated 18 May 2012.
[228] **CWS – 2**, Potrubach WS, at para.116.
[229] **Exhibit C-111**, Restructuring Fee Letter from Deutsche Bank to Montenegro (the "**November Restructuring Fee Letter**"), dated November 2011.
[230] **Exhibit C-111**, Returned Restructuring Fee Letter (the "**Returned Restructuring Fee Letter**"), dated 25 November 2011.

fixing the following day, 23 December 2011, for payment of the "restructuring fee".[231]

3.126 It appears that Montenegro paid the "restructuring fee" the following day, as requested.[232] Notably, Deutsche Bank's subsequent correspondence with KAP, in which it detailed the sums paid by Montenegro to Deutsche Bank, conspicuously omitted to mention the payment of this "restructuring fee".[233]

3.127 Montenegro's payment of this "restructuring fee" to Deutsche Bank, ostensibly on behalf of KAP but without KAP's notice or consent, for a restructuring that had not yet even taken place, was troubling. Even more troubling was the acknowledgement in the letter from Deutsche Bank to Montenegro of 22 December 2011 that the "restructuring fee" in fact bore no relationship to Deutsche Bank's fees, costs or expenses incurred in connection with the restructuring:

> "the Guarantor [Montenegro] must pay the Restructuring Fee by or before the date set out in paragraph (a) above notwithstanding the fact that such date precedes the deadline, as set out in the Waiver Letter[234] and referred to in paragraph 3 above, of 20 February 2012 for payment by the Guarantor to the Agent and the Arranger of the amount of all fees payable to, and costs and expenses (including legal fees) reasonably incurred by any of, the Agent and the Arranger in connection with the negotiation, preparation, printing, execution, syndication and perfection of the Amendment Agreement and the amendments to be effected thereby." [235]

4. Ongoing negotiations between CEAC, En+ and Montenegro

3.128 The remainder of 2012 was marked by apparent differences between the postures adopted by Montenegro's parliament, and the position conveyed to Mr Deripaska in private by the government and its ministers. In public, parliament was overtly hostile to CEAC, En+, and Mr Deripaska. Amongst other things, on 8 June 2012, the Montenegrin Parliament passed a further resolution that called on the Government to "as soon as possible, continue with

[231] **Exhibit C-14**, Restructuring Fee Letter, (the "**December Restructuring Fee Letter**"), dated 22 December 2011.
[232] **Exhibit C-114**, Payment confirmation, dated 23 December 2011.
[233] **Exhibit C-130**, Letter from Deutsche Bank to KAP, dated 15 May 2012.
[234] This appears to refer to the letter sent from Deutsche Bank to KAP on 22 December 2011, which set a deadline of 20 February 2012 for KAP to agree to restructure the Deutsche Bank Loan and for Montenegro to pay all associated fees, costs and expenses: **Exhibit C-113,** Letter from Johannes Philippi and Franz-Josef Ewerhardy to Viacheslov Krylov, dated 22 December 2011.
[235] **Exhibit C-113**, Restructuring Fee Letter, (the "**December Restructuring Fee Letter**"), dated 22 December 2011.

activities in order to realise the key request by the Parliament of Montenegro concerning termination of cooperation with CEAC, in the manner deemed most efficient by the Government."[236]

3.129 But behind the scenes, Montenegro, together with its lawyers, gave CEAC the impression that Montenegro wished to work out a new financial model for KAP, with both sides taking further equity in the business. These negotiations, conducted in good faith by CEAC, carried on through the end of 2012 until well into 2013, as Montenegro exchanged proposals and correspondence with CEAC including:

(a) At a meeting of 10 December 2012, at which Montenegro and CEAC "agreed to continue or restart negotiations in relation to restructuring of KAP and RBN and, in particular, to agree on the financial model of KAP".[237]

(b) Montenegro's letter of 14 March 2013 to OTP Bank requesting further forbearance on its loan, explaining that "the Government of Montenegro ('GoM') and its Russian partners in KAP are in process of finding the best possible solution aiming to resolve KAP's debt and its long term energy supply. Please be informed that this matter is currently also discussed in Parliament, after which we expect to have Montenegro's final position concerning the course of resolving KAP's problems, inter alia, aiming to reach the most favourable solution for all KAP's creditors, including OTP Bank."[238]

3.130 Montenegro's description of itself as Mr Deripaska's "partner" in the search for a solution accorded with his own views. Despite Montenegro's repeated failings and its hostile attitude, the two parties were locked together in the venture as major creditors. It was a source of some frustration to Mr Deripaska and his representatives that Montenegro failed to take the decisions necessary and which could have saved KAP. Montenegro proved unable to balance the circumstances impacting KAP in a realistic way.

5. <u>KAP's electricity supply situation deteriorates</u>

3.131 Throughout 2012 and during the first half of 2013, Mr Deripaska's representatives continued to work with Montenegro to try to secure KAP's future. However, due to the decisions

[236] **Exhibit C-133**, Conclusions of the Parliament of Montenegro, dated 8 June 2012 (the "**June 2012 Parliamentary Decree**"), dated 8 June 2012.
[237] **Exhibit C-140**, Letter from Elena Mironova to Vladimir Kavarić, dated 21 December 2012.
[238] **Exhibit C-144**, Letter from Radoje Zugic to Laszlo Wolf and Balazs Fekete, dated 14 March 2013.

adopted by Montenegro's representatives, KAP was forced into ever less sustainable positions, most notably in respect of electricity use and operations. As to this:

(a) In early 2012, Montenegro ceased paying the electricity subsidies altogether. Montenegro claimed that it had paid its full EUR 60 million worth of subsidies in accordance with the Settlement Agreement even though, excluding VAT, it had in fact only paid around EUR 51 million.[239] From this point onwards, EPCG began invoicing KAP for electricity in a way which disregarded the terms of the subsidy. The result was that KAP was suddenly asked to pay electricity at a rate – around EUR 40 MWh – that was simply unaffordable for KAP.[240]

(b) On the basis that KAP was unable to meet its electricity bills, ***EPCG proceeded progressively to reduce the supply of electricity to KAP during 2012***. In February 2012, EPCG had notified KAP that its electricity supply would be temporarily reduced due to an adverse weather event. However, once the bad weather had passed, EPCG did not return KAP's electricity supply to its previous levels.[241] In May 2012, KAP received a letter from EPCG stating that KAP had to produce an electricity plan to reduce its electricity consumption by 20% within a week, and by 50% by the end of May. If KAP did not submit the plan, EPCG would unilaterally cut KAP's electricity.[242] This was financially ruinous for KAP, because any decrease in production increased KAP's per-unit costs.[243] KAP pleaded with Montenegro for its assistance, including payment of the remainder of the electricity subsidies which it had refused to pay. KAP noted that if Montenegro did not assist, then KAP would be forced to shut down operations.[244] Montenegro, however, declined to assist.[245]

(c) On 17 September 2012, EPCG served a notice of termination of the EPCG Framework Agreement, announcing its intention to terminate KAP's electricity supply entirely.[246] On 27 November 2012, EPCG notified KAP that "starting from 1 January 2013, EPCG cannot be requested to supply electricity to KAP, while KAP is

[239] **CWS – 2**, Potrubach WS, at para.82; **CWS – 3**, Kuznetsov WS, at para.21.
[240] **CWS – 2**, Potrubach WS, at para.83; **CWS – 3**, Kuznetsov WS, at para.23.
[241] **CWS – 3**, Kuznetsov WS, at paras.85-86.
[242] **Exhibit C-128**, Letter from Yuri Moiseev to Vladimir Kavarić, dated 8 May 2012 and **Exhibit C-127,** Letter from Enrico Malerba to Yuri Moiseev, dated 7 May 2012.
[243] **CWS – 3**, Kuznetsov WS, at para.25; **CWS – 2**, Potrubach WS, at para.86.
[244] **Exhibit C-128**, Letter from Yuri Moiseev to Enrico Malerba, dated 8 May 2012 and **Exhibit C-127,** Letter from Enrico Malerba to Yuri Moiseev, dated 7 May 2012.
[245] **CWS – 3**, Kuznetsov WS, at para.26; **CWS – 2**, Potrubach WS, at paras.87-88.
[246] **Exhibit C-135**, Letter from EPCG to KAP, dated 17 September 2012.

entitled to purchase electricity on the market either from the supplier or from electricity traders at market rates".[247]

(d) In circumstances where EPCG remained the monopoly supplier of electricity in Montenegro, and electricity imports were not viable, EPCG's stated refusal to supply electricity to KAP entirely appeared to leave KAP with no option but to shut down operations. In response, Montenegro urged KAP to enter into an electricity supply agreement with Montenegro Bonus, a state-owned oil storage and trading company with no connection to the electricity industry, whereby Montenegro Bonus would be the purchaser of electricity from EPCG and would on-sell that electricity supply to KAP. KAP's directors regarded the proposal as bizarre and unworkable. Not least, the proposed tariff was too high, Montenegro Bonus asked for prepayments which KAP could not provide, and also required KAP to pledge assets over which Montenegro had refused to confirm KAP's legal title.[248]

(e) KAP, now left in a desperate position, sought to exercise its only remaining option, to shut down production. At a board meeting in December 2012, the CEAC representatives to KAP's board proposed a resolution that KAP's operations be halted, in light of the termination of KAP's electricity supply.[249] Montenegro, relying on its veto rights under the KAP Shareholders' Agreement, refused its consent to this motion. In February 2013, KAP's board again tried to agree to shut down production, and again Montenegro withheld its consent.[250]

(f) Montenegro's position simply refused to recognise reality. In effect, Montenegro compelled KAP to continue consumption of electricity and to maintain operations, in circumstances where KAP had no contractual entitlement to obtain electricity from any supplier, and in circumstances where continued production at reduced levels was causing KAP serious financial harm.

3.132 In the first half of 2013, KAP continued to receive a reduced supply of electricity, but had no idea where it was coming from. The state-owned electricity transmission company CGES continued to provide KAP with monthly invoices for transmission costs, which recorded the total amount of electricity consumed by KAP. But the CGES invoices did not specify where the

[247] **Exhibit C-139**, Letter from Enrico Malerba to Yuri Moiseev, dated 27 November 2012.
[248] **CWS – 2**, Potrubach WS, at paras. 92-93; **CWS-3**, Kuznetsov WS, at para.28.
[249] *See* **Exhibit C-140;** CEAC Letter to Minister of Economy, dated 21 December 2012.
[250] **CWS – 2**, Potrubach WS, at para.107.

electricity was being received from. When KAP's management enquired as to the source of the electricity, they received no response. With no idea to whom it should make payment, or on what terms, KAP was forced simply to make provision in its accounts for payment at the Montenegrin Energy Regulatory Agency price.[251]

3.133 The European Energy Commission later discovered that CGES had been drawing energy, apparently with the knowledge of Montenegro, from regional interconnectors in Serbia, Bosnia and Albania in order to supply KAP. Reports stated that CGES had informed the Ministry of Economy, the Deputy Prime Minister, and the Speaker of the National Parliament that it was taking this electricity, and none of the officials did anything to stop the practice. Only after the European Energy Commission warned Montenegro to stop taking the electricity, or face being excluded from the European network, did CGES cease its practice and agree to reimburse the cost of the wrongfully taken electricity.[252] Rather than accepting public responsibility, however, Montenegro attempted to blame KAP's CFO, Mr Potrubach, for CGES's wrongdoing, as described further below.

K. Bankruptcy Petition: June 2013

3.134 As CEAC continued its efforts to agree with Montenegro a restructuring of KAP, while reassuring KAP's international creditors (particularly the two largest, OTP Bank and VTB Bank) to persuade them not to follow Deutsche Bank's lead in accelerating their loans, matters took an unexpected and irreversible turn.

3.135 On 14 June 2013, the Ministry of Finance of Montenegro filed a bankruptcy petition against KAP (the "**Bankruptcy Petition**") in the Commercial Court.[253] It did so without notice to Mr Deripaska, En+, or CEAC, with whom it had been negotiating the restructuring of KAP for over two years.

3.136 Only the day before, Ms Elena Mironova of En+ had chased Mr Vladimir Kavarić of the Ministry of Finance in connection with materials she had sent him on 5 June 2013 in preparation for the forthcoming annual shareholders meeting of KAP to be held the

[251] **CWS –2**, Potrubach WS, at para.97.
[252] **Exhibit C-210**, South East Europe Sustainable Energy Policy, 'Winners and Losers: Who Benefits from High-Level Corruption in the South East Europe Energy Sector?', pp.34-35.
[253] **Exhibit C-149**, Bankruptcy Petition, dated 14 June 2013 ("**Bankruptcy Petition**").

following week.[254] Such was her surprise at receiving Montenegro's Bankruptcy Petition that she forwarded a copy to Mr Kavarić, asking "***What is that?***"[255] Mr Kavarić appears not to have responded.

3.137 The Bankruptcy Petition's basis was KAP's failure to pay Montenegro EUR 24,427,740.18 (consisting of EUR 22,000,000 for principal, EUR 1,427,740.18 for interest, and EUR 1,000,000 for a restructuring fee) that Montenegro had paid pursuant to the guarantee it provided under the Deutsche Bank loan within 45 days of the debt falling due. Montenegro alleged that KAP had a "durable inability to pay" under Article 12(3) of the Bankruptcy Law.[256]

3.138 Pending the hearing of Montenegro's Bankruptcy Petition, Judge Veselin Vujošević appointed Mr. Veselin Perišić as KAP's interim bankruptcy administrator.[257] A hearing to examine the grounds for commencing bankruptcy was scheduled for 16 July 2013.[258] Around this time, the Montenegrin press speculated that Montenegro Bonus – a state-owned entity active in the storage, distribution, and trading of oil and related products, that had also been engaged in a plan to sell electricity to KAP – was to be appointed to manage KAP.[259]

3.139 Judge Dragan Rakočević subsequently was assigned to oversee the proceedings. The examination of the Bankruptcy Petition was brought forward due to concerns that KAP's production would be halted before the hearing scheduled for 16 July 2013 could be heard.[260]

3.140 On 8 July 2013, Judge Rakočević ordered KAP's bankruptcy commenced and placed KAP into liquidation. The basis for his decision was that KAP was over-indebted within the meaning of Article 12(4) of the Bankruptcy Law. In this regard, the court noted that KAP's operating loss in 2012 amounted to EUR 399,115,855, while the value of its assets in its financial

[254] **Exhibit C-148**, Email from E. Mironova to V. Kavarić, dated 13 June 2013.
[255] **Exhibit C-151**, Email from E. Mironova to V. Kavarić, dated 14 June 2013 (emphasis added).
[256] **Exhibit C-149**, Bankruptcy Petition.
[257] **Exhibit C-157**, Letter from Veselin Perišić to Judge Veselin Vujošević, dated 5 July 2013.
[258] **Exhibit C-160**, Decision of Judge Dragan Rakočević commencing KAP's bankruptcy ("**Bankruptcy Commencement Decision**"), dated 8 July 2013.
[259] **Exhibit C-264**, Statement from the Tax Administration Central Company Register, Montenegro Bonus Company for Production, Trade and Services ("**Montenegro Bonus Tax Registry Entry**"); **Exhibit C-154**, BIZLife, "Montenegro Bonus is Taking Over KAP", dated 25 June 2013; **Exhibit C-152**, Analitika, "Montenegro Bonus Taking Over KAP", dated 25 June 2013; **Exhibit C-156**, RTCG, "KAP: Bankruptcy on Monday", dated 5 July 2013.
[260] **Exhibit C-160**, Bankruptcy Commencement Decision.

statements as at 31 December 2012 amounted to EUR 183,496,897[261] (although KAP's total property was later assessed at EUR 172,984,121 as of 8 July 2013, of which EUR 153,264,016 was attributed to fixed property).[262] Creditors were ordered to submit their claims within 30 days of the order's publication.[263]

3.141 By the same order, Judge Rakočević confirmed Mr Perišić's appointment as KAP's bankruptcy administrator (the "**Bankruptcy Administrator**"). Mr Perišić had previously served as the bankruptcy administrator in the bankruptcy of Željezara Nikšić A.D. ("**ZN**"). This is the only other bankruptcy in Montenegro's post-independence history that is of a comparable scope, size and complexity to that of KAP's, and that also involved a foreign investor.

3.142 Three subsequent events in KAP's bankruptcy will be explored for the purposes of Mr Deripaska's claims: (i) the appointment of Montenegro Bonus to manage KAP's business; (ii) the formation of KAP's Board of Creditors; and (iii) the sale of substantially all of KAP's assets to Uniprom.

L. KAP in Bankruptcy: June 2013 to Present

3.143 On the day after KAP's bankruptcy was commenced, and in confirmation of well-informed press articles chronicling an appointment foretold,[264] the Bankruptcy Administrator dismissed KAP's management and procured the entry by KAP into an Agreement on Business and Technical Cooperation with Montenegro Bonus (the "**Montenegro Bonus BCA**"). Under the Montenegro Bonus BCA, Montenegro Bonus contracted to assume management of KAP's ongoing production, movable property, and real estate. The Montenegro Bonus BCA also specifically provided that the "[a]greement comes into force by the day it is confirmed by Government of Montenegro…".[265]

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[261] **Exhibit C-160**, Bankruptcy Commencement Decision.
[262] **Exhibit C-159**, KAP Bankruptcy Valuation, dated 8 July 2013.
[263] **Exhibit C-160**, Bankruptcy Commencement Decision.
[264] **Exhibit C-264**, Montenegro Bonus Tax Registry Entry; **Exhibit C-154**, BIZLife, "Montenegro Bonus is Taking Over KAP", dated 25 June 2013; **Exhibit C-152**, Analitika, "Montenegro Bonus Taking Over KAP", dated 25 June 2013; **Exhibit C-156**, RTCG, "KAP: Bankruptcy on Monday", dated 5 July 2013.
[265] **Exhibit C-161**, Montenegro Bonus BCA. Montenegro Bonus and the Bankruptcy Administrator also concluded a supplementary agreement on 1 August 2013 concerning the use of proceeds from the Bankruptcy Administrator's sale of KAP's finished products that existed as of the time it entered bankruptcy. *See* **Exhibit C-166,** Agreement by and between: KAP and Montenegro Bonus, dated 1 August 2013. In addition, the Montenegro Bonus BCA was extended officially three times. *See* **Exhibit C-170**, Annex No 1 to the Agreement on Business and Technical Cooperation No 564/13 as of 9 July 2013, dated 9 October 2013; **Exhibit C-179**, Annex No 2 to the Agreement on Business and Technical Cooperation No 564/13 as of 9 July 2013, dated 9

3.144 Montenegro Bonus was and is a company wholly owned by Montenegro.[266] As noted in its statement from the central company register of Montenegro, its main business activity is "Solid, Liquid, and Gaseous Fuel and Similar Products Wholesale".[267] It also is active in oil and gas trading.[268] However, it has no experience in the aluminium smelting business. Owing to its sales of electricity to KAP, Montenegro Bonus has itself become a creditor of KAP, asserting a claim for EUR 16,305,904.50 for KAP's electricity supply.[269]

3.145 As explained in the Pavić/Živković Report, Article 35(1) of the Bankruptcy Law requires a bankruptcy administrator to seek the prior consent of a debtor's board of creditors and the bankruptcy judge before taking any actions that "significantly affect the bankruptcy estate."[270] Although the Montenegro Bonus BCA was signed by Judge Rakočević and the Bankruptcy Administrator,[271] it had been entered into without the prior consent of KAP's Board of Creditors, which, was not constituted until 10 September 2013. The only creditor whose consent was obtained was Montenegro itself. [272]

3.146 As explained in the Pavić/ Živković Report, the Montenegro Bonus BCA was null and void pursuant to Article 35(5) of the Bankruptcy Law, and any transactions purportedly concluded pursuant to it were likewise a nullity.[273] On this basis, Mr Deripaska sought redress from the

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November 2013; and **Exhibit C-184**, Annex 2 [sic] to the Agreement on Business and Technical Cooperation No 564/13, dated 9 December 2013.

[266] **Exhibit C-180**, Response of bankruptcy administrator to submission of creditors CEAC, En+, and WTB [sic] Bank Austria AG, dated 14 November 2013 ("**Bankruptcy Administrator's 14 November Response**") ("…and the Government of Montenegro granted its consent to the agreement, as it is the founder of Montenegro Bonus and its 100% owner, and at the same time the guarantor of the fulfilment of all its obligations").

[267] **Exhibit C-264**, Montenegro Bonus Statement from the Tax Administration Central Company Register, dated 4 July 2017.

[268] **Exhibit C-105**, *See*News, "Montenegro Bonus Opens Upgraded Gas Station", dated 9 August 201.

[269] **Exhibit C-195**, Final list of KAP claims admitted by the court, dated 19 February 2014, claim no. 96, pg. 6, ("**Final KAP Creditor Claims**").

[270] **CER-1**, Pavić/Živković Report.

[271] **Exhibit C-161**, Montenegro Bonus BCA.

[272] **Exhibit C-224**, Bankruptcy Trustee's Response, ("…and the Government of Montenegro granted its consent to the agreement…"); **Exhibit C-161**, Montenegro Bonus BCA.

[273] **CER-1**, Pavić/Živković Report. While the Montenegro Bonus BCA was in effect, Montenegro Bonus concluded agreements with Glencore International AG ("**Glencore**") for the purchase of various aluminium products on 12 July 2013, 24 September 2013, 25 October 2013, and 20 December 2013. *See* **Exhibit C-165**, Contract number 162-13.13895-P between Montenegro Bonus and Glencore, dated 12 July 2013; **Exhibit C-174**, Contract number 162-13.14953-P between Montenegro Bonus and Glencore, dated 24 September 2013; **Exhibit C-177**, Contract number 162-13.15432-P between Montenegro Bonus and Glencore, dated 25 October 2013; and **Exhibit C-185**, Contract number 162-13.16352-P between Montenegro Bonus and Glencore International AG, dated 20 December 2013.

Montenegrin courts and authorities on numerous occasions to ensure that his rights as a creditor were properly respected:

(a) through his investment vehicles En+ and CEAC, Mr Deripaska sought the annulment of the Montenegro Bonus BCA. In Proceedings No. 24/14 brought before the Commercial Court on 13 January 2014 (and the subsequent appeal to the Appellate Court in Proceedings No. Pž. 236/15), CEAC and En+ claimed that the conclusion of the Montenegro Bonus BCA was an action that "significantly affect[ed] the bankruptcy estate" within the meaning of Article 35(1) of the Bankruptcy Law, and thus required the Board of Creditors' prior consent. The Bankruptcy Administrator did not disagree with this contention;

(b) however, the Commercial Court on 20 February 2015, and the Appellate Court on 24 March 2015, both accepted the Bankruptcy Administrator's argument that the permission of the Board of Creditors was not required because the Montenegro Bonus BCA had been executed the day after KAP's bankruptcy was commenced, and before its Board of Creditors has been constituted. As the Pavić/ Živković Report explains these decisions are manifestly incorrect and lead to an absurd position. An appeal to the Constitutional Court is pending;[274] and

(c) in addition, through En+ and CEAC, Mr Deripaska filed a criminal complaint on 12 March 2014 with the Superior State Prosecution Service of Montenegro (the "**State Prosecution Service**") concerning the Montenegro Bonus BCA. The main basis for his complaint was that the Bankruptcy Administrator had not obtained the Board of Creditors' prior consent pursuant to Article 35(1) of the Bankruptcy Law.[275] The State Prosecution Service took no action in response to Mr Deripaska's complaint.

3.147 Further to Judge Rakočević's order of 8 July 2013, CEAC and En+ both submitted their claims into KAP's estate. CEAC submitted on 5 August 2013 claims totalling EUR 50,084,717 arising from the shareholder loan, calculated as at 8 July 2013.[276] Further amounts of interest were

[274] **Exhibit C-220,** Commercial Court Judgment No. 24/14, dated 20 February 2015; **Exhibit C-227**, Appellate Court Judgment No. Pž. 236/15, dated 24 March 2015. The appeal to the Constitutional Court of Montenegro ("**Constitutional Court**") has been allocated Proceedings No. Uz 425/15. VTB Bank also is a party to these proceedings.

[275] **Exhibit C-209**, Notice for the Prosecution Service, dated 12 March 2014. VTB Bank also was a party to this complaint.

[276] CEAC's claims comprised (1) EUR 19,915,953.30 (being USD 25,592,000 in outstanding principal (using the middle exchange rate of the Central Bank of Montenegro on 8 July 2013), (2) EUR 23,905,764.09 in

claimed subsequent to the bankruptcy proceedings' commencement.[277] En+ also submitted its own claims for EUR 43,356,869.33.[278]

3.148 On 10 July 2013, and in accordance with Article 81 and 33(13) of the Bankruptcy Law, the Bankruptcy Administrator closed KAP's accounts at VTB Bank and transferred all available funds to the insolvency bank account opened at Prva Banka Crne Gore Bank.[279]

3.149 Montenegro submitted its own registration of claims dated 6 August 2013. From this, it was apparent that Montenegro had, since the announcement of the first Parliamentary Conclusion on 29 March 2012, assumed significant amounts of KAP's debt. In particular, and in addition to the assumption of the EUR 23.4 million debt owed to Deutsche Bank, Montenegro had:

(a) taken an assignment on 16 July 2012 of EUR 15 million in debt owed by KAP to EPCG;

(b) on 12 July 2013 – four days after KAP's bankruptcy had been commenced – assumed a further EUR 60,056,480 owed by KAP to VTB Bank under a medium-term credit facility agreement dated 11 November 2007 and guaranteed by Montenegro under a guarantee dated 25 October 2010; and

(c) in or around early August 2013, but after preparation of its registration of claims, assumed according to its registration of claim EUR 42,365,432.50 of debt owed by KAP to OTP Bank pursuant to three State guarantees given by Montenegro in respect of three credit facilities, all of which were dated 20 November 2009.[280]

3.150 In consequence, Montenegro had increased its ranking from a very minor debtor of some EUR 7.4 million of KAP's debts, to become KAP's largest single debtor owed EUR

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outstanding principal and (3) interest of EUR 6,262,999.60 on the USD and EUR portions of the loan. **Exhibit C-167**, CEAC's Registration of Claim in KAP's Bankruptcy Proceedings ("**CEAC Claim Registration**"), dated 5 August 2013.

[277] **Exhibit C-167**, CEAC Claim Registration.

[278] **Exhibit C-176**, List of KAP's Determined and Disputed Creditor Claims ("**KAP Determined and Disputed Creditor Claims**"), dated 14 October 2013.

[279] **Exhibit C-158**, Letter from V. Perišić to VTB Bank, dated 10 July 2013; **CER-1**, Pavić/Živković Repor; **Exhibit C-275**,Bankruptcy Law, Arts. 81 and 33(13).

[280] **Exhibit C-167**, Montenegro's Registration of Claims in KAP's Bankruptcy Proceedings ("**Montenegro Claim Registration**"), dated 5 August 2013.

148,100,053.15 in principal, plus EUR 5,126,608.54 in interest.[281] In doing so, it had thus overtaken all remaining creditors including the second, third, fourth and fifth largest creditors, EPCG, CEAC, En+, and VTB Bank.

3.151 Following the commencement of KAP's bankruptcy, and further to Judge Rakočević's order of 8 July 2013, a meeting of all creditors to consider and appoint the Board of Creditors was held on 15 August 2013. As explained in the Pavić/Živković Report, under Articles 42(3) and 44 of the Bankruptcy Law, creditors may form either a three person or a five person board of creditors. This decision rests with the creditors.[282] At the 15 August 2013 meeting, agreement could not be reached amongst the creditors as to whether the constitution of the Board of Creditors. The meeting was adjourned until on 10 September 2013.[283]

3.152 At the reconvened meeting, the creditors appointed a Board of Creditors comprising only its three largest creditors: Montenegro, EPCG, and CEAC. It excluded En+ and VTB, KAP's fourth and fifth largest creditors, contrary to the wishes and rights of Mr Deripaska and VTB Bank.[284]

3.153 In supervising this meeting, the Bankruptcy Administrator decided to conduct the vote on the Board of Creditors' constitution on a "one creditor, one vote" basis.[285] This meant that, for example, each employee creditor had the same voting rights as did CEAC, En+, and VTB Bank, who had submitted claims for EUR 50,024,901, EUR 43,355,859, and EUR 25,855,407 respectively.[286]

3.154 As explained in the Pavić/Živković Report, the Bankruptcy Law does not expressly provide how votes are to be counted when forming a board of creditors – that is, whether voting should be conducted on a weighted basis in proportion to the value of each creditor's claim as against the total amount of claims, or on a "one creditor, one vote" basis as was the case in KAP's bankruptcy. However, and as detailed in the Pavić/Živković Report, in the absence of

[281] **Exhibit C-167**, Montenegro Claim Registration.
[282] **CER-1**, Pavić/Živković Report, para 5.15.
[283] **Exhibit C-172**, Minutes of the Meeting of the Board of Creditors, dated 15 August 2013.
[284] **Exhibit C-173**, Minutes of the Meeting of the Board of Creditors, dated 10 September 2013; **Exhibit C-175**, Commercial Court Judgment No. St. 199/13, dated 8 October 2013; **Exhibit C-182**, Appellate Court Judgment No. Pž 791/13, dated 21 November 2013.
[285] **Exhibit C-187**, Commercial Court Judgment No. St. 199/13, dated 8 October 2013; **Exhibit C-182**, Appellate Court Judgment No. Pž 791/13, dated 21 November 2013; **Exhibit C-186**, Constitutional Court Judgement No. 73/14, dated 23 December 2016.
[286] **Exhibit C-195**, Final Court Approved KAP Creditor Claims, dated 19 February 2014.

any contrary provision, Montenegrin law should be construed as requiring weighted voting, including when forming a board of creditors.[287]

3.155 To protect his investment, Mr Deripaska challenged the composition of KAP's Board of Creditors, filing an objection in KAP's bankruptcy proceedings on 16 September 2013 before Judge Rakočević (and subsequently before the Appellate Court in Proceedings No. Pž 791/13 and before the Constitutional Court in Proceedings No. Už-III 73/14).[288] One of the two principal arguments made by En+ was that procedural fairness has been violated by the Bankruptcy Administrator's adoption of a "one creditor, one vote" approach to forming KAP's board of creditors. Notwithstanding the absurd result that a "one creditor, one vote" approach would engender,[289] the Commercial Court and the Appellate Court endorsed the Bankruptcy Administrator's "one creditor, one vote" approach.

3.156 On 14 October 2013, the Bankruptcy Administrator published a list of determined and disputed claims in KAP's bankruptcy. CEAC's claim was recognised for EUR 50,024,901.24 (with EUR 59,815.76 having been disputed), and En+'s claim was recognised for EUR 43,356,869.33 (with EUR 111,344 having been disputed).[290] The list of claims was subsequently confirmed by Judge Rakočević on 19 February 2014.[291]

3.157 On 21 November 2013, and at the direction of the Bankruptcy Administrator, the Institute of Accountants and Auditors of Montenegro issued a report on the appraisal of KAP's property, plants and equipment as of 31 October 2013 (the "**Appraisal Report**"). This stated that the fair market value of KAP's fixed assets as of 31 October 2013 was EUR 122,462,000, but that the appraised value in bankruptcy was only EUR 52,469,000.[292]

3.158 On 6 December 2013, the Bankruptcy Administrator publicly announced his intention to schedule a first round sale of KAP's assets (the "**First Sale Announcement**"). It stated, based

[287] **CER-1**, Pavić/Živković Report, para. 5.26.
[288] **Exhibit C-234**, Commercial Court Judgment No. St. 199/13, dated 8 October 2013; **Exhibit C-182**, Appellate Court Judgment No. Pž 791/13, dated 21 November 2013; **Exhibit C-186**, Constitutional Court Judgement No. 73/14, dated 23 December 2016.
[289] **CER-1**, Pavić/Živković Report, para. 5.18.
[290] **Exhibit C-176**, KAP Determined and Disputed Creditor Claims, dated 14 October 2013.
[291] **Exhibit C-195**, Final KAP Creditor Claims.
[292] **Exhibit C-181**, Report on the Appraisal of Property Plants, and Equipment of the Bankruptcy Debtor KAP from Podgorica as of 31 October 2013, dated 21 November 2013 ("**Appraisal Report**").

on the Appraisal Report, that the value of the totality of KAP's assets was EUR 52,469,000.[293] This was far below the EUR 183,496,897 recognised in KAP's 2012 accounts as being the value of KAP's assets; the EUR 172,984,121 appraised as of 8 July 2013 (of which EUR 153,264,016 was attributed to fixed property); and the book value of EUR 122,462,000 in the Appraisal Report.[294]

3.159 Three bids were received in response to the First Sale Announcement:

(a) On 26 December 2013, Uniprom offered EUR 28,500,000 for the entirety of KAP's property (except for the "red sludge tank" and "cathode waste landfill"). The bid was subject to obtaining a cap on electricity prices and a re-zoning of KAP's property – both of which were outside of KAP's control.[295]

(b) Also on 26 December 2013, GetSales Ltd. a UK entity, offered EUR 5,100 for items 1-6 of KAP's property (as listed in the First Sale Announcement), subject to clarifying certain points.[296]

(c) On 8 January 2014, Politpropus Alternative d.o.o. Tivat's ("**Politpropus**") bid EUR 450,000 for items 2, 7, and a portion of item 3 (as listed in the First Sale Announcement).[297]

3.160 Two further points of note arise from Uniprom's bid. First, Uniprom's accompanying statement from the Montenegro Register showed that its founder was Veselin Pejović. According to Mr Deripaska, Mr Pejović was also linked to Vektra, the entity that had assumed control of KAP's anode plant under contract at the time Mr Deripaska closed on the purchase of KAP.[298] Second, Uniprom's bid stated that Uniprom's main business activity was "Road Transport of Goods",[299] and had no experience in the aluminium smelting business.

[293] **Exhibit C-183**, The Announcement of Collection of Bids for Purchase of Property of KAP in Bankruptcy, dated 6 December 2013 ("**First Sales Announcement**").
[294] **Exhibit C-142**, Excerpt of KAP's Annual Accounts as of 31 December 2012.
[295] **Exhibit C-188**, Uniprom Bid for the Purchase of the Assets of KAP in Bankruptcy ("**Uniprom First Bid**"), dated 26 December 2013.
[296] **Exhibit C-187**, GetSales Ltd. 'Bid for the Purchase of the Assets of KAP in Bankruptcy', dated 26 December 2013.
[297] **Exhibit C-191**, Politpropus Bid for Purchase of Assets of KAP in Bankruptcy, dated 8 January 2014.
[298] *See above* at Section III(E)(I).
[299] **Exhibit C-188**, Uniprom First Bid.

3.161 On 17 January 2014, and pursuant to the First Sale Announcement, the Bankruptcy Administrator announced that he had accepted only Politpropus's bid.[300] The next day, the Bankruptcy Administrator publicly announced an intention to schedule a second round sale of KAP's assets on 20 February 2014 (the "**Second Sale Announcement**"). The announcement stated that the assessed value of the totality of KAP's property remaining after the sale to Politpropus was EUR 52,040,000, but that the starting sale price was EUR 28,000,000,[301] only EUR 500,000 less than Uniprom's bid in response to the First Sale Announcement. Despite the lacklustre response to the First Sale Announcement, the Bankruptcy Administrator did not advertise the Second Sale Announcement widely; it only was announced locally in the Pobjeda Daily and Viiesti Daily newspapers, and on KAP's web site.

3.162 Uniprom again bid, offering EUR 28,000,000 for the remainder of KAP's assets on 21 February 2014. Its offer again was subject to obtaining a cap on electricity prices and re-zoning of KAP's property, both of which were outside KAP's control. No other bids were received. Notwithstanding the value of KAP's assets as assessed over the previous months to be: (i) EUR 183,496,897 in its 2012 annual statements; (ii) EUR 172,984,121 as of 8 July 2013, of which EUR 153,264,016 was attributed to fixed property; (iii) a fair market value of EUR 122,462,000 per the Appraisal Report; and (iv) the even lower level of an appraised value in bankruptcy of EUR 52,469,000 also per the Appraisal Report, the Bankruptcy Administrator on 28 February 2014 decided to accept Uniprom's significantly lower offer.[302]

3.163 Throughout the remainder of 2014, the Montenegrin courts acquiesced to KAP's production being transferred to Uniprom, and to the payment of consideration by Uniprom for KAP being repeatedly deferred:

(a) in connection with the sale, the Bankruptcy Administrator on behalf of KAP and Uniprom entered into a sale and purchase agreement on 10 June 2014 (the

[300] A share and purchase agreement was concluded between KAP and Politpropus on 8 July 2014 to give effect to the sale. **Exhibit C-213**, Share and Purchase Agreement between Politpropus and KAP in Bankruptcy, dated 8 July 2014. Consideration was paid in full on the same day; **Exhibit C-214**, Bankruptcy Administrator Notification on effected purchase, dated 11 July 2014.

[301] **Exhibit C-183**, The Announcement for Collection of Bids for Purchase of Property of KAP in Bankruptcy, dated 18 January 2014.

[302] **Exhibit C-197**, Announcement by the Bankruptcy Administrator, dated 4 March 2014.

"**Uniprom SPA**"), which provided for a 30 day deadline for payment.[303] This was subsequently postponed by an agreement on 11 September 2014 for at least another 90 days and up to 180 days (the "**First Uniprom SPA Annex**").[304] The Board of Creditors' consent was not obtained for the Uniprom SPA, which was concluded in connection with a sale by public bidding. Contrary to the approach adopted with the Uniprom SPA, however, the Bankruptcy Administrator sought and obtained the Board of Creditors consent to the First Uniprom SPA Annex, with Montenegro and EPCG voting in favour, and CEAC dissenting;[305]

(b) despite the timeline for payment having been postponed, and the sale to Uniprom having not yet concluded, the Bankruptcy Administrator on behalf of KAP and Uniprom entered into a business cooperation agreement (the "**Uniprom BCA**") on 18 July 2014.[306] The terms of the Uniprom BCA were nearly identical to those of the Montenegro Bonus BCA. The duration of the Uniprom BCA subsequently was extended on 11 September 2014 until all conditions to the Uniprom sale were met (the "**Uniprom BCA Extension**").[307] This gave Uniprom – a company under the control and ownership of Mr Pejović – the ability to control KAP's production indefinitely without completing the sale. The Board of Creditors' prior consent was not obtained under Article 35(1) of the Bankruptcy Law in connection with the Uniprom BCA; and

(c) through the dismissal and rejection of Mr Deripaska's numerous objections and claims concerning the Uniprom SPA and the Uniprom BCA,[308] as well as Judge

[303] **Exhibit C-211**, Agreement of the sale of the assets of the company in bankruptcy between KAP in Bankruptcy and Uniprom, dated 10 June 2014, *see also* **Exhibit C-212**, Announcement of Mr. Veselin Perišić, dated 16 June 2014.

[304] **Exhibit C-219**, Contract UZZ no. 575/14 between KAP in Bankruptcy and Uniprom, ("**First Uniprom SPA Annex**"), dated 11 September 2014 Art. 4. EUR 4 million of consideration was paid pursuant to the First Uniprom SPA Annex.

[305] **Exhibit C-297**, Minutes of Meeting of Board of Creditors, dated 10 September 2014.

[306] **Exhibit C-161**, Business and Technical Cooperation Agreement between Uniprom and KAP, dated 9 July 2014 ("**Uniprom BCA**").

[307] **Exhibit C-219**, Annex to the Business and Technical Cooperation Agreement concluded on 18 July 2014 by and between KAP in Bankruptcy and Uniprom, dated 11 September 2014 ("**Uniprom BCA Annex**").

[308] **Exhibit C-252**, Commercial Court Judgment No. 690/15, dated 5 April 2016; **Exhibit C-253**, Appellate Court Judgment No. Pz 557/16, dated 2 June 2016; **Exhibit C-255**, Supreme Court Decision, dated 15 November 2016, an appeal to the Constitutional Court is pending. **Exhibit C-240**, Commercial Court Judgment No. 945/14, dated 22 September 2015; **Exhibit C-241**, Appellate Court Judgment No. Pz 698/15, dated 12 November 2015; **Exhibit C-251**, Supreme Court Decision, dated 25 February 2016. An appeal to the Constitutional Court, allocated Proceedings No. Uz 336/16, is pending.

Rakočević's signature to the Uniprom BCA and Uniprom BCA Extension, the Montenegrin courts acquiesced to the Uniprom sale and Uniprom BCA.[309]

3.164 Having postponed Uniprom's timeline for payment of consideration for KAP, and having transferred production rights to Uniprom prior to the sale's completion, the Montenegrin courts then acquiesced, contrary to the Bankruptcy Law, to the transfer of legal title of KAP's property from KAP's estate to Uniprom – in return for consideration paid into escrow:

(a) under a further annex entered into by the Bankruptcy Administrator on behalf of KAP and Uniprom on 11 March 2015 (the "**Second Uniprom SPA Annex**"), EUR 10,020,000 consideration was paid.[310] However, EUR 13,980,000 of consideration was still outstanding and was due to be paid by 10 September 2015 upon KAP meeting both the conditions in Uniprom's offer (which were largely outside KAP's control) and additional conditions (such as releasing Uniprom from the obligations to pay environmental taxes for 30 years – which also was outside of KAP's control). According to Article 4.2, EUR 13,980,000 could be paid by depositing the funds in escrow or by a bank guarantee.[311] The EUR 13,980,000 was eventually paid into an escrow account with Zapad Banka Ad Podgorica ("**Zapad Banka**") on 7 August 2015; the funds' release to KAP's estate was made conditional on KAP's fulfilment of Uniprom's conditions in its offer – which were outside KAP's control;[312] and

(b) despite that full consideration was not paid, Article 7 of the Second Uniprom SPA Annex provided for legal title to KAP's property to be transferred to Uniprom on payment of the EUR 10,020,000 and pending the remaining balance being paid in escrow. In return, Uniprom granted KAP a first ranking mortgage for the amount of EUR 13,980,000 that secured the depositing of funds into escrow. [313]

[309] **Exhibit C-198**, Uniprom BCA; **Exhibit C-219**, Uniprom BCA Annex.
[310] **Exhibit C-222**, Contract UZZ no. 164/2015 between KAP in Bankruptcy and Uniprom, dated 11 March 2015 ("**Second Uniprom Annex**"); **Exhibit C-226**, Statement No. 1 as of 20 March 2015.
[311] **Exhibit C-223**, Second Uniprom Annex.
[312] **Exhibit C-232**, Zapad Banka Excerpt from the Account for the period 4 August 2015 to 7 August 2015; **Exhibit C-231**, Escrow Agreement between Zapad Bank, KAP and Uniprom, dated 4 August 2015 ("**Escrow Agreement**").
[313] **Exhibit C-222**, Second Uniprom Annex; **Exhibit C-231**, Escrow Agreement.

3.165 Both the transfer of legal title prior to full payment of consideration and the escrow arrangements contemplated in and conducted pursuant to the Second Uniprom SPA Annex were unlawful under the Bankruptcy Law:

(a) as explained by the Pavić/Živković Report, under Articles 81 and 33(12) of the Bankruptcy Law, paying funds from the Uniprom sale into escrow was unlawful;

(b) further, as explained in the Pavić/Živković Report, under Article 140(1) of the Bankruptcy Law, transferring the title to KAP's property prior to payment of the full purchase price was unlawful. Indeed, the Second Uniprom SPA Annex contained a proviso that:

> "familiar with the content of the agreement, and especially the transfer of the right to use and ownership right to the benefit of the Buyer although the purchase price for the purchased property was not paid, the Public Notary has warned the parties about the provision of the Bankruptcy Law (the "**Montenegro Official Gazette**", no. 1/11) that envisages that when a Buyer pays the price, the ownership right over the purchased property is transferred to the Buyer free of encumbrances, as well as free of liabilities occurred before the executed purchase and sale… and the parties hereby represent [sic] that they have understood the warning, and that, despite the warning, they want today to conclude this Annex, because the bankruptcy estate would not be decreased in the agreed manner and no actions are taken to the detriment of the acknowledged creditors";[314] and

(c) the reason for the inclusion of this warning was because the transfer of legal title contemplated under the Second Uniprom SPA Annex was unlawful and was flagged to the parties as being unlawful.

As explained in the Pavić/Živković Report, both Articles 7 and 4.2 are null and void for being contrary to (respectively) Articles 140(1) and Articles 81 and 33(13) of the Bankruptcy Law. To the extent that either forms an essential term of the Second Uniprom SPA Annex, it is null and void in its entirety (as are any acts purportedly conducted pursuant to it). As also explained in the Pavić/Živković Report, Uniprom having granted KAP a first ranking mortgage for the amount of EUR 13,980,000 that secured the depositing of funds into escrow was highly unusual, and possibly unlawful.[315]

[314] **Exhibit C-222**, Second Uniprom Annex.
[315] **CER-1**, Pavić /Živković Report.

3.166 The Board of Creditors' prior consent was sought for the extension of time to pay and the transfer of legal title pursuant to Article 35(1) of the Bankruptcy Law (though not some additional conditions that were introduced or the escrow arrangements). The former aspects of the Second Uniprom SPA Annex were approved by both Montenegro and EPCG; CEAC dissented.[316]

3.167 Despite the unlawfulness of the escrow arrangements and the transfer of KAP's legal title to Uniprom, Judge Vujošević issued an order to formalize the transfer of legal title to Uniprom on 12 August 2015.[317] In doing so, he sanctioned an unlawful act.

3.168 In response to the unlawfulness of these arrangements, Mr Deripaska, through his investment vehicles En+ and CEAC, launched numerous objections in the bankruptcy proceedings as well as litigation in the Commercial Court regarding the Uniprom sale, and in particular, the Second Uniprom SPA Annex. Thus far, and even before the appellate courts, he has been unsuccessful. For example:

(a) through CEAC, Mr Deripaska filed a claim before the Commercial Court on 8 July 2014 seeking the annulment of the Uniprom SPA, the First Uniprom SPA Annex, and the Second Uniprom SPA Annex. In Proceedings No. 733/14 (and the subsequent appeal to the Appellate Court in Proceedings No. Pž 541/15 and revision to the Supreme Court), CEAC argued that the purported transfer of title to KAP's estate prior to the payment of full consideration under the Second Uniprom SPA Annex violated Article 140 of Bankruptcy Law. CEAC also stressed the illegality of the escrow agreements. The Commercial Court (and subsequently the Appellate Court and the Supreme Court) held, inter alia, that Article 140 of the Bankruptcy Law does not prevent the parties from concluding their own arrangements bilaterally. It also held that parties could stipulate security obligations such as an escrow account. An appeal to the Constitutional Court, filed on 4 April 2016, is pending;[318] and

(b) through En+, Mr Deripaska filed also filed a claim before the Commercial Court on 9 July 2014 seeking the annulment of the Uniprom SPA, the First Uniprom SPA Annex,

[316] **Exhibit C-225**. Bankruptcy Administrator Notification to Bankruptcy Judge Ivan Kovacevic, dated 17 March 2015.
[317] **Exhibit C-234**, Decision of the Commercial Court of Montenegro St. no. 199/13, dated 21 August 2015.
[318] **Exhibit C-229**, Commercial Court Judgment P. No 733/14, dated 8 June 2015; **Exhibit C-236**, Appellate Court Judgment Pž. 541/15, dated 15 September 2015; **Exhibit C-244**, Supreme Court Decision No. Rev. IP 148/15, dated 20 January 2016. The appeal to the Constitutional Court has been allocated proceedings No. Uzz 281/16.

and the Second Uniprom SPA Annex. In Proceedings No. 740/14 (and the subsequent appeal to the Appellate Court in Proceedings No. Pž 540/15), En+ put forward the same arguments as did CEAC. These likewise were dismissed. An appeal to the Constitutional Court, filed on 8 April 2016, is pending.[319]

3.169 Owing to the acquiescence of the Montenegrin courts in transferring legal title to Uniprom without payment of full consideration, Uniprom was then able to mortgage KAP's property to obtain the EUR 13,980,000 due under the Second Uniprom SPA Annex. In particular, Uniprom and Zapad Banka entered into the following documents:

(a) a special purpose loan concluded between Zapad Banka ("**Zapad**") and Uniprom dated 4 August 2015;[320] and

(b) second and third ranking mortgages given by Uniprom to Zapad Banka and Liya Morokhovska (one of Zapad Banka's shareholders at the time) over KAP's property.

3.170 The Bankruptcy Administrator on behalf of KAP also gave written consent to the second and third ranking mortgages being registered on 4 August 2015 (the "**Pledge Consents**"). The Board of Creditors' consent was not sought pursuant to Article 35(1) of the Bankruptcy Act. In addition to objections made in the bankruptcy proceedings, these are currently the subject of pending litigation before the Commercial Court.[321]

3.171 On 10 August 2015, the Bankruptcy Administrator and Uniprom gave a video press release stating that the entire consideration under the SPA (EUR 28 million) had been paid by Uniprom. However, this statement was untrue. On 1 February 2016, KAP and Uniprom entered into a third annex to the Uniprom SPA (the "**Third Uniprom SPA Annex**"), again without the Bankruptcy Administrator seeking the prior consent of the Board of Creditors. The Third Uniprom SPA Annex terminated the escrow arrangement on the basis that KAP did not fulfil the numerous conditions that were outside of its control. EUR 7,000,000 was transferred to KAP, and EUR 6,980,000 was returned to Uniprom. The EUR 6,980,000 was

[319] **Exhibit C-228**, Commercial Court Judgment P. No. 740/14, dated 8 June 2015; **Exhibit C-235**, Appellate Court Judgment Pž. 540/15, dated 3 September 2015; **Exhibit C-245**, Supreme Court Decision No. Rev. IP 149/15, dated 21 January 2016. The appeal to the Constitutional Court has been allocated proceedings No. Uzz 297/16.

[320] **Exhibit C-230** Loan Agreement between Zapad Bank and Uniprom, dated 4 August 2015.

[321] CEAC and En+ challenged on 15 October 2015 the loan, the two mortgages, and Pledge Consents before the Commercial Court in (respectively) Proceedings P. No. 1018/15 and 1016. The proceedings are pending before the Commercial Court.

secured to KAP by a bill of exchange.[322] To date, the bill of exchange has not been realized. Consequently, the effective amount paid by Uniprom for KAP has been reduced by EUR 6,980,000.

3.172 Through the rejection of CEAC's and En+'s objections, the Montenegrin courts have acquiesced to the latest Uniprom sale arrangements:

(a) CEAC and En+ Group filed an objection in KAP's bankruptcy challenging Annex III to the SPA with Uniprom on the basis that, *inter alia*, Annex III required the prior consent of the Board of Creditors under Article 35(1) of the Bankruptcy Law;

(b) although unsuccessful in the bankruptcy proceedings, the Appellate Court accepted CEAC's and En+'s arguments and granted their appeal in Proceedings No. Pz. 597/17; and

(c) however, once remanded by the Appellate Court, the bankruptcy judge again rejected the objection. A second appeal was filed with the Appellate Court on 13 June 2017 and is pending.[323]

3.173 In addition, the purchase price paid by Uniprom has been further reduced owing to litigation ("**Case P. 998/15**") that it brought against KAP. In particular, Uniprom brought a damages claim against KAP for EUR 7,000,000 in the Commercial Court on the basis that Uniprom had not been informed that toxic alumina waste was present on KAP's land and that the City of Podgorica had constructed a public square and road on KAP's land. On 12 December 2015, KAP, acting through the Bankruptcy Administrator, paid EUR 2,371,950 to Uniprom, as a partial return of the purchase price under the Uniprom SPA, in part settlement of the proceedings. This had the effect of further diminishing the price paid by Uniprom for KAP. The Bankruptcy Administrator did not seek the Board of Creditors' consent pursuant to Article 35(1) of the Bankruptcy Law to the settlement.

[322] **Exhibit C-248**, Annex to the Agreement on the Sale and Purchase of the Assets of KAP a.d. in bankruptcy, dated 1 February 2016; **Exhibit C-249**, Zapad Banka notice regarding termination of escrow agreement, dated 1 February 2016.

[323] **Exhibit C-258**, Commercial Court Judgment No. St. 199/13, dated 29 March 2017; **Exhibit C-259**, Appellate Court Judgment No. Pz. 597/17, dated 11 May 2017; **Exhibit C-262**, Commercial Court Judgment No. St. 199/13, dated 5 June 2017.

3.174 In response to the further depletion of KAP's estate, CEAC and EN+ filed an objection in KAP's bankruptcy proceedings to the settlement with Uniprom on the basis that the settlement of Case P. 998/15 required the prior approval of the Board of Creditors pursuant to Article 35(1) of the Bankruptcy Law. The objection was rejected by Judge Kovačević on 1 February 2016. However, the Appellate Court accepted CEAC and En+'s argument regarding Article 35(1) of the Bankruptcy Law, in Proceedings No. Pz. 596/16. Yet once again, after the case was remanded to first instance, and notwithstanding the Appellate Court's instructions, the Commercial Court again rejected CEAC's and En+'s objection. A second appeal, filed 24 March 2017, is pending before the Appellate Court.[324]

3.175 Despite the numerous procedural and substantive irregularities in KAP's bankruptcy, as explained above and further below, none of the bankruptcy judges who has presided over KAP's bankruptcy has ever utilized their *ex officio* power under Article 38(1) of the Bankruptcy Law to remove Mr Perišić as Bankruptcy Administrator. By failing to do so, they again acquiesced to the Bankruptcy Administrators' actions and the procedural and substantive irregularities present in KAP's bankruptcy.

3.176 The sale of KAP's property to Uniprom is still not complete. To date, the result of KAP's bankruptcy has been to transfer legal title and production rights to KAP's land and facilities – originally valued at EUR 52,040,000 – to Uniprom for approximately EUR 18,700,000. In so doing, Montenegro has suffered the transfer of KAP from Mr Deripaska back to Mr Pejović. As Mr Deripaska explains in his witness statement, Mr Pejović now enjoys ownership and control of assets and plant that had been the subject of an extensive modernisation programme undertaken by Mr Deripaska and for which he has never been compensated.

3.177 As of 31 March 2017, KAP's various bankruptcy accounts contained EUR 14,325,808.87 (excluding the bill of exchange of EUR 6,980,000 bill of exchange).[325] Through his investment vehicles, En+ and CEAC, Mr Deripaska has claimed EUR 93,381,770.57 in KAP's bankruptcy – a fraction of the investment that Mr Deripaska made in KAP in 2005. To date, Mr Deripaska has received, and expects to receive, no distributions.

[324] **Exhibit C-250**, Commercial Court Judgment No. St. 199/13, dated 1 February 2016; Exhibit **C-295**, Appellate Court Judgment No. Pz. 596/16, dated 26 May 2016; **Exhibit C-257**, Commercial Court Judgment No. St. 199/13, 9 February 2017.
[325] **Exhibit C-260**, Report on the course of bankruptcy proceedings, dated 25 May 2017.

M. Bankruptcy of RBN

3.178 The damage done to KAP had an immediate and direct negative effect on RBN. On 19 November 2013, bankruptcy proceedings were initiated against RBN, after the filing of a bankruptcy petition by Montenegrin bank Crnogorska Komercijalna Banka a.d. Podgorica ("**CKB**"). Mr Veljko Rakočević was appointed as insolvency manager (later to be replaced by Mr Zdravko Cicmil, who in turn was replaced by Mr Mladen Marković). KAP was a major creditor in RBN's bankruptcy, with a claim against RBN of EUR 43.6 million.

3.179 The RBN bankruptcy proceedings are ongoing. As with KAP, a large portion of RBN's assets have been sold to Uniprom.

N. Montenegro's harassment of Dmitry Potrubach

3.180 Montenegro's hostile conduct against Mr Deripaska following KAP's bankruptcy continued not only through its actions in the insolvency proceedings, but in its persecution of Dmitry Potrubach. As CFO, Mr Potrubach had occupied a prominent role in Mr Deripaska's management of KAP and had been directly involved for many years in negotiations between Mr Deripaska, CEAC, En+, KAP and Montenegro. As such, he presented a target for Montenegro.

3.181 Like the other senior members of KAP's management, Mr Potrubach had been dismissed from employment shortly after KAP was placed into bankruptcy in July 2013. When Mr Potrubach sought to leave the country on 10 July 2013, however, he was detained on the Montenegro–Serbia border and held without explanation. Mr Potrubach was then forcibly returned to Podgorica, where he was informed by state prosecutors that he would face a criminal investigation for the crime of "grand larceny", in violation of Article 240 of the Montenegrin Criminal Code, for having assisted KAP to take electricity unlawfully from the European grid.[326] A criminal investigation was formally commenced against Mr Potrubach on 12 July 2013.[327]

3.182 It is evident that these allegations were spurious. As CFO of KAP, Mr Potrubach had no authority or control over KAP's electricity supply, nor any power to stop KAP consuming

[326] **CWS – 2**, Potrubach WS, at paras. 144-145. *See* **Exhibit C-272,** Montenegrin Criminal Code, Art 240.
[327] *See* **Exhibit C-164**, Montenegro Public Prosecutor's Office, Decision on Conducting of Investigation against Dmitry Potrubach, dated 12 July 2013.

electricity by shutting down production. In fact, it was Montenegro's own appointee to the KAP board of directors, Mr Nebojsa Dozić, who had opposed every attempt to instigate a shutdown of the plant. There was accordingly no legal basis on which Mr Potrubach could be personally liable for any unlawful taking of electricity.

3.183 Moreover, there was no legal basis on which KAP could be liable, as KAP had no connection to the regional interconnector through which electricity from the European grid flowed. Only CGES – the state-owned monopoly electricity transmission company – had direct access to the European grid. As contemporaneous media reports indicated, it was CGES that had taken electricity from the European grid without payment, apparently with the knowledge and consent of Montenegro.[328] Mr Potrubach was being used as a scapegoat to distract attention from Montenegro's own wrongdoing.

3.184 Mr Potrubach spent a week in prison, in harsh conditions, after which he was released on condition he pay a EUR 100,000 bond and remain in Podgorica pending the outcome of the criminal investigation against him.[329] Mr Potrubach spent the following seven months confined in Podgorica, unable to leave the city and subject to a sustained media campaign of hostility, including false reports that he was a fugitive who had fled Montenegro. Mr Potrubach was so distressed by his treatment that he filed a complaint against Montenegro with the European Court of Human Rights.[330]

3.185 On 31 January 2014, the investigation against Mr Potrubach was concluded, with no charges being laid against Mr Potrubach.[331] The report of the public prosecutor confirmed what had been obvious all along, namely that:[332]

(a) it was CGES, not KAP, which as the sole authorised operator of the transmission system had taken electricity from the European interconnection via power lines from Serbia, Bosnia and Albania;

(b) CGES had done so with the knowledge of Montenegrin officials, including the Montenegrin Economy, Finance and Budget Committee;

[328] **Exhibit C-210**, South East Europe Sustainable Energy Policy, 'Winners and Losers: Who Benefits from High-Level Corruption in the South East Energy Sector'.
[329] **Exhibit C-162**, Basic Court in Podgorica, Decision on the Acceptance of the Bail Bond, dated 12 July 2013.
[330] **CWS – 2**, Potrubach WS, at paras.150-152.
[331] **Exhibit C-193**, Decision of the Public Prosecutor's Office to Terminate Investigation, dated 31 January 2014.
[332] **Exhibit C-193**, Decision of the Public Prosecutor's Office to Terminate Investigation, dated 31 January 2014.

(c) there was no evidence that Mr Potrubach or KAP had committed any wrongdoing;

(d) to the contrary, KAP had properly made provision in its accounts for its liabilities for electricity consumed during this period;

(e) while the KAP board of directors had discussed a controlled shut down of KAP while the electricity issue was resolved, this proposal had been repeatedly blocked or postponed by Montenegro's appointee, Mr Nebojsa Dozić; and

(f) Montenegro had expressly ordered Mr Dozić to reject the proposal to carry out a controlled shut down of KAP.

3.186 Mr Potrubach left Montenegro after the investigation against him was dropped. Nevertheless, serious damage had been done by this time to Mr Potrubach's personal and professional reputation. Mr Potrubach had also suffered humiliation and distress as a result of the continued threat of criminal jeopardy and more than half a year of being wrongfully confined in Podgorica. As Mr Potrubach states in his evidence:

> "I was devastated by what had happened. […] Although I knew there was no case against me, I knew my reputation and career had been badly damaged, if not destroyed. Images of my arrest had spread through the internet, and I was the subject of negative articles in the Montenegrin press. My family, friends and colleagues watched my arrest and detention on TV and on the internet. The American business magazine *Forbes* describes me as having been 'paraded around in hand cuffs like an animal act on national television'. I have had no success in getting these images removed from the internet: you only have to type my name into Google to see the permanent damage that has been done to my reputation."[333]

3.187 Mr Potrubach has never received any compensation for his mistreatment. Independent reports indicate that Montenegro subsequently agreed to reimburse the European electricity authorities for the electricity that CGES had taken from the European grid, using money from CGES's accounts.[334]

[333] **CWS – 2**, Potrubach WS, at para.150.
[334] **Exhibit C-274**, European Commission Quarterly Report on European Electricity Markets, undated.

IV APPLICABLE LAW

A. Applicable International Law

4.1 The Treaty is the primary source of Montenegro's obligations to Mr Deripaska with regard to his investment. In addition to the express terms of the Treaty, the Tribunal is entitled to refer to and should have regard to principles of customary international law and general principles of international law.

B. Applicable Montenegrin Law

4.2 Mr Deripaska's investment was made in the territory of Montenegro and was subject to Montenegro's laws and to agreements with Montenegro and organs of the Montenegrin state, as detailed above. Montenegrin law is relevant to Mr Deripaska's claims in these proceedings in at least two respects:

(a) whilst the KAP SPA and the RBN SPA were governed by German law, each of the other agreements defining CEAC and/or En+'s contractual rights (the 2009 MoU, the Settlement Agreement, the Shareholders Agreement, and the MoU of June 2011) are governed by Montenegrin law, including the Civil Code. The nature and content of Montenegro's obligations under these agreements are relevant as part of the assessment of the standard of conduct required to constitute fair and equitable treatment of Mr Deripaska's investment. To that extent, Mr Deripaska relies on applicable principles of Montenegrin law; and

(b) the bankruptcy of KAP was by way of a process under the Montenegrin Bankruptcy Law and was administered by the Montenegrin Courts. As set out at Section V below, Montenegro failed to meet its obligations to ensure fair and equitable treatment of Mr Deripaska's investment by reason of its failure to ensure that the relevant law was applied in a consistent, transparent, non-discriminatory and equitable manner. It further breached Mr Deripaska's legitimate expectations as to the manner of its conduct of KAP's bankruptcy. It is also Mr Deripaska's case that his investments were expropriated by reason of the bankruptcy proceedings and that he was denied justice in his capacity as a creditor of KAP, in breach of Montenegro's obligations under Article 2(2) of the Treaty.

C. Interpretation of the Treaty

4.3 As a matter of customary international law, a treaty is to be interpreted in good faith, giving an ordinary meaning to the words used in that treaty, while having proper regard to the context in which the treaty is concluded.

4.4 Both the Russian Federation and Montenegro are parties to the 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), which specifies that:[335]

> "Article 31: General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32: Supplementary means of interpretation

[335] **Exhibit CLA-2**, Vienna Convention on the Law of Treaties 1969 (the "**VCLT**"), Articles 31 & 32. The Russian Federation is a party to the VCLT as successor state to the Union of Soviet Socialist Republics, which acceded to the VCLT on 29 April 1986. Montenegro is a party to the VCLT, having (i) declared upon independence its intention to be bound by all treaty obligations of the State Union of Serbia and Montenegro (see paras. 7.1 – 7.8 above); and (ii) thereafter delivering a letter of 10 October 2006 to the Secretary General of the United Nations listing the multilateral treaties to which Montenegro resolved to succeed and notifying Montenegro's intention to perform and carry out the stipulations of those treaties (which included the VCLT).

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

4.5 The Treaty must be construed in accordance with the above principles.

D. Evidence of Montenegrin Law

4.6 Mr Deripaska's Statement of Claim is accompanied by a joint expert report by Professor Dr Vladimir Pavić and Assistant Professor Dr Miloš Živković (referred to herein as the Pavić/Živković Report), which addresses various matters of Montenegrin law.

4.7 First, the Pavić/Živković Report addresses the sources and interpretation of Montenegrin law. Regarding sources, it explains how, given the recent independence of Montenegro and consequently the limited number of court decisions and scholarly writings establishing a system of local jurisprudence, it is accepted practice under Montenegrin law to consider other sources of law when interpreting Montenegrin laws, including specifically (given their common origin) Serbian law, former Yugoslav law, and the sources and influences of those laws (including, in connection with the Bankruptcy Law, German and Anglo-Saxon legal systems).[336]

4.8 Regarding interpretation, it explains that, amongst others, linguistic, historic, systematic, teleological, and comparative interpretive methods are used to interpret Montenegrin law. There is no hierarchy in this regard; linguistic is normally the starting point; teleological often proves of particular importance in jurisprudence; and comparative (in particular, with Serbian or Yugoslav law) often is useful.[337]

4.9 Second, the Pavić/Živković Report addresses various irregularities in the conduct of KAP's bankruptcy proceedings with regard to four key events:

[336] **CER-1**, Pavić/Živković Report, at paras.4.1 – 4.7.
[337] **CER-1**, Pavić/Živković Report, at para.3.2.

(a) The Montenegro Bonus BCA: The Pavić/Živković Report concludes that the appointment of Montenegro Bonus was null and void under Article 35(5) of the Bankruptcy Law, because the Bankruptcy Administrator did not obtain the Board of Creditors' prior consent to the sale pursuant to Article 35(1) of the Bankruptcy Law. In particular, the Pavić/Živković Report concludes that the Montenegrin courts' endorsement of the Bankruptcy Administrator's argument that he did not need to obtain the Board of Creditors' prior consent was a misapplication of Montenegrin law that leads to an absurd result.[338]

(b) The Formation of KAP's Board of Creditors: The Pavić/Živković Report concludes that, in forming the Board of Creditors, the Bankruptcy Administrator was wrong to adopt a "one creditor, one vote" method of voting, rather than conducting voting on a weighted basis in proportion to the value of each creditor's claim as against the total amount of claims. The Montenegrin courts' endorsement of this voting approach is manifestly wrong, leads to absurd results, and does not withstand basic scrutiny.[339]

(c) The Uniprom Sale: The Pavić/Živković Report considers three specific aspects of the sale to Uniprom. In particular, regarding the Second Uniprom SPA Annex:

(i) the Pavić/Živković Report concludes that the transfer of legal title to KAP's assets prior to payment of full consideration under Article 7 of the Second Uniprom SPA Annex was illegal under Article 140 of the Bankruptcy Law. The result is that, at a minimum, Article 7 of the Second Uniprom SPA Annex is null and void, and if it is deemed an essential term, the entire Second Uniprom SPA Annex is null and void. In addition, Judge Vujošević's order of 12 August 2015 transferring title to KAP's property pending payment of the entirety of the consideration owed sanctioned an unlawful act. In the proceedings brought by Mr Deripaska, the Montenegrin courts failed to provide any reasoning about why the transfer of KAP's legal title pending the payment of full consideration was not contrary to Article 140 of the Bankruptcy Law, apart from claiming that there was a change in circumstances that occurred subsequent to executing the Uniprom SPA that was not attributable to any

[338] **CER-1**, Pavić/Živković Report, at para.3.3(a).
[339] **CER-1**, Pavić/Živković Report, at para.3.3(b).

party's fault. This is not sufficient reasoning, and constitutes a gross denial of justice;

(ii) the Pavić/Živković Report concludes that the payment of EUR 13,980,000 into escrow under Article 4.2 of the Second Uniprom SPA Annex was illegal under Articles 81 and 33(13) of the Bankruptcy Law. The result is that, at a minimum, Article 4.2 of the Second Uniprom SPA Annex is null and void, and if it is deemed an essential term, the entire Second Uniprom SPA Annex is null and void. Furthermore, in the proceedings brought by Mr Deripaska, the Montenegrin courts' reasoning constitutes a gross denial of justice; and

(iii) in addition, the first ranking mortgage given by Uniprom to KAP on payment of EUR 13,980,000 into escrow was, at best highly irregular and contrary to Article 140 of the Bankruptcy Law.

(d) The removal of the Bankruptcy Administrator: in light of the events described in above, the Pavić/Živković Report concludes that there were several junctures where the bankruptcy judge could and should have exercised his right *ex officio* to remove the Bankruptcy Administrator under Article 38(1) of the Bankruptcy Law.

4.10 Third, the Pavić/Živković Report examines the doctrine of abuse of rights in connection with Montenegro's presentation of the Bankruptcy Petition. It explains that, on the present facts of this case, an abuse of right may exist if Montenegro presented the Bankruptcy Petition for a reason other "the purpose of collective settlement of bankruptcy debtor's creditors, by realization encashment of its assets and distribution of thus collected funds to creditors" as stipulated in Article 2(1) of the Bankruptcy Law. To determine whether there were elements of abuse in Montenegro's actions, one must take into account events subsequent to the Bankruptcy Petition's presentation, including how KAP's bankruptcy proceedings were in fact conducted, and the Montenegrin influence on the proceedings as KAP's largest creditor, and given its unique position as the State before whose courts the proceedings were conducted. Based on the assumed facts in the report, there is clear evidence of an abuse of rights.

4.11 Fourth, the Pavić/Živković Report explains that the rules on *culpa in contrahendo*, contained in Article 23 of the Montenegrin Code of Obligations, are engaged in the present case, given the ongoing negotiations between Montenegro and CEAC concerning KAP's restructuring

until Montenegro presented the Bankruptcy Petition on 14 June 2013. In addition, liability for *culpa in contrahendo* may itself be evidence of an abuse of right.

E. Exercise of Sovereign Authority

4.12 It is Mr Deripaska's case that in relation to all of the acts and omissions taken by or attributable to Montenegro, Montenegro was acting not as Mr Deripaska's contractual counterparty under the various agreements entered into between Montenegro and Mr Deripaska's entities, nor as an ordinary shareholder in KAP.

4.13 To the contrary, Montenegro was acting at all relevant times in the exercise of its sovereign powers. Specifically, but without limitation:

(a) In entering into the Settlement Agreement, and taking its 29% shareholding in KAP, Montenegro asserted that its "primary goal" was for the public purposes of "support[ing] the financial recovery of [KAP and RBN] so that they can once again fulfil their important role within the Montenegrin economy … , [to] their employees as well as their environmental obligations".[340]

(b) In the clear exercise of its sovereign powers, Montenegro agreed under the Settlement Agreement to: (1) issue "sovereign payment guarantees" to KAP's lenders; (2) forgive KAP's indebtedness "to the State Budget due as of 31 July 2008"; (3) enter into a new bauxite mining concession agreement with RBN; (4) toll the enforcement of KAP's environmental liabilities until 30 November 2012; and (5) "subsidise KAP's electricity supply". If any further confirmation was required that Montenegro had entered into the Settlement Agreement other than as sovereign, Montenegro (6) expressly waived its rights of sovereign immunity from "suit, judgment, execution, enforcement, attachment or any other legal process".[341]

(c) Moreover, as the relationship with Mr Deripaska soured, it was for unquestionably public purposes that the Montenegro Parliament mandated the Government to "take over control of KAP" from "the foreign partner" – CEAC – under the Parliamentary Conclusions of 29 February 2012.[342] Specifically, the Parliament

[340] **Exhibit C-5**, Settlement Agreement, Recital D.
[341] **Exhibit C-5**, Settlement Agreement, cl. 34.4.
[342] **Exhibit C-10**, February 2012 Conclusion.

mandated the Government to do so "to solve the social aspect and the issue of debts, … to avoid insolvency … and maintain production, taking into account the importance of KAP for Montenegrin economy". In addition, the Government was asked to recover the debt incurred "on the issued state guarantees and thereby compromising the liquidity of Montenegrin economic system."

(d) Indeed, in June 2012, the Montenegrin Parliament, still concerned that "the public finances" had been "undermined", urged the Government to terminate "cooperation with CEAC" and to avoid "permanent damage to the economic and social stability of Montenegro".[343]

4.14 It was under these imperatives that Montenegro acted in bad faith and abuse of its rights, first to obstruct KAP's management and restructuring, then to put KAP into bankruptcy and finally by suffering its courts to acquiesce in the sale to a company controlled by Mr Pejović, a Montenegrin (rather than foreign) national well known to the Government, all at a significant undervalue. In doing so, Montenegro deprived Mr Deripaska of the entire value of his investment and all control over it.

4.15 Thus, the Tribunal will see the familiar pattern emerging of a state wishing to "take over control" of a significant economic enterprise in its territory, with a view to handing it, on the cheap, to a local partner perceived to be more politically aligned than the existing "foreign partner", all in the name of shoring up the public finances and avoiding "permanent damage" to the "economic and social stability" of Montenegro.

4.16 In these circumstances, it is unquestionable that Montenegro has acted not as an ordinary contracting party or shareholder, but as a public authority in the clear exercise of its sovereign powers. In doing so, Mr Deripaska submits that Montenegro breached its obligations under Article 3(1) – as well as Article 4 – of the Treaty on the grounds and for the reasons explained below.

[343] **Exhibit C-133**, June 2012 Resolution.

V FAILURE TO AFFORD FAIR AND EQUITABLE TREATMENT

A. Overview of Mr Deripaska's Unfair and Inequitable Treatment Case

5.1 As set out below, Montenegro failed to meet its obligations under the Treaty to afford fair and equitable treatment of Mr Deripaska's investment and the activities relating to that investment. Specifically, Montenegro unfairly and inequitably:

(a) violated Mr Deripaska's legitimate expectations that Montenegro would not act in such a manner as to frustrate:

(i) his opportunity to acquire TPP Pljevlja and the opportunity to add new coal-fired electricity capacity for use by KAP;
(ii) the securing of an affordable long-term supply of electricity;
(iii) appropriate measures being taken to ensure KAP's financial liquidity and debt restructuring;
(iv) necessary measures to reduce KAP and RBN's workforce and to rationalise the cost base of their respective businesses;
(v) the proper governance of KAP by its board and shareholders; and
(vi) the proper conduct of KAP's bankruptcy proceedings;

(b) acted in a manner that lacked transparency and consistency, contrary to its obligations under the Treaty;

(c) acted in an unfair, arbitrary and abusive manner;

(d) inequitably brought about KAP's insolvency; and

(e) denied Mr Deripaska and/or his representatives access to justice in respect of valid claims arising as a matter of domestic law.

B. The Meaning and Content of the FET Standard in Article 3(1) of the Treaty

5.2 Article 3(1) of the Treaty states:

> "(1) Each Contracting Party shall ensure in its territory fair and equitable treatment of investments made by investors of the other Contracting Party, and activities related to such investments, precluding the application of discriminatory measures which could hinder the management or disposal of the investments.

> (2) The treatment referred to in paragraph 1 of this Article shall not be less favourable than that granted to the investments and investment activities of its own investors of any third state.
>
> (3) Each Contracting Party has the right to preserve or introduce in its legislation exemptions of organic nature of the national treatment, granted in accordance with paragraph 2 of this Article."[344]

5.3 Article 3(1) therefore specifies three distinct obligations that Montenegro was required to observe with respect to Mr Deripaska's investment and activities related to his investments:

(a) first, it was required to ensure that the investment and related activities were treated fairly;

(b) second, it was required to ensure that the investment was treated equitably; and

(c) third, it was required to refrain from applying any discriminatory measure capable of interfering with management of the disposal of capital investments.

5.4 In each case, Montenegro's obligations extended not only to its treatment of the investment, *per se*, but also to "activities related to such investments." Applying ordinary principles of treaty interpretation, this language can only be construed as a broadening of the ambit of Montenegro's obligations to act fairly, equitably, and non-discriminatorily.

1. Ordinary Meaning

5.5 Tribunals charged with the interpretation of treaties sometimes find it useful to engage in a close textual analysis of relevant treaty terms. However, textual analysis in the present case is complicated by the fact that there is no authoritative English-language version of the Treaty. Both the Serbian language and Russian language versions of the Treaty are equally authoritative. Even if an English language translation to the satisfaction of both parties can be agreed, the Tribunal is not necessarily able to glean any special significance to the English language rendering of the concepts of "fair", "equal" or "discriminatory" in their ordinary English meaning.

[344] **Exhibit C-1**, the Treaty, Art.3.

2. The Context in Which the Words of Article 3 (1) are Used

5.6 As required by the VCLT, the words of Article 3(1) must be interpreted in the context in which they are used in the Treaty.

5.7 The most relevant parts of this context are the Articles that immediately precede and follow Article 3:

(a) first, Article 2, which is addressed in further detail below, is the source of Montenegro's basic obligation to guarantee that investments by a national of the Russian Federation are given protection of law; and

(b) second, Article 4, addressed above, contains a prohibition on expropriation by Montenegro of an investment made by a Russian national in its territory.

5.8 Plainly, behaviour that constitutes a breach of the obligations found in Articles 2 and/or 4 also constitute a breach of the obligations found in Article 3, and *vice versa*. According to the basic principles of treaty interpretation, however, the obligations found in one part of a treaty cannot be reducible to separate obligations found in another part of the same treaty. It follows that the obligations of "fairness", "equitable treatment" and "non-discrimination" in Article 3 must mean something different (and, it is submitted, are broader in scope) than the obligation to treat the investment lawfully in accordance with the requirements of Montenegrin law. A treaty obligation should not be interpreted in such a way as to render it otiose. Thus if the obligation to treat an investment "equitably" simply meant an obligation to treat that investment in accordance with domestic law (which, as will be seen, Montenegro failed to do), then the obligation under Article 3(1) would add nothing to the obligation under Article 2.[345] Equally, if the obligation to treat an investment "fairly" simply

[345] Several tribunals have also confirmed this interpretation. *See, for example*, **Exhibit CLA-36**, *El Paso v Argentina* ICSID Case No. ARB/03/15 para. 337 ("it is the Tribunal's view that the FET is not to be viewed with reference to national law – in which case it could be lower than required by international law – but has to be interpreted with reference to international law, the result being that it cannot go below what is required by international law, which is the standard to be applied. But if national law or the treatment accorded to some foreigners exceeds this international minimum standard, it is one of the former that has to be applied. In a sense, it could be said that the foreign investor is entitled to the most favourable treatment, be it national law, rules applied to some foreigners or the international minimum standard embodied in FET. The Tribunal thus considers that the FET of the BIT is the international minimum standard required by international law, regardless of the protection afforded by the national legal orders."). *See also* **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award, dated 17 March 2006, para. 295.

meant an obligation not to wholly deprive an investor of his investment, then the obligation under Article 3(1) would add nothing to the obligation under Article 4.

5.9 It follows that the obligation to treat investments "fairly" and "equitably" must be interpreted as a prohibition on treatment that may be on its face lawful, but that nevertheless infringes the enjoyment or realisation of the investment. Behaviour in violation of the obligation to treat the investment fairly and equitably need not be so egregious, nor so significant in its consequences, as to amount to an expropriation.

3. The Object of the Treaty

5.10 Furthermore, the obligations in Article 3(1) of the Treaty must be interpreted in light of the object and purpose of the Treaty as a whole. The chapeau to the Treaty indicates that the common purpose for the Treaty was:

(a) the desire to create favourable conditions for investment by nationals of the Russian Federation in Montenegro (and vice versa); and

(b) the desire to increase trade and economic cooperation between Russia and Montenegro through the protection of investments.

5.11 The language of the chapeau makes clear the intention of Russia and Montenegro to encourage and incentivise investment by each other's nationals, by means of the Treaty. This implies that the obligations contained in the Treaty were intended by the contracting parties to act as a positive inducement to investment, rather than simply a negative prohibition on egregious behaviour. Article 3(1) should be interpreted in light of this stated purpose of the Treaty.

5.12 When interpreting obligations similar to those contained in Article 3(1), other international tribunals have emphasised the need to interpret those obligations in light of the objective of bilateral investment treaties to encourage, incentivise, and increase investment.

5.13 The tribunal in *Tecmed v Mexico* found that, in including an analogous provision concerning fair and equitable treatment of investments, "the parties intended to strengthen and increase the security and trust of foreign investors that invest in the member States….. This is the goal of such undertaking in light of the Agreement's preambular paragraphs which

express the will and intention of the member States to '…intensify economic co-operation for the benefit of both countries…' and the resolve of the member States, within such a framework, '***…to create favourable conditions for investments made by each of the Contracting Parties in the territory of the other***.'"[346]

5.14 Likewise, the tribunal in *Pope & Talbot Inc. v Canada* (in a formulation later approved by the tribunal in *Saluka B.V. v Czech Republic*) interpreted an analogous provision as connoting an obligation on the host state to ensure "the kind of hospitable climate that would insulate [the investments] from political risks or incidents of unfair treatment."[347] The tribunal in *Saluka B.V. v Czech Republic* also noted, as a general matter, that "investment treaties….are designed to promote foreign direct investment as between Contracting Parties: in this context, investors' protection by the 'fair and equitable treatment' standard is meant to be a guarantee providing a positive incentive for foreign investors."[348]

5.15 Numerous other tribunals have similarly reached the conclusion that, in circumstances where the stated purpose of an investment treaty is to make investors more likely to invest in the host country, the obligation to ensure fair and equitable treatment connotes an obligation to act in such a way as to make the host country attractive for investment (see, for example, the decisions in *Azurix v Argentina,* [349] *Kardassopoulos v Georgia*[350] and *MTD v Chile*[351]).

[346] **Exhibit CLA-13**, *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, Case No. ARB (AF)/00/2, Award, dated 29 May 2003, at para. 156 (emphasis added). The case concerned a dispute arising under the bilateral investment treaty in force between Spain and Mexico.

[347] **Exhibit CLA-8**, *Pope & Talbot v The Government of Canada*, UNCITRAL Arbitration under NAFTA, Award on the Merits of Phase 2, dated 10 April 2001, at para. 116; **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award, dated 17 March 2006, at para. 286.

[348] **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award, dated 17 March 2006, at para. 293.

[349] **Exhibit CLA-20**, *Azurix Corp v The Argentine Republic* ICSID Case No. ARB/01/12, Final Award, dated 23 June 2006.

[350] **Exhibit CLA-32**, *Ioannis Kardassopoulos v The Republic of Georgia* ICSID Case No. ARB/05/18, Award, dated 28 February 2010.

[351] **Exhibit CLA-18**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award, dated 25 May 2004.

4. Article 32 VCLT, Article 3(2) of the Treaty, and the International "Jurisprudence" of FET Clauses

5.16 If the interpretative steps set out above leave any ambiguity in defining Montenegro's obligations under Article 3(1) (which they do not), then the Tribunal is permitted to have recourse to wider principles of construction, in accordance with Article 32 VLCT.

5.17 The Tribunal is also required to interpret the obligations under Article 3(1) of the Treaty in a manner that is consistent with the obligation in Article 3(2) that the treatment to be afforded under Article 3(1) "shall not be less favourable than that granted with regard to investments and business activities in connection with investments by its own investors or investors of any third state."[352]

5.18 The requirements of Article 3(2) are potentially significant, in circumstances where Montenegro is signatory to twenty-seven other bilateral investment treaties, of which twenty-three are in force. Montenegro has concluded eleven bilateral investment treaties in the past decade. Each of these recent treaties includes an obligation stated in identical terms in each treaty that Montenegro will ensure "fair and equitable treatment" of investments made in Montenegro by a national of the counterparty state.[353] Each of these treaties was concluded at a time when a high degree of consistency had developed in the interpretation of the term "fair and equitable treatment" in the context of bilateral investment treaties. If and to the extent that these recent treaties themselves fall to be interpreted by means of the wider ambit of Article 32 VCLT, the "circumstances of their conclusion" include recognition by the state parties of the increasing use by tribunals and academics of "fair and equitable treatment" to connote a normative subset of rules or standards, and an intention to use the FET standard in those treaties as a term of art.

5.19 If and to the extent one (or any) of the bilateral investment treaties concluded by Montenegro is to be properly interpreted as incorporating a "fair and equitable treatment"

[352] **Exhibit C-1**, the Treaty, Art. 3(1).

[353] The relevant treaties (and the Article within the Treaty containing the promise to grant "fair and equitable treatment" are as follows: **Exhibit CLA-44**, Moldova (Art. 2(2); **Exhibit CLA-38,** Turkey (Art. 2(2)); **Exhibit CLA-39,** UAE (Art. 5(1)); **Exhibit CLA-33,** Malta (Art. 2(2)); **Exhibit CLA-34,** Macedonia (Art. 3(2)); **Exhibit CLA-35,** Azerbaijan (Art. 2(2)); **Exhibit CLA-31,** Belgium & Luxembourg (Art. 3(1)); **Exhibit CLA-28,** Qatar (Art. 3(1)); **Exhibit CLA-26,** Finland (Art. 2(2)); **Exhibit CLA-27,** Denmark (Art. 3(2)); **Exhibit CLA-29,** Serbia (Art. 2(2)). The Montenegro-Serbia BIT is unique among these treaties in so far as there is no authoritative version in English; however, the obligation in that treaty is to afford "pravican i ravnopravan tretman", which is rendered as "fair and equitable treatment" on an ordinary English translation.

standard that connotes a more prescriptive set of prohibitions, then Mr Deripaska is entitled to any additional protections that result from that interpretation. This is because he is entitled, by virtue of Article 3(2) of the Treaty, to the same standard of protection that Montenegro affords to any other foreign national.

5.20 The international "jurisprudence" on the meaning and interpretation of FET clauses is therefore potentially relevant in at least two respects:

(a) first, because it might constitute a legitimate aid to interpretation of certain instruments entered into by Montenegro (and in turn affect the interpretation of Montenegro's obligations under the Treaty, by virtue of Article 3(2)); and

(b) second, because the approach of other tribunals to interpretation of an obligation stated in the same terms (i.e., the obligation to afford "fair" and "equitable" treatment) may usefully inform the interpretation of those same terms in the present context, even absent a rule of precedent.

5.21 Of course, dozens (perhaps scores) of claims by investors asserting "unfair" and "inequitable" treatment have been resolved in investment arbitrations over the past four decades. In the absence of any formal system of precedent, each tribunal must assess for itself the nature and scope of the obligations that are imposed on a host state as a consequence of the specific FET clause contained in the subject treaty. It is undeniable, however, that tribunals are entitled to have regard to the approach of other tribunals addressing analogous obligations and that certain broad principles of interpretation have therefore been developed. This has seen certain standards reflected repeatedly in the case law as conduct potentially constitutive of a violation of FET. A non-exhaustive list comprises: defeating the foreign investor's legitimate expectations; denial of justice and due process; manifest arbitrariness, inconsistency or non-transparency in decision-making; discrimination; and abusive treatment.

5.22 The FET provision in bilateral investment treaties has been described as a provision affording the foreign investor a general standard of investor protection:

> "[t]he operation of FET clauses in investment treaties is reminiscent of codes in civil law countries which set forth a number of specific rules and complement these with a general clause of good faith as an

> overarching principle which fills gaps and informs the understanding of specific clauses. Indeed, the substance of the standard of fair and equitable treatment overlaps with the meaning of good faith in its broader setting, including the related notions of *venire contra factum proprium* and estoppel."[354]

5.23 It is, however, an autonomous standard and not a catch all provision. Tribunals have set out that the FET standard is independent from the national treatment standard and, as such, the FET standard may be violated even if the foreign investor receives the same treatment as a national investor.[355]

5.24 A key element in considering whether a breach of the FET standard has occurred is Mr Deripaska's reasonable expectations. One of the most prominent cases to set this out was *Tecmed v Mexico*, in which the tribunal stated:

> "[t]he Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations…The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and lunch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation." [356]

5.25 Other tribunals have considered carefully the interpretation of the FET standard and what it means on a practical level. It is widely recognised - as set out in *Tecmed* above - that the FET standard must comply with the foreign investor's reasonable and/or legitimate expectations,

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[354] **Exhibit CLA-37**, Dolzer & Schreuer, Principles of International Investment Law, 2012, p.132.

[355] **Exhibit CLA-37**, Dolzer & Schreuer, Principles of International Investment Law, 2012, p133. *See also* **Exhibit CLA-9**, *Genin v Estonia* ICSID Case No. ARB/99/2, Award, dated 25 June 2001, at para. 367; **Exhibit CLA-6**, *SD Myers v Canada*, First Partial Award, 13 November 2000, para 259; **Exhibit CLA-10**, *CME v Czech Republic*, Partial Award, 13 September 2001, para. 611; **Exhibit CLA-12**, *UPS v Canada*, Decision on Jurisdiction, 22 November 2002, para. 80; **Exhibit CLA-36**, *El Paso v Argentina* ICSID Case No. ARB/03/15, Award, dated 31 October 2011, para. 337.

[356] **Exhibit CLA-13**, *Tecmed v Mexico*, Case No. ARB (AF)/00/2, Award at para. 154.

which is the dominant element of the FET standard.[357] In that connection, in *El Paso v Argentina*, [358] the tribunal stated that it was:

> "inclined to accept the overwhelming jurisdictional trend mentioned above, which considers that the concept of fair and equitable treatment must be analysed with due consideration of the legitimate expectations of the Parties… If legitimate expectations of the foreign investors are to be taken into account at all, it has to be stressed that of course all the elements that the investors would like to rely on in order to maximise their benefits, if they are indeed expectations, cannot be considered legitimate and reasonable." [359]

5.26 Similarly, the tribunal in *Convial Callao v Peru*[360] relied on the tribunal's analysis in *Saluka v Czech Republic* that:

> "[t]he standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the 'fair and equitable treatment' standard included in Article 3.1, the Czech Republic must therefore be regarded as having assumed an obligation to treat foreigners so as to avoid the frustration of investors' legitimate and reasonable expectations." [361]

5.27 The tribunal in *Saluka v Czech Republic* stated that "[a] foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] ***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)."[362] In addition, the tribunal in *Genin v Estonia* stated that acts in violation of the FET standard "would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[363] The tribunal in *Saluka v Czech Republic* clearly states that the FET standard "should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors."[364]

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[357] **Exhibit CLA-19**, *Saluka v Czech Republic*, para. 302.
[358] **Exhibit CLA-36**, *El Paso v Argentina* ICSID Case No. ARB/03/15 para 355.
[359] **Exhibit CLA-36**, *El Paso v Argentina* ICSID Case No. ARB/03/15 para 355. *See also* **Exhibit CLA-17**, *Waste Management* ("it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant" para. 98).
[360] **Exhibit CLA-43**, *Convial Callao v Peru* ICSID Case No. ARB/10/2, paras. 561-570.
[361] **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award dated 17 March 2006, para 302.
[362] **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award dated 17 March 2006, at para. 309 (emphasis added).
[363] **Exhibit CLA-9**, *Genin v Estonia*, Award dated 25 June 2001 (2002) 17 ICSID Review, para. 367.
[364] **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award, dated 17 March 2006, at para. 301.

Furthermore, that same tribunal went on to stipulate that "[t]he expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination."[365] Likewise, the tribunal in *Jan de Nul NV v Egypt* (citing *Tecmed*) found that "the purpose of the fair and equitable treatment guarantee is 'to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[366]

5.28 It is clear that the FET standard must be applied on a case-by-case basis, and this approach has consistently been adopted by well-regarded tribunals.[367] The tribunal in *El Paso v Argentina* set out clearly that legitimate expectations must be assessed objectively and that "a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not require subjective bad faith on the part of the State."[368] The expectations of the foreign investor will include the observation by the host State of fundamental standards of good faith, due process, and non-discrimination. [369]

5.29 Furthermore, "legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than [sic] can be deduced from the circumstances and with due regard to the rights of the State … a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest."[370] Therefore, legitimate expectations must be considered in the light of the

[365] **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award, para. 303.
[366] **Exhibit CLA-25**, *Jan de Nul NV v Egypt* ICSID Case No. ARB/04/14 para. 186.
[367] *See for example*, **Exhibit CLA-36**, *El Paso v Argentina* ICSID Case No. ARB/03/15, Award, dated 31 October 2011, para. 364 ("In sum, the Tribunal considers that FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all the circumstances. As a consequence, the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so.") *See also* **Exhibit CLA-17**, *Waste Management v Mexico*, Final Award dated 30 April 2004, para. 99 ("the standard is to some extent a flexible one which must be adapted to the circumstances of each case.")
[368] **Exhibit CLA-36**, *El Paso Argentina*, Final Award ICSID Case No. ARB/03/15 para. 357.
[369] **Exhibit CLA-19**, *Saluka v Czech Republic*, para. 303; *see also* para. 307 ("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.")
[370] **Exhibit CLA-36**, *El Paso v Argentina*, ICSID Case No. ARB/03/15, Final Award, para. 358.

circumstances, including the purpose of the treaty.[371] Thus, in *Saluka v Czech Republic*, the tribunal stated that the FET standard "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."[372] Mr Deripaska submits that similar principles apply in the present case.

5.30 A recent UNCTAD report on the FET standard sets out five principal concepts that are described as relevant, but not exhaustive: prohibition of manifest arbitrariness in decision-making; prohibition of the denial of justice and disregard of due process; prohibition of targeted discrimination; prohibition of abusive treatment; and protection of the legitimate expectations of investors arising from a government's specific representations or investment-inducing measures, balanced with the host State's right to regulate in the public interest.[373]

5.31 This list of indicia identified by the authors of the UNCTAD report in turn bears close resemblance to the interpretation derived from the tribunal in *Waste Management v United Mexican States* which concluded:

> "... 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 candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[374]

5.32 In addition, it is not only actions against an investor itself (or its investment) that are capable of giving rise to a treaty breach, but also, as explained by the tribunal in *Rompetrol v Romania*, "action against the investor's executives for their activity on behalf of the investor"

[371] **Exhibit CLA-19**, *Saluka v Czech Republic*, Partial Award, para. 304.
[372] **Exhibit CLA-17**, *Saluka v Czech Republic,* Partial Award, para 309.
[373] **Exhibit CLA-53,** 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' 2012, at pp. xv-xvi.
[374] **Exhibit CLA-17**, *Waste Management Inc v. united Mexican States,* ICSID Case No. ARB(AF)/00/3, Final Award, at para. 98 (a formulation which, in turn, was cited with approval by the Tribunal in *MNSS B.V. and Recupero Credito Accigio N.V. v. Montenegro,* (ICSID Case No. ARB(AF)/12/8, Final Award, at para. 327).

and "action against the executives personally but with the intent to harm the investor".[375] In particular, in this context, criminal investigations of individuals other than the investor can give rise to a breach of fair and equitable treatment provided that the investigation breaches the investor's treaty rights.[376] These considerations apply in connection with the treatment accorded to Mr Potrubach in this case.

5.33 Finally, in so far as the conduct complained of in this case concerns statements or representations made to Mr Deripaska by the prime minister or other ministers of Montenegro, the Tribunal is invited to consider and adopt the formulation used by the tribunal in *Peter Allard v Barbados*.[377] In that case, the tribunal assessed the extent of Barbados' compliance with the applicable standard of fair and equitable treatment by considering, in turn "(i) was there a specific representation?; (ii) did the investor rely on it, i.e., was it critical to his making of the investment?; and (iii) was the investor's reliance reasonable?"[378] If the answer to each question was affirmative, this constituted a clear indication that the state had failed to meet its obligation to act in accordance with its obligation to afford fair and equitable treatment.

5. Factors Specific to the FET Standard in Respect of Mr Deripaska's Investment

5.34 In this arbitration, the Tribunal must ultimately determine what constitutes "fair" and "equitable" treatment of Mr Deripaska's investment by reference to the specifics of the case.[379] Discharge by the state of its obligation to treat a foreign investor's investment "fairly" and "equitably" depends on the nature of the investment and the context in which it is made.

5.35 In the present case, the assessment of the benchmark for fair and equitable conduct is informed by the fact that Mr Deripaska's investment:

(a) was made in respect of a recently privatised asset of substantial strategic and political importance to Montenegro;

[375] **Exhibit CLA-42**, *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award, dated 6 May 2013, at para. 200.
[376] **Exhibit CLA-42**, *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award, dated 6 May 2013, at para. 151.
[377] **Exhibit CLA-52**, *Peter A. Allard v. The Government of Barbados,* PCA Case No. 2012-06.
[378] **Exhibit CLA-52**, *Allard v Barbados,* at para. 194.
[379] **Exhibit CLA-41**, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, 2013) at pp.116-117.

(b) was uniquely dependent on a secure supply of energy, at a cost that was competitive with the energy supply cost to competitor aluminium producers worldwide;

(c) took place at a time and under circumstances where the energy market in Montenegro was under state control and not liberalised, but where Montenegro had indicated a clear intention to effect changes, including the privatisation of its energy market and the sale to Mr Deripaska of a captive power plant; and

(d) was openly premised on the need to modernise and rationalise the smelting plant, in order to bring production methods and the cost profile up to a competitive standard, including by way of a restructuring of a bloated and inefficient workforce.

5.36 These circumstances substantially increased Mr Deripaska's vulnerability to the conduct of the Montenegrin state in several respects. He acquired an asset that was the subject of political sensitivity. The investment was vulnerable to any inconsistency in the government's stated energy policies. The investment was openly understood to require significant capital investment and restructuring of KAP's external debt and workforce. As a result of the imperative need to invest to modernise and restructure, it was apparent to both Mr Deripaska and Montenegro that the investment had to be for the long-term, for Mr Deripaska to realise a return on his Investment.

5.37 Mr Deripaska reasonably and legitimately expected that the FET standard in the Treaty would ensure stable and transparent conditions for investment, as this is especially important in an energy intensive sector such as the production of aluminium. Moreover, any investor was going to have to undertake difficult negotiations with KAP's creditors, manage the commercial imperative of downsizing KAP's workforce against the needs of Montenegrin workers and the desire of Montenegro to maintain KAP's status as a significant national employer, and return KAP to operational profit after years of declining competitiveness. Plainly, any investor undertaking these tasks would need to rely on a stable and supportive regulatory environment.

5.38 The guarantee of stable and transparent investment conditions is a well-recognised expectation for foreign investors, one which has been highlighted by many tribunals. For example, in *LG&E Energy Corp v Argentina*, the tribunal stated that:

> "[s]everal tribunals in recent years have interpreted the fair and equitable treatment standard in various investment treaties in light of the same or similar language as the Preamble of the Argentina-US BIT. These tribunals have repeatedly concluded based on specific language concerning fair and equitable treatment, and in the context of the stated objectives of the various treaties, **that *the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment*.** As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in national law." [380]

5.39 Similarly, in *BG Group Plc v Argentina*, the tribunal concluded that "Argentina … entirely altered the legal and business environment by taking a series of radical measures … In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment." [381]

6. Montenegro's Obligations

5.40 Mr Deripaska submits that a non-exhaustive list of Montenegro's obligations under Article 3(1) of the Treaty under the circumstances of his investment includes obligations:

(a) to act fairly in all dealings with Mr Deripaska in respect of his investment, and the wider activities related to his investment;

(b) to act in such a manner as not unfairly to frustrate the reasonable and legitimate expectations that Mr Deripaska had of Montenegro and its legal system;

(c) to act in a manner that is reasonably transparent and consistent and is not arbitrary;

(d) to act in accordance with the standards of behaviour mandated by Montenegrin law, including its Bankruptcy Law and the Law of Civil Procedure, and to adhere to its obligation to avoid any abuse of right;

(e) to comply with all promises that Montenegro made to Mr Deripaska, in good faith, whether such promises constituted a contractual obligation, a representation of fact or law or an expression of intent; and

[380] **Exhibit CLA-21**, *LG&E Energy Corp v Argentina* ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006, at para. 125 (emphasis added).
[381] **Exhibit CLA-24**, *BG Group Plc v Argentina*, Final Award, dated 24 December 2007, at para. 307.

(f) to treat Mr Deripaska's investment equitably, connoting an obligation:

(i) to ensure procedural propriety, due process and equality before the law; and

(ii) to ensure that Mr Deripaska and his representatives were free from harassment, intimidation and unlawful interference with their rights.

C. Montenegro Breached Mr Deripaska's Legitimate Expectations

5.41 Montenegro caused Mr Deripaska to hold – both (a) prior to his investment in KAP and RBN, and (b) during the course of his investment in KAP and RBN (on the basis of which Mr Deripaska made further investments in KAP and RBN)[382] – a series of legitimate expectations with respect to Montenegro's intended conduct in support of his investment.

5.42 Mr Deripaska's legitimate expectations included that Montenegro would act in good faith to:

(a) afford him the opportunity to acquire the soon-to-be-privatised Pljevlja Power Plant if he first invested in KAP and RBN;

(b) more broadly, provide its reasonable assistance in securing an affordable long-term supply of electricity for KAP;

(c) assist in ensuring KAP's financial liquidity and a successful restructuring of its debts;

(d) cooperate in ensuring that KAP and RBN could reduce their respective workforces to commercially sustainable levels;

(e) cooperate reasonably and in good faith in KAP's governance; and

(f) ensure the proper conduct of KAP's bankruptcy proceedings.

5.43 Montenegro breached each of these legitimate expectations throughout the course of Mr Deripaska's investment in KAP and RBN.

[382] For instance, under the terms of **Exhibit C-5**, the Settlement Agreement, Mr Deripaska, acting through CEAC and En+, agreed to waive its contractual claims against Montenegro in the value of EUR 375 million (Settlement Agreement, cl 27.1), agreed to waive claims against KAP with a value of US $27.8 million and EUR 40.5 million (Settlement Agreement, cl 13.3), agreed to commit EUR 39 million in an Investment Programme for KAP (Settlement Agreement, cl 18.1), and agree to provide a renewable performance bond to Montenegro with a value of EUR 2 million (Settlement Agreement, cl 23.1). CEAC also loaned around EUR 12 million to KAP between the signing of the Settlement Agreement in November 2009 and January 2011, and loaned a further EUR 800,000 to KAP in February/March 2011 to make repayments to OTP Bank.

1. Montenegro Breached Mr Deripaska's Legitimate Expectation of Acquiring TPP Pljevlja

5.44 Montenegro breached Mr Deripaska's legitimate expectation, induced by Montenegro before he made his investment, that he would be afforded the opportunity to acquire the soon-to-be-privatised TPP Pljevlja if he first invested in KAP and RBN.

5.45 Mr Deripaska's legitimate expectation was based on, *inter alia*:

(a) a common understanding between Mr Deripaska and Montenegro that, in order for Mr Deripaska's investment to be economically successful, KAP required a guaranteed long-term source of electricity at an affordable rate;[383]

(b) Montenegro's history of supplying KAP with electricity at discounted below-market rates;[384]

(c) a common understanding between Mr Deripaska and Montenegro of the widespread global practice of constructing or acquiring "captive" power plants to support aluminium production;[385]

(d) the Montenegrin Privatisation Strategy, which specifically recorded that "[a]dequate conditions of the purchase of electricity, representing one of the highest cost items of KAP, are essential for the long-term development of the company", that "[i]t is crucial to secure not only a favourable price level but also this price to be applied for longer period of time", and that Montenegro would therefore "provide KAP's Buyer with electricity supply under compet[i]tive prices for [a] longer period of time";[386]

(e) the inclusion of TPP Pljevlja in Montenegro's 2003 privatisation programme;[387]

(f) specific commitments made personally by Prime Minister Đukanović to Mr Deripaska that Montenegro intended to privatise TPP Pljevlja and that, if Mr

[383] **CWS – 1**, Deripaska WS, at paras. 20-22.
[384] **CWS – 4**, Itskov WS, at para. 28.
[385] **CWS – 1**,Deripaska WS, at para. 21.
[386] **Exhibit C-3**, KAP SPA, pp. 13 and 25.
[387] **Exhibit C-21**, Government of Montenegro Program for Restructuring of Companies and Supporting Institution Development, June 2003, at p.6; **Exhibit C-23**, Economic Policy of Montenegro for 2005, February 2005, at para.2.4.

Deripaska invested in KAP and RBN, he would be given the opportunity to bid to acquire TPP Pljevlja;[388]

(g) a common understanding between Mr Deripaska and Montenegro that there were no other viable sources of electricity available for acquisition in Montenegro which could supply electricity at sufficient quantities and at a sufficiently low price to meet KAP's needs;[389]

(h) the resolution of EPCG on 24 December 2004 to initiate the formal process for privatisation of TPP Pljevlja; and

(i) the announcement by the Tender Commission on 30 May 2005 of the initiation of a formal tender process for TPP Pljevlja (relaunched on 16 December 2005).[390]

5.46 Montenegro breached Mr Deripaska's legitimate expectation by denying him the opportunity to acquire TPP Pljevlja. Montenegro's breach comprised the following steps:

(a) after the formal tender process was announced by the Tender Commission on 16 December 2005, Mr Deripaska's company En+ made a binding offer to acquire TPP Pljevlja on 31 May 2006;[391]

(b) the terms of the En+ bid for TPP Pljevlja were generous, and involved a significant capital outlay by Mr Deripaska. The terms of the bid were as follows;[392]

(i) purchase of a 100% stake in the Pljevlja Power Station for EUR 45 million;

(ii) modernisation of the existing power station through investment of a further EUR 195.4 million in the power plant to address existing environmental and technological issues;

(iii) investment in the construction of a second 225MW block at the power station, for a further estimated EUR 179.97 million, to increase supply and address Montenegro's severe electricity shortages;

(iv) purchase of a 31% stake in the adjacent state-owned coal mine Rudnik uglja ad Pljevlja for EUR 5 million, in order to guarantee a stable supply of coal for the power plant; and

[388] **CWS – 1**, Deripaska WS, at para. 22.
[389] **CWS – 1**, Deripaska WS, at paras. 21-22.
[390] *See above* at Section III(D).
[391] *See above* at Section III(D).
[392] *See above* at Section III(D).

(v) investment of a further EUR 78.74 million to upgrade the Rudnik uglja mine;

(c) on 30 June 2006, the Tender Commission announced that En+ had made the winning bid for the Pljevlja Power Plant.[393] At this point, Mr Deripaska, through En+, acquired a binding legal right (and obligation) to acquire TPP Pljevlja.

(d) on 3 July 2007, Montenegro's parliament resolved that the government should terminate the privatisation process for Pljevlja and should maintain that asset in the hands of the state-owned electricity company;[394]

(e) on 4 July 2007, Montenegro, in apparent pursuit of the parliamentary directive announced, without any reasonable justification, that it was terminating the tender, and cancelling the privatisation of TPP Pljevlja.[395] Mr Deripaska was never again offered an opportunity to invest in TPP Pljevlja; and

(f) despite Montenegro's professed desire for TPP Pljevlja to remain in state hands, in 2017 Montenegro has begun publicly soliciting foreign investment to fund the expansion of the plant – an integral part of the same proposal Mr Deripaska had been made ten years earlier.[396]

5.47 Without the guaranteed long-term source of affordable electricity which acquisition of the Pljevlja Power Plant would have provided, the prospects for KAP becoming a viable and competitive aluminium producer were severely reduced. Had Mr Deripaska known in advance that Montenegro would not respect its commitment to give him the opportunity to acquire the Pljevlja Power Plant, he would not have invested in KAP and RBN.[397]

2. <u>Montenegro Breached Mr Deripaska's Legitimate Expectation of Assistance in Securing an Affordable Long-Term Supply of Electricity</u>

5.48 Beyond its commitment to permit Mr Deripaska to acquire the Pljevlja Power Plant, Montenegro more broadly breached Mr Deripaska's legitimate expectation, induced by Montenegro both before he made his investment and during the course of his investment (on the basis of which Mr Deripaska made further investments in KAP and RBN), that

[393] *See above* at Section III(D).
[394] See **Exhibit C-33**, Letter from Government of Montenegro Privatization Council to En+, dated 6 July 2007.
[395] *See above* at Section III(D).
[396] **Exhibit C-261**, SeeNews, "Montenegro still in talks with investors on TPP Pljevlja project – PM".
[397] **CWS – 1**, Deripaska WS, at para. 40.

Montenegro would provide its reasonable assistance in securing an affordable long-term supply of electricity for KAP.

5.49 Mr Deripaska's legitimate expectation was based on, *inter alia*:

(a) a common understanding between Mr Deripaska and Montenegro that, in order for the KAP investment to be economically successful, KAP required a guaranteed long-term source of electricity at an affordable rate;[398]

(b) Montenegro's history of supplying KAP with electricity at discounted below-market rates;[399]

(c) the Montenegrin Privatisation Strategy, which specifically recorded that "[a]dequate conditions of the purchase of electricity, representing one of the highest cost items of KAP, are essential for the long-term development of the company", that "[i]t is crucial to secure not only a favourable price level but also this price to be applied for longer period of time", and that Montenegro would therefore "provide KAP's Buyer with electricity supply under compet[i]tive prices for longer period of time";[400]

(d) a common understanding between Mr Deripaska and Montenegro that the guaranteed rate under the KAP SPA was merely an interim measure that would expire in 2010,[401] and that once this interim measure expired, KAP would require further assistance to secure a long-term supply of affordable electricity;[402]

(e) specific assurances made personally by Prime Minister Đukanović to Mr Deripaska that Montenegro would provide all reasonable assistance to KAP to secure a long-term source of electricity at an affordable rate;[403]

(f) Montenegro's control and majority ownership, at the time Mr Deripaska invested in KAP and RBN, of Montenegro's monopoly electricity supplier, EPCG;

(g) a common understanding between Mr Deripaska and Montenegro that in the event (as transpired) that Montenegro failed to make the Pljevlja Power Plant available for

[398] **CWS – 1**, Deripaska WS, at paras. 20-22; *See also* **CWS – 4**, Itskov WS, at para.31.
[399] **CWS – 4**, Itskov WS, at para.9.
[400] **Exhibit C-3**, KAP SPA, pp.13 and 25.
[401] **Exhibit C-3**, KAP SPA, cl. 8.5.
[402] **CWS – 1**, Deripaska WS, at paras. 22,38.
[403] **CWS – 1**, Deripaska WS, at paras. 20-22.

Mr Deripaska's acquisition, an alternative long-term source of affordable electricity for KAP would be secured;[404]

(h) a common understanding that the establishment under the Settlement Agreement of Montenegro as an equal shareholder in KAP (as a result of CEAC's agreement to transfer 50% of its shareholding in KAP to Montenegro for a nominal price of EUR 1) was intended to reflect and affirm Mr Deripaska's legitimate expectation that Montenegro would act as CEAC's partner in ensuring KAP's ongoing viability, which included securing a long-term supply of affordable electricity for KAP;[405]

(i) the express written commitment made by Montenegro in the Settlement Agreement that it would use its "best endeavours […] to enable supplying of the electric energy, to KAP";[406]

(j) the additional written commitment made by Montenegro in the Settlement Agreement to provide a further interim measure in the form of EUR 60 million worth of electricity subsidies to be paid to EPCG from 2009–2012;[407] and

(k) the further written agreement made by Montenegro in the Memorandum of Understanding signed with En+ on 10 June 2011 that Montenegro and En+ would both "use their best efforts" to agree no later than 31 October 2011 on terms to ensure KAP's "long-term operational viability and financial solvency" by reducing KAP's expenditure on electricity "until at least 31 December 2015".[408]

5.50 Montenegro breached Mr Deripaska's legitimate expectation by failing to provide reasonable assistance to secure a long-term supply of affordable electricity for KAP. Montenegro's breach comprised the following steps:

(a) Montenegro failed, as described above, to afford Mr Deripaska the opportunity to acquire the Pljevlja Power Plant, the only reasonable means of guaranteeing a long-term supply of affordable electricity to KAP;

[404] **CWS – 1**, Deripaska WS, at paras. 27,38.
[405] **CWS – 2**, Potrubach WS, at para.28.
[406] **Exhibit C-5**, Settlement Agreement, cl. 11.5.
[407] **Exhibit C-5**, Settlement Agreement, cl. 11.3.
[408] **Exhibit C-103**, June 2011 MoU.

(b) Following Montenegro's refusal to afford Mr Deripaska the opportunity to acquire the Pljevlja Power Plant, and prior to the conclusion of the Settlement Agreement in 2009, Montenegro failed to take any further steps to assist Mr Deripaska to secure a long-term supply of affordable electricity for KAP;

(c) In September 2009, shortly before the signing of the Settlement Agreement, Montenegro alienated any remaining ability to meet its commitment to assist KAP to secure a long-term supply of affordable electricity by ceding day-to-day control of EPCG (and a 43.7% stake in EPCG) to Italian utility company A2A.[409] Montenegro subsequently asserted that it had lost the ability to direct the conduct of EPCG, to regulate its supply tariffs, or to procure that EPCG meet its commitments to supply KAP;

(d) following the signing of the Settlement Agreement, Montenegro failed to respect the terms of its written commitment to provide EUR 60 million worth of electricity subsidies to EPCG. Montenegro wrongly and unreasonably asserted that the value of the EUR 60 million should be interpreted as inclusive of VAT, an interpretation without any contractual or other legal support, and which defied common sense. As a result, from early 2012 onwards, KAP was forced to pay EPCG for its electricity at a wholly unaffordable market rate;

(e) following the signing of the Settlement Agreement, Montenegro failed to use its "best endeavours […] to enable supplying of the electric energy to KAP". While CEAC repeatedly requested Montenegro's assistance to obtain an affordable long-term electricity supply agreement with EPCG, Montenegro declined to assist. Instead, Montenegro supported EPCG in its pursuit of a commercial strategy that rendered it unable to meet KAP's supply demands;

(f) similarly, Montenegro failed to use its "best efforts" in accordance with the terms of the Memorandum of Understanding of 10 June 2011 to agree terms no later than 31 October 2015 to ensure KAP's "long-term operational viability and financial solvency" by reducing KAP's expenditure on electricity until at least 31 December 2015;

[409] *See* **Exhibit C-70**, A2A press release, 30 September 2009 ("**A2A Press Release**").

(g) Montenegro failed to support KAP when EPCG (which Montenegro itself controlled) systematically reduced KAP's supply of electricity in 2012. Despite knowing that any reduction in electricity supply had a severely negative impact on KAP's production and profitability, Montenegro failed to respond to KAP's request for assistance after EPCG permanently reduced KAP's electricity supply by 20% in February 2012. Montenegro further failed to respond to KAP's request for assistance after EPCG reduced KAP's electricity supply by approximately 50% in September 2012;

(h) Montenegro failed to support KAP when EPCG terminated KAP's supply of electricity entirely in October 2012. Montenegro's only purported assistance at this time was to propose the insertion of one of its own state-owned companies, Montenegro Bonus, as an intermediary between KAP and EPCG. Montenegro must have known this proposal was unworkable because:[410]

(i) the tariff proposed by Montenegro Bonus was not affordable for KAP, and would not have resolved KAP's need to secure an affordable supply of electricity;

(ii) the proposed arrangement would have required KAP to make prepayments to Montenegro Bonus, which Montenegro knew KAP was unable to do; and

(iii) the proposed arrangement would have required a pledge of security over assets, such as the land on which KAP sat, in respect of which Montenegro had consistently refused to provide KAP with legal title;

(i) Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, unreasonably refused even to let KAP take the emergency measure of conducting an orderly shutdown of KAP's operations while the electricity supply issue was resolved;

(j) after the termination of KAP's electricity supply agreement with EPCG in late 2012, Montenegro permitted the state monopoly transmission company CGES wrongfully to take electricity from the European grid and provide it to KAP, without seeking KAP's consent or reasonably providing KAP with any information as to the source of the electricity or how to make payment, despite KAP's requests; and

[410] **CWS – 2**, Potrubach WS, para.93.

(k) Montenegro wrongfully sought to attribute blame for CGES's misconduct to KAP's CFO, Mr Dmitry Potrubach, going so far as to launch a criminal investigation against him, knowing it was without factual or legal foundation in order to distract attention from CGES's own wrongdoing.

5.51 Without a guaranteed long-term source of affordable electricity, KAP's ability to continue as a viable and competitive aluminium producer was severely impaired, with a corresponding effect on its value as well as on RBN's value. Mr Deripaska's evidence is that, had he known in advance that Montenegro would not respect its commitment to support him to secure a long-term supply of affordable electricity for KAP, he would not have invested in KAP and RBN.[411]

3. Montenegro Breached Mr Deripaska's Legitimate Expectation of Cooperation in Ensuring KAP's Financial Liquidity and Debt Restructuring

5.52 Montenegro breached Mr Deripaska's legitimate expectation, induced by Montenegro both before he made his investment and during the course of his investment (on the basis of which Mr Deripaska made further investments in KAP and RBN), that Montenegro would cooperate in ensuring KAP's financial liquidity and a successful restructuring of its debts.

5.53 Mr Deripaska's legitimate expectation was based on, *inter alia*, the following factors:

(a) a common understanding between Mr Deripaska and Montenegro that, in order for Mr Deripaska's investment to be economically successful, KAP required the injection of funds to ensure its financial liquidity, and the renegotiation and restructuring of its debts;[412]

(b) the Montenegrin Privatisation Strategy, which recorded that "[t]he debt issue has a specific position […] because of the heavy indebtedness of KAP",[413] and that while investors might be in a stronger position than Montenegro to directly negotiate a debt settlement, "[t]he complex debt situation of KAP resulting primarily from the

[411] **CWS – 1,** Deripaska WS, at para. 17; *See also* **CWS – 4**, Itskov WS at para.31.
[412] **CWS – 1**, Deripaska WS, at paras. 19,25.
[413] **Exhibit C-2**, Privatisation Strategy Document, p. 14.

past economic sanctions on the former Yugoslavia requires an active approach of the Government of Montenegro in debt restructurings with the Major Creditors";[414]

(c) specific assurances made personally by Prime Minister Đukanović to Mr Deripaska that KAP was of major economic and political significance to Montenegro, that Montenegro wanted to see KAP survive as a going concern, and that Montenegro would accordingly provide reasonable assistance to ensure KAP's ongoing liquidity, including the successful restructuring of KAP's debts;[415]

(d) a common understanding that the establishment under the Settlement Agreement of Montenegro as an equal shareholder with CEAC in KAP was intended to reflect and affirm Mr Deripaska's legitimate expectation that Montenegro would act as CEAC's partner, thus reinforcing Mr Deripaska's expectation that Montenegro would work to ensure KAP's ongoing financial viability.[416] This common understanding was expressly recorded in the recitals to the Settlement Agreement, which provided that:

> "[t]he Parties are aware that the Companies [KAP and RBN] have certain liquidity problems, that the Companies need to be restructured and that their accrued debts must be rescheduled. The Parties expect these problems to be resolved within two years from the Closing Date, particularly due to the assistance of the SoM. The SoM's primary goal is to support the financial recovery of the Companies so that they can once again fulfil their important role within the Montenegrin economy, their obligations to EPCG, other suppliers, banks and institutions and their employees as well as their environmental obligations timely and regularly;" [417] and

(e) the written commitment made in the Memorandum of Understanding with En+ signed on 10 June 2011 that both Montenegro and En+ would "use their best efforts to ensure KAP's long-term operational viability and financial solvency" by agreeing terms no later than 31 October 2011 on, inter alia, a financial restructuring of KAP's indebtedness to Deutsche Bank, OTP Group and VTB Bank.[418]

[414] **Exhibit C-2**, Privatisation Strategy, pp. 8, 14.
[415] **CWS – 1**, Deripaska WS. at paras. 19,25.
[416] **CWS-2**¸Potrubach WS, at para.28.
[417] **Exhibit C-5**, Settlement Agreement, Recital D.
[418] **Exhibit C-103**, June 2011 MoU.

5.54 Montenegro breached Mr Deripaska's legitimate expectation by failing to cooperate in ensuring KAP's financial liquidity or in the successful restructuring of its debts. Montenegro's breach comprised the following steps:

(a) Montenegro refused to permit Mr Deripaska, acting through CEAC, to inject any substantial amount of funds into KAP after the signing of the Settlement Agreement. Montenegro unreasonably withheld its consent to both:[419]

(i) KAP's request for validation of the approximately EUR 12 million loaned by CEAC to KAP as an interim measure to ensure KAP's liquidity between the signing and coming into force of the Settlement Agreement; and

(ii) KAP's request to raise the debt ceiling for loans from CEAC back to the level of EUR 75.6 million at which it had stood before Mr Deripaska, acting through CEAC, had waived approximately EUR 40 million worth of existing debt under the Settlement Agreement;

(b) Montenegro refused, without any reasonable justification, to repay debts of approximately EUR 1.5 million which Montenegro itself owed to KAP;[420]

(c) Montenegro refused, without any reasonable justification, to permit KAP to sell off non-core assets in order to raise funds to support its own financial solvency. In particular:

(i) Montenegro refused its consent for KAP to sell scrap alumina, with an estimated value of approximate EUR 8 million, left over from its defunct alumina production operations;

(ii) Montenegro later unreasonably refused its consent even to allow KAP to pledge the scrap alumina to VTB Bank as collateral to secure its loan with VTB; and

(iii) Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, refused its consent to allow KAP to sell a commercial property in Podgorica for which it had no use;

(d) Montenegro refused reasonably to engage with proposals presented for restructuring KAP's debts. In particular, Montenegro unreasonably withheld its

[419] *See above* at Section III(H).
[420] *See above* at Section III(H).

consent to the proposal to carry out a debt-for-equity swap, which was the only realistic way to reduce KAP's debt burden, before wrongfully terminating negotiations with CEAC that were aimed at restructuring KAP:

(i) In 2011, KAP, with the support of external consultants Houlihan Lokey, prepared a detailed restructuring plan for KAP. The restructuring plan would have resolved KAP's liquidity issues and generated an estimated profit of EUR 40 million over five years. Although Montenegro gave an initially positive reception to the plan, after the summer of 2011 Montenegro refused, without reasonable justification to engage in further discussions. When members of KAP's management attempted to reach out to their Montenegrin counterparts, they were simply ignored;

(ii) In 2012, CEAC and KAP presented an updated term sheet to representatives of Montenegro for a restructuring of KAP's debt. Again, while Montenegro initially gave the impression that it was receptive to the proposal, at the end of May 2012 Montenegro informed CEAC, without any reasonable justification, that "the Government of Montenegro ('GoM') failed to reach a positive resolution on the terms and conditions set out under the last version of the draft Term Sheet pertaining to the Restructuring".[421]

(iii) In 2013, CEAC and KAP sent Montenegro a further updated proposal for KAP's restructuring. Minister Kavarić indicated on 7 June 2013 that Montenegro would consider the proposal, stating that "[a]bout model we will review it and get back to you […] As you know we are always trying to save KAP."[422] Contrary to Mr Kavarić's representations, Montenegro instead terminated the negotiation and proceeded instead to file for KAP's bankruptcy, just one week later. As explained by Mr Pavić and Mr Živković in their expert report, this conduct was wrongful and in breach of Montenegro's obligations.[423]

(e) Montenegro directly created the conditions which led to Deutsche Bank's acceleration of the Deutsche Bank Loan Facility and demand for immediate repayment of more than EUR 23 million by KAP. Montenegro caused the three salient acts of default on which Deutsche Bank relied to accelerate the loan, namely:

[421] **Exhibit C-132**, Email from J. Bezarević to G. Maitincric *et al*, dated 31 May 2012.
[422] **Exhibit C-147**, Email from V. Kavarić to E. Miranova, dated 7 June 2013.
[423] **CER-1**, Pavić/Zivković Expert Report, at para.7.4.

(i) KAP's failure to meet repayments to OTP Bank on time in February 2011 (because Montenegro failed to provide its consent in time for CEAC to loan funds to KAP to make the payments, and had refused to make payment of its own debts to KAP);

(ii) KAP's failure to submit a compliance certificate in respect of its 2009 financial statements (because Montenegro, repeatedly and without reasonable justification, refused to approve the 2009 financial statements); and

(iii) KAP's failure to submit a 2011 business plan (because Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, vetoed the adoption of the business plan by the board).

(f) Montenegro engaged in 2011 in secret, unilateral discussions with Deutsche Bank concerning Deutsche Bank's loan to KAP, without the knowledge of Mr Deripaska or KAP, and, to the extent that Montenegro purported to represent KAP's interests in these discussions, in violation of KAP's obligation to its other creditors not to engage in exclusive restructuring negotiations with any one creditor.[424] In December 2011, Montenegro paid a EUR 1 million "restructuring fee" to Deutsche Bank, purportedly on behalf of KAP but without the knowledge or consent of KAP or Mr Deripaska, for a restructuring that never took place, and later proved for that sum in KAP's bankruptcy.[425]

(g) Montenegro's only concrete proposal to assist KAP to restructure its debts was the proposed restructuring of the Deutsche Bank Loan Facility presented in January 2012, which was apparently the product of the secret discussions between Deutsche Bank and Montenegro. Montenegro must have known that this proposal was unworkable and could not be accepted by KAP, for the following reasons:[426]

(i) for KAP to have entered into a new loan with Montenegro without consulting its other creditors would have triggered a cross-default under its loan agreements with OTP Bank and VTB Bank (each of whom was a substantially larger creditor of KAP than Deutsche Bank); and

[424] *See above* at Section III(J).
[425] *See above* at Section III(J).
[426] **CWS – 2,** Potrubach WS, at para.113; **CWS – 3**, Kuznetsov WS, at para.35.

(ii) for KAP to have entered into any new loan at this time would have risked exposing KAP and its board of directors to personal liability for entering into a loan that KAP knew it would be unable to service.

(h) Montenegro ultimately elected, rather than cooperate with Mr Deripaska and KAP to restructure KAP's debts as it had represented it would do, to use the very debt that it had negotiated with, and assumed from, Deutsche Bank to place KAP into bankruptcy – a clear breach of Mr Deripaska's legitimate expectation that Montenegro would refrain from taking any unreasonable, unilateral action to prevent KAP from maintaining its solvency.

5.55 Without the ability to ensure KAP's financial liquidity by injecting further funds into KAP, and with Montenegro refusing to engage in good faith on restructuring KAP's debts (except in secret, unilateral negotiations with Deutsche Bank), there was no possibility that Mr Deripaska could put KAP (and, correspondingly, RBN) on the path to financial solvency.

4. Montenegro Breached Mr Deripaska's Legitimate Expectation of Cooperation in Ensuring a Reduction in KAP and RBN's Workforce

5.56 Montenegro breached Mr Deripaska's legitimate expectation, induced by Montenegro both before he made his investment and during the course of his investment (on the basis of which Mr Deripaska made further investments in KAP and RBN), that Montenegro would cooperate in ensuring that KAP and RBN reduced their respective workforces to commercially sustainable levels.

5.57 Mr Deripaska's legitimate expectation was based on, *inter alia*:

(a) a common understanding between Mr Deripaska and Montenegro that KAP, RBN and KAP's subsidiaries were significantly overstaffed and that, in order for KAP and RBN to become commercially competitive, both companies required a significant reduction in the size of their existing workforces;[427]

(b) the Montenegrin Privatisation Strategy, which acknowledged that one of Montenegro's "legitimate objectives" was the "[a]ddressing of social issues", noting

[427] **CWS – 1**, Deripaska WS, at para. 25; *See also* **CWS – 2**, Potrubach WS, at para.18 and **CWS – 3**, Kuznetsov WS, at paras.12-14.

that "KAP and the bauxite mine [R]udnici Boksita are overstaffed employing over 4900 employees", "[t]here is a significant number of redundant labo[u]r", "[a]verage salary in KAP is significantly higher than national level" and that the government wanted to "include a social plan as an integral part of [the] privatisation program";[428]

(c) specific assurances made personally by Prime Minister Đukanović to Mr Deripaska that Montenegro would cooperate with him to ensure that KAP and RBN's workforces were reduced to a competitive level, provided that reasonable arrangements were also put in place under a social programme to assist those workers who were made redundant;[429]

(d) a common understanding that the establishment under the Settlement Agreement of Montenegro as an equal shareholder with CEAC in KAP was intended to reflect and affirm Mr Deripaska's legitimate expectation that Montenegro would act as CEAC's partner in ensuring a reduction in KAP and RBN's respective workforces.[430] This common understanding was expressly recorded in the recitals to the Settlement Agreement, which provided that:

> "RBN, KAP and KAP's subsidiaries will reduce their work forces substantially in order to reduce costs and they are aiming at obtaining one or several separate facilities from a bank in order to fund severance payments to employees made redundant and for other labour related expenses […]."[431]

(e) the written agreement contained in the KAP Shareholders' Agreement that neither CEAC nor Montenegro would "adopt an employees redundancy program which regulates the programme of the work forces of the Company or its subsidiaries, or which provides for minimum severance payments to employees made redundant" without the agreement of the other.[432] This provision gave rise to a legitimate expectation on Mr Deripaska's part that CEAC and Montenegro would cooperate in good faith to implement the necessary redundancy programme;[433] and

[428] **Exhibit C-2**, Privatisation Strategy Document, pp. 8, 31.
[429] **CWS – 1**, Deripaska WS, at para. 25.
[430] **CWS – 2** Potrubach WS, at para.28.
[431] **Exhibit C-5**, Settlement Agreement, Recitals.
[432] **Exhibit C-6**, KAP SHA, cl. 4.1(f).
[433] **CWS – 4**, Itskov WS, at para.36; **CWS – 2**, Potrubach WS at para.34.

(f) the parties' agreement during settlement discussions that the average redundancy payment to be made to each of the 2,500 employees whom KAP and RBN aimed to make redundant should be no more than EUR 10,000 per employee.[434]

5.58 Montenegro breached Mr Deripaska's legitimate expectation by failing to cooperate in ensuring that KAP and RBN could reduce their respective workforces to commercially sustainable levels. Montenegro's breach comprised the following steps:

(a) after the signing of the Settlement Agreement, Montenegro reversed its earlier position and insisted that KAP and RBN's employees had to be made redundant not at a rate of around EUR 10,000 per employee, but at a much higher rate of around EUR 14,000 per employee. Montenegro knew that KAP and RBN could not afford to make the full targeted reductions at this higher rate;[435]

(b) Montenegro was in a position to exert significant influence over the trade unions whose employees worked at KAP and RBN, yet did not assist to negotiate affordable redundancy rates with the unions;[436]

(c) Montenegro refused, as described above, to permit CEAC to inject further loans into KAP, which could have helped fund an expanded Social Programme to make the full targeted reductions, notwithstanding Montenegro's insistence on increased redundancy payments. Montenegro also failed to provide any further funds of its own to support an expanded Social Programme;[437]

(d) in any event, to carry out the Social Programme at the rate demanded by Montenegro would have cost EUR 35 million or more, which exceeded the expenditure ceiling of EUR 30 million which CEAC and Montenegro had agreed under the Settlement Agreement;[438] and

[434] **CWS – 2**, Potrubach WS, at paras. 35, 78.
[435] *See above* at Section III(H); In negotiations that it conducted at around the same time in 2010 concerning restructuring of the Nikšić steel mill, Montenegro offered substantially more generous terms to underwrite a similar redundancy programme than those it offered to Mr Deripaska in connection with KAP. In this connection, Montenegro was prepared to underwrite any redundancy cost in excess of EUR 8,000 for steel workers at Nikšić, whereas in the case of KAP, it set the benchmark at EUR 14,000–15,000. (**Exhibit CLA-45**, *MNSS v Montenegro,* Final Award, at para. 241).
[436] **CWS – 4**, Itskov WS, at para.36.
[437] *See above* at Section III(H).
[438] **Exhibit C-5**, Settlement Agreement, cl. 5.3.

(e) as a result of Montenegro's insistence on higher redundancy payments, KAP and RBN were unable to complete the full targeted workforce reductions in order to make the companies economically competitive.[439]

5.59 Although Montenegro had repeatedly acknowledged the need to reduce KAP and RBN's workforces to commercially competitive levels, by insisting on higher redundancy payments Montenegro prevented Mr Deripaska from doing what was necessary to improve the companies' cashflows and make KAP and RBN internationally competitive.

5. Montenegro Breached Mr Deripaska's Legitimate Expectation of Cooperation with CEAC's Governance of KAP

5.60 Montenegro breached Mr Deripaska's legitimate expectations, induced both before he made his investment and during the course of his investment, and particularly after the signing of the Settlement Agreement (on the basis of which Mr Deripaska made further investments in KAP and RBN), that Montenegro would cooperate reasonably and in good faith in the governance of KAP's operations.

5.61 Mr Deripaska's legitimate expectation was based on, *inter alia*:

(a) specific representations made personally by Prime Minister Đukanović to Mr Deripaska that KAP was of major economic and political significance to Montenegro, that Montenegro wanted to see KAP survive as a going concern, and that Montenegro would accordingly provide reasonable assistance to ensure KAP's ongoing viability;[440]

(b) this representation was expressly recorded in the recitals to the Settlement Agreement, which provided that:

> "The SoM's primary goal is to support the financial recovery of the Companies so that they can once again fulfil their important role within the Montenegrin economy, their obligations to EPCG, other suppliers, banks and institutions and their employees as well as their environmental obligations timely and regularly." [441]

[439] *See above* at Section III(H).
[440] **CWS – 1**, Deripaska WS, at paras. 19,25.
[441] **Exhibit C-5**, Settlement Agreement, Recital D.

(c) a common understanding created by the signing of the KAP Shareholders' Agreement that, in return for the parties agreeing to exercise their voting rights on a variety of key issues affecting the governance of KAP only by prior written agreement,[442] the parties would act reasonably and in good faith to attempt to reach agreement on the joint exercise of those rights;[443]

(d) a common understanding created by the parties' joint venture in KAP that Montenegro would ensure that its appointee to the KAP board would exercise its voting rights reasonably, in good faith, and in accordance with Mr Deripaska's legitimate expectations founded on Montenegro's representations, including to support the financial recovery of the companies;[444] and

(e) an express commitment by CEAC and Montenegro under the KAP Shareholders' Agreement not to:

> "[d]o or permit or suffer to be done any act or thing whereby the Company [KAP] may be wound up (whether voluntarily or compulsory[ily]), unless the Company must be wound up pursuant to compulsory provisions of Montenegrin law, or pass decisions on the restructuring, liquidation or bankruptcy of the Company […] ." [445]

5.62 Montenegro breached Mr Deripaska's legitimate expectation by failing to cooperate reasonably and in good faith to support the financial recovery of KAP and RBN. Montenegro's breach comprised the following steps:

(a) Montenegro repeatedly and without reasonable justification refused to approve KAP's 2009 financial statements, on the purported basis that the financial statements made provision for an environmental reserve to address KAP's future environmental liabilities, a matter subject to resolution under the Settlement Agreement.[446] This position – which ran contrary to the recommendation of KAP's board of directors, as well as its external auditors KPMG – was unreasonable and illogical, because the financial statements did not record or admit any such liability but simply made provision for KAP's future liabilities.[447]

[442] **Exhibit C-6**,KAP SHA, cl. 4
[443] **CWS – 1**, Deripaska WS, at para.44.
[444] *See above* at Section III(F) and III(H).
[445] **Exhibit C-6**, KAP SHA, cl. 4.1(c).
[446] *See above* at Section III(H).
[447] **CWS – 2**, Potrubach WS, at paras.100-101.

(b) Montenegro was further revealed to be acting unreasonably and in bad faith when, at the next KAP shareholders' meeting, Montenegro continued to withhold its approval of KAP's 2009 financial statements, yet approved KAP's 2010 financial statements – which made the same provision for the environmental reserve.[448]

(c) Montenegro, as described above, refused, without any reasonable justification, to permit KAP to sell off non-core assets in order to raise funds to support its own financial solvency. In particular:

(i) Montenegro refused its consent for KAP to sell scrap alumina, with an estimated value of approximately EUR 8 million, left over from its defunct alumina production operations;

(ii) Montenegro later refused its consent even to allow KAP to pledge the scrap alumina to VTB Bank as collateral to secure its loan with VTB; and

(iii) Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, refused its consent to allow KAP to sell a commercial property in Podgorica for which it had no use.

(d) Montenegro, acting through its first appointee to the KAP board of directors, Mr Radomir Mitrović, unreasonably vetoed KAP's 2011 business plan, on the purported basis that Mr Mitrović had not had an opportunity to participate in its preparation. While this request in itself was unreasonable, Montenegro was further revealed to be acting unreasonably and in bad faith when, after a second business plan with Mr Mitrović's input was prepared, Mr Mitrović still did not grant his consent to its adoption.

(e) Montenegro, acting through its second appointee to the KAP board of directors, Mr Nebojsa Dozić, unreasonably vetoed on multiple occasions any attempt by the KAP board of directors to conduct an orderly shutdown of KAP's operations while the future of KAP's electricity supply was determined.

(f) Montenegro engaged in secret, unilateral negotiations with Deutsche Bank concerning restructuring its loan to KAP, without the knowledge or consent of Mr Deripaska or KAP, and at risk of breaching KAP's arrangements with its other creditors.

[448] *See above* at Section III(H).

(g) Montenegro acted unreasonably and in bad faith in filing a petition for KAP's bankruptcy on 14 June 2013. This act constituted not only a contractual breach of the KAP Shareholders' Agreement, but a breach of Mr Deripaska's legitimate expectation that Montenegro would refrain from taking any unreasonable, unilateral or arbitrary action to take away both Mr Deripaska's ability to govern the company and its value to him.

5.63 In many of the above instances, Montenegro was entitled as a matter of contract to exercise the wide shareholder protections that were afforded to it under the Settlement Agreement and the Shareholders Agreement. However, its purported exercise of these contractual controls was for avowed public purposes. Montenegro consistently required KAP to, inter alia: (i) maintain high levels of employment, in fulfilment of its "social obligations"; (ii) maintain aluminium production, even in circumstances where all commercial indicators required cessation of production; (iii) pay other state-owned or state-controlled companies for services rendered; and (iv), by means of its starvation of funds to KAP, its secret negotiations with Deutsche Bank, and its ultimate triggering of bankruptcy, to remove Mr Deripaska's ability to control his investment and its value to him.

5.64 Montenegro's obstruction of KAP's governance not only caused KAP (and, correspondingly, RBN) operational problems (for instance, by preventing KAP from raising funds from the sale of non-core assets) but also, as described above, created the conditions of default which precipitated Deutsche Bank's acceleration of the Deutsche Bank Loan Facility, and ultimately led Montenegro, acting unreasonably and in bad faith, to sabotage Mr Deripaska's ability to govern the company entirely by filing for KAP's bankruptcy.

6. <u>Montenegro Breached Mr Deripaska's Legitimate Expectation in its Conduct of KAP's Bankruptcy Proceedings</u>

5.65 Montenegro breached Mr Deripaska's legitimate expectations by failing to conduct KAP's bankruptcy either in accordance with its own Bankruptcy Law, or in accordance with the stability and predictability required under international law. The very presentation by Montenegro of its Bankruptcy Petition and the commencement of bankruptcy proceedings constituted an abuse of right in and of itself and, to that extent, constituted a breach of Article 3(1). In its oversight of the bankruptcy proceedings, the respective bankruptcy judges (and where applicable, Commercial, Appellate, and Constitutional Court judges) sanctioned

numerous acts and transactions that were in breach of the express provisions of the Bankruptcy Law and were unlawful.

5.66 By reason of Article 4 of the International Law Commission's Draft Articles on the Responsibility of States for Intentionally Wrongful Acts (the "**ILC Articles**"), Montenegro's breach encompassed its judiciary's acquiescence to the following procedural irregularities in KAP's bankruptcy.

(a) The appointment (as predicted by the press) of Montenegro Bonus, a 100% State owned entity that also was a creditor of KAP, to manage KAP's ongoing production, movable property, and real estate. The appointment was made without obtaining the prior consent of KAP's Board of Creditors as required by Article 35(1) of Bankruptcy Code – which the Bankruptcy Administrator himself conceded in court.

(b) The usage of an absurd principle of "one creditor, one vote" when conducting the vote to form KAP's Board of Creditors, thus giving disproportionate influence to Montenegro and to EPCG, to the detriment of CEAC and En+ (and ultimately Mr Deripaska).

(c) The procurement of a sale of substantially all of KAP's property to Uniprom for EUR 28,000,000, in circumstances where those assets had been valued at: (i) EUR 183,436,897 in its 2012 annual statements; (ii) EUR 172,984,121 as of 8 July 2013, of which EUR 153,264,016 was attributed to fixed property; (iii) a fair market value of EUR 122,462,000 per the Appraisal Report; and (iv) the even lower level of an appraised value in bankruptcy of EUR 52,469,000 also per the Appraisal Report.[449]

(d) The transfer of KAP's production rights to Uniprom prior to the sale's completion, without having obtained the required prior consent of the Board of Creditors pursuant to Article 35(1) of the Bankruptcy Law.[450]

(e) The transfer of legal title of KAP's property to Uniprom prior to the sale's completion, in clear violation of Article 140 of the Bankruptcy Law as the Bankruptcy Administrator and Uniprom themselves recognised.[451]

[449] **Exhibit C-142**, Excerpt of KAP's Annual Accounts as of 31 December 2012; **Exhibit C-159**, KAP Bankruptcy Valuation, dated 8 July 2013; **Exhibit C-40**, Appraisal Report.
[450] *See above* Section III(L).
[451] **Exhibit C-222**, Second Uniprom SPA Annex; **CER-1**, Pavić /Živković Report, at para.5.30.

(f) The consent to an escrow arrangement to be entered into in connection with the Uniprom sale, in clear violation of Articles 81 and 33(13) of the Bankruptcy Law.[452]

(g) The unusual (and possibly unlawful) arrangement of Uniprom granting KAP a first ranking mortgage for the amount of EUR 13,980,000 that secured the depositing of funds into escrow, and benefitted not KAP but Uniprom.[453]

D. Montenegro's Actions Lacked Consistency and Transparency

5.67 Montenegro treated Mr Deripaska's investment with a manifest lack of consistency and transparency, causing damage to both KAP and RBN. Montenegro did so in numerous ways, including:

(a) regularly and unjustifiably reversing position in negotiations with CEAC and En+ in respect of KAP's restructuring;

(b) acting inconsistently and in a non-transparent manner in respect of KAP's governance;

(c) engaging in secret, unilateral negotiations with Deutsche Bank, including payment of a highly non-transparent "restructuring fee" on KAP's behalf; and

(d) refusing to disclose to KAP the source of its electricity supply after KAP's supply agreement with EPCG was terminated;

(e) purchasing third party debt owed to KAP to increase its own power as a creditor of KAP in KAP's bankruptcy; and

(f) conducting a sale process for KAP at an undervalue that has resulted in the legal title to KAP's property and KAP's production being in the hands of Uniprom, despite Uniprom having not completed the sale by paying full consideration due.

1. Montenegro Reversed Position on KAP's Restructuring

5.68 Following the signing of the Settlement Agreement, Mr Deripaska, acting through CEAC and En+, and KAP consistently sought to engage Montenegro in discussions about KAP's

[452] **CER-1**, Pavić/Živković Report, at para.5.41.
[453] **CER-1**, Pavić/Živković Report, at para.5.38.

restructuring. In response, Montenegro displayed regular and unjustified reversals of position, which extinguished any opportunity for the parties to reach a final agreement. This included repeated inconsistencies and reversals on the three key issues which had to be addressed for KAP to complete a successful restructuring – namely, electricity, labour and debt:

(a) Montenegro, as described above,[454] made an express commitment to provide Mr Deripaska with the opportunity to invest in the Pljevlja Power Plant, based on the parties' understanding of the importance of securing a long-term supply of affordable electricity for KAP. While Mr Deripaska was permitted to bid for, and indeed won, the tender for the purchase of the Pljevlja Power Plant, Montenegro subsequently cancelled the tender, terminated the privatisation process and refused Mr Deripaska any subsequent opportunity to invest in the Pljevlja Power Plant.[455] Montenegro's conduct was fundamentally inconsistent and lacking in transparency (and also breached Mr Deripaska's legitimate expectations, as set out above).

(b) Montenegro, as described above, continually shifted its position on how the restructuring of KAP and RBN's workforces should be carried out. During settlement discussions, Montenegro had compelled CEAC, En+ and KAP to compromise on an average redundancy payment of around EUR 10,000 per employee.[456] The parties recorded in the Settlement Agreement that the Social Programme through which the redundancies were to be carried out would not exceed a total budget of EUR 30 million.[457] Yet, when it came time to carry out the Social Programme, Montenegro reversed course and refused its consent unless redundancy payments were made at an average of 12–24 months' salary, or around EUR 14,000. This figure was unaffordable for KAP, exceeded the agreed Social Programme budget, and resulted in KAP and RBN being unable to make the full targeted reductions in their respective workforces.

(c) Montenegro, as described above, constantly changed its position on the restructuring of KAP's debts in a way which made it impossible for the parties to reach agreement. Despite agreeing in principle with the need to restructure KAP's

[454] *See above* at Section III(D).
[455] *See above* at Section III(D).
[456] *See above* at Section III(H).
[457] **Exhibit C-5**, Settlement Agreement, cl. 5.3.

debts, Montenegro's conduct in practice was evasive, inconsistent and lacking in transparency:

(i) in 2011, Montenegro initially gave a positive reception to KAP and Houlihan Lokey's restructuring plan, only to refuse after the summer of 2011, without reasonable justification, to engage in further discussions concerning the proposal. When members of KAP's management attempted to reach out to their Montenegrin counterparts to restart discussions, they were simply ignored;

(ii) in 2012, Montenegro again initially gave the impression that it was receptive to the term sheet proposed by CEAC and KAP (noting that it had only "minor, mostly typographical amendments" to the proposal), [458] yet at the end of May 2012 Montenegro informed CEAC, without any reasonable justification, that "the Government of Montenegro ('GoM') failed to reach a positive resolution on the terms and conditions set out under the last version of the draft Term Sheet pertaining to the Restructuring";[459] and

(iii) in 2013, when CEAC and KAP sent Montenegro a further updated proposal for KAP's restructuring, Minister Kavarić indicated on 7 June 2013 that Montenegro would consider the proposal, stating that "[a]bout model we will review it and get back to you […] As you know we are always trying to save KAP",[460] yet just one week later Montenegro instead filed for KAP's bankruptcy.

2. Montenegro Acted Unreasonably and Non-Transparently in Respect of KAP's Governance

5.69 Following the Settlement Agreement, Montenegro exercised its substantial powers over KAP's governance in a manner that was inconsistent, non-transparent and lacked good faith. Montenegro's obstructive conduct includes the following:

(a) Montenegro, as described above, repeatedly and without reasonable justification refused to approve KAP's 2009 financial statements.[461] Montenegro's lack of transparency and inconsistency was fully revealed when, at the shareholders' meeting of 31 October 2011, Montenegro continued to withhold its approval of

[458] **Exhibit C-126**, Email from Jelena Bezarević to Goran Martincvic *et al*, dated 18 April 2012.
[459] **Exhibit C-132**, Email from Jelena Bezarević to Goran Martincvic *et al*, dated 31 May 2012.
[460] **Exhibit C-147**, Email from Vladimir Kavarić to Elena Miranova, dated 7 June 2013.
[461] *See above* at Section III(H).

KAP's 2009 financial statements, yet approved KAP's 2010 financial statements which made the same provision for the environmental reserve.[462]

(b) Montenegro, as described above, refused, without reasonable justification, to permit KAP to sell off non-core assets in order to raise funds to support its own financial solvency. In particular.[463]

(i) Montenegro refused its consent for KAP to sell scrap alumina, with an estimated value of approximate EUR 8 million. Montenegro's justification for doing so lacked transparency;

(ii) Montenegro later refused its consent even to allow KAP to pledge the scrap alumina to VTB Bank as collateral to secure its loan with VTB. Montenegro's justification for doing so again lacked transparency; and

(iii) Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, refused its consent to allow KAP to sell a commercial property in Podgorica for which it had no use. The justification given by Mr Dozić for doing so lacked transparency.

(c) Montenegro, acting through its first appointee to the KAP board of directors, Mr Radomir Mitrović, unreasonably vetoed KAP's 2011 business plan.[464] Montenegro's lack of transparency and inconsistency was fully revealed when Mr Mitrović continued to withhold his approval to the adoption of a second business plan which had been prepared with Mr Mitrović's input;[465] and

(d) Montenegro, acting through its second appointee to the KAP board of directors, Mr Nebojsa Dozić, unreasonably vetoed on multiple occasions any attempt by the KAP board of directors to carry out an orderly shutdown of KAP's operations while the future of KAP's electricity supply was determined.[466] The justification given by Mr Dozić for doing so lacked transparency.

[462] *See above* at Section III(H).
[463] *See above* at Section III(H).
[464] *See above* at Section III(H).
[465] *See above* at Section III(H).
[466] *See above* at Section III(H).

3. Montenegro Engaged in Secret, Unilateral Negotiations with Deutsche Bank

5.70 Montenegro failed to act with transparency in engaging in secret, unilateral negotiations with Deutsche Bank in respect of KAP's loan with Deutsche Bank without the knowledge or consent of Mr Deripaska, CEAC, En+ or KAP:

(a) It was revealed to Mr Deripaska and KAP in December 2011 that Montenegro had been engaging in secret, unilateral negotiations with Deutsche Bank concerning KAP's loan with Deutsche Bank. Neither Mr Deripaska, CEAC, En+ nor KAP had been informed by Montenegro in advance of these negotiations, nor had their consent been sought.[467]

(b) Following these secret negotiations, KAP was presented with a proposal to restructure the Deutsche Bank Loan Facility as a *fait accompli* (indeed, Deutsche Bank's letter of 22 December 2011 conditioned its waiver of KAP's earlier defaults on KAP's acceptance of the restructuring proposal).[468] As a result of Montenegro's conduct, KAP was placed in an impossible position: either (a) agree to an unworkable restructuring proposal (which might expose KAP and/or its directors to personal liability); or (b) default under the Deutsche Bank loan.[469]

(c) Montenegro concealed from Mr Deripaska, CEAC, En+ and KAP that it had paid a EUR 1 million "restructuring fee" to Deutsche Bank in December 2011, ostensibly on KAP's behalf. Montenegro later demanded repayment of this fee by KAP.[470] Not only did Montenegro conceal payment of this sizeable fee on KAP's behalf, but the justification for the payment lacked all transparency, apparently constituting payment for a restructuring which never took place.

4. Montenegro Refused to Disclose the Source of KAP's Electricity Supply

5.71 Montenegro failed to act with transparency in refusing to disclose the source of KAP's electricity after EPCG terminated its electricity supply agreement with KAP in late 2012:

(a) After EPCG gave notice that it was terminating the electricity supply contract, KAP continued to be provided with a reduced supply of electricity. When KAP made

[467] *See above* at Section III(J).
[468] **Exhibit C-113**, Waiver Letter, dated 22 December 2011.
[469] **CWS – 2**, Potrubach WS, at para. 56.
[470] **Exhibit C-138**, Letter from Boris Buskevic to Yuri Moiseev, dated 13 November 2012.

enquiries with Montenegro as to the source of this electricity, it received no clear response.[471]

(b) Montenegro's state monopoly transmission company CGES continued to bill KAP each month for electricity transmission charges. Although CGES monitored and recorded KAP's electricity consumption in order to calculate transmission costs, CGES declined to inform KAP of the source of this electricity.[472]

(c) It later transpired that CGES had been taking electricity unlawfully from the European grid to provide to KAP. Rather than acknowledge its wrongful conduct, however, Montenegro targeted KAP's Chief Financial Officer, Dmitry Potrubach, as a public scapegoat for the electricity theft.[473]

5. Montenegro Acquired Other KAP's Debts and Triggered Government Guarantees to Enable it to Control KAP's Bankruptcy

5.72 By presenting the Bankruptcy Petition, Montenegro acted non-transparently in wilfully and knowingly triggering its obligations under the State Guarantees given in favour of VTB and OTP to place itself in a position where it could become KAP's largest single creditor and thus control the Bankruptcy Proceedings. This was a continuation of efforts, engaged in parallel with negotiations to restructure KAP, to increase its exposure to KAP's debt. In addition to the assumption of the EUR 23.4 million debt owed to Deutsche Bank, it:

(a) took an assignment on 16 July 2012 of EUR 15 million in debt owed by KAP to EPCG;[474]

(b) on 12 July 2013 – four days after KAP's bankruptcy was commenced – assumed a further EUR 60,056,480 owed by KAP to VTB;[475] and

(c) in or around early August 2013, but after preparation of its registration of claim into KAP's estate, assumed EUR 42,365,432.50 of debt owed by KAP to OTP.[476]

[471] *See above* at Section III(J).
[472] *See above* at Section III(J).
[473] *See above* at Section III(J) and Section III(N).
[474] *See above* at Section III(J) and Section III(L).
[475] *See above* at Section III(J) and Section III(L).
[476] *See above* at Section III(J) and Section III(L).

5.73 Montenegro consequently increased its ranking from a very minor debtor claiming some EUR 7.4 million in debts by KAP to become KAP's largest single debtor owed EUR 148 million. There is no commercial rationale for a sovereign State such as Montenegro to engage in such behaviour. The sole purpose was to increase its power covertly, thus enabling it to "take over control" of KAP through bankruptcy, as dictated by Montenegro's Parliament.

5.74 Montenegro later non-transparently engineered a sale by direct negotiation to Uniprom at an undervalue through its courts' acquiescence to the following:

(a) Prior to the sale to Uniprom, KAP's assets had been valued at: (i) EUR 183,496,897 in its 2012 annual statements; (ii) at EUR 172,984,121 as of 8 July 2013, of which EUR 153,264,016 was attributed to fixed property; (iii) a fair market value of EUR 122,462,000 per the Appraisal Report; and (iv) the even lower level of an appraised value in bankruptcy of EUR 52,469,000 also per the Appraisal Report.[477]

(b) In response to the First Sale Announcement, which contained no minimum-bid requirement, Uniprom bid EUR 28,500,000 for KAP's assets.[478] Uniprom, as described above, is controlled by Mr Pejović, who was linked to Vektra, an entity that (unbeknownst to Mr Deripaska) had assumed control of KAP's anode plant under contract at the time Mr Deripaska closed on the purchased of KAP.

(c) Uniprom's bid was rejected, and a small portion of KAP's property was sold to Politpropus.[479]

(d) In response to the Second Sale Announcement, which contained a minimum bid requirement of EUR 28,000,000, Uniprom bid EUR 28,000,000, which was accepted.[480]

(e) While the bid originally progressed under the Bankruptcy Law as being a sale by public bidding, in executing the First Uniprom SPA Annex and the Second Uniprom SPA Annex, the Bankruptcy Administrator sought the Board of Creditors' prior consent. In doing so, he implicitly accepted that the sale had transformed to what it

[477] *See above* at Section III(L).
[478] *See above* at Section III(L).
[479] *See above* at Section III(L).
[480] *See above* at Section III(L).

was intended all along – a sale by direct negotiation, which requires the Board of Creditors' consent under Article 134(9) of the Bankruptcy Law.[481]

(f) Payment of consideration by Uniprom was repeatedly postponed, then paid into escrow, and now EUR 9,351.950 has been returned (following dissolution of the escrow arrangements and the settlement of Case P. 998/15).[482]

(g) Title and control of KAP have been purportedly transferred to Uniprom through the Second Uniprom SPA Annex and the Uniprom BCA, even though full consideration has not been paid and those agreements are null and void.[483]

(h) Through its courts' dismissal of CEAC and En+'s objections and claims, Montenegro has sanctioned this non-transparent behaviour.[484]

E. Montenegro Acted Unfairly, Arbitrarily and Abusively

5.75 Montenegro subjected Mr Deripaska's investment to treatment that was unfair, arbitrary and an abuse of right, causing damage to both KAP and RBN. Montenegro did so in the following ways:

(a) refusing to allow Mr Deripaska, through CEAC, to inject funds into KAP after settlement;

(b) refusing to settle its own debt to KAP;

(c) refusing to allow KAP to raise its own funds;

(d) denying KAP the full contracted-for benefit of the electricity subsidies;

(e) failing to prevent a reduction in KAP's electricity supply by EPCG;

(f) refusing to allow an operational shutdown of KAP;

(g) directly creating the circumstances which precipitated Deutsche Bank's acceleration of the Deutsche Bank Loan Facility;

[481] *See above* at Section III(L).
[482] *See above* at Section III(L).
[483] *See above* at Section III(L).
[484] *See* above at Section III(L).

(h) presenting its bankruptcy petition and commencing bankruptcy proceedings in an abuse of process; and

(i) harassing KAP's officials and subjecting them to spurious criminal charges.

1. Montenegro Refused to Allow Mr Deripaska to Inject Funds into KAP

5.76 Montenegro arbitrarily refused, without any reasonable justification, to permit Mr Deripaska to inject substantial further funds into KAP after the signing of the Settlement Agreement. In arbitrary and abusive exercise of its rights of consent under the Deutsche Bank Loan Facility, Montenegro refused its consent to both:[485]

(a) KAP's request for validation of the approximately EUR 12 million which had been loaned by CEAC to KAP as an interim measure to ensure KAP's liquidity between the signing and coming into force of the Settlement Agreement; and

(b) KAP's request to raise the debt ceiling for loans from CEAC back to the level of EUR 75 million at which it had stood before Mr Deripaska, acting through CEAC, had waived approximately EUR 40 million worth of existing debt under the Settlement Agreement.

2. Montenegro Refused to Settle its Own Debt with KAP

5.77 Montenegro arbitrarily refused, without any reasonable justification, to repay debts of approximately EUR 1.5 million which Montenegro itself owed to KAP, relating to a pre-settlement payment made by KAP to a chemical supplier (which debt Montenegro had agreed to assume under the terms of the KAP SPA). Montenegro's arbitrary refusal to repay its debt starved KAP of funds it needed to remain financially solvent.

3. Montenegro Refused to Allow KAP to Raise its Own Funds

5.78 Montenegro arbitrarily refused, without any reasonable justification, to permit KAP to sell off non-core assets in order to raise funds to support its own financial solvency. In particular:

(a) Montenegro refused its consent for KAP to sell scrap alumina, with an estimated value of approximate EUR 8 million. Montenegro's justification for doing so, to the

[485] *See above* at Section III(H).

extent it was ever articulated, was unreasonable and arbitrary. Montenegro later arbitrarily refused its consent even to allow KAP to pledge the scrap alumina to VTB Bank as collateral to secure its loan with VTB.

(b) Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, refused its consent to allow KAP to sell a commercial property in Podgorica for which it had no use. The justification given by Montenegro's appointee for doing so that a second appraisal report needed to be obtained was unreasonable and arbitrary.

4. Montenegro Denied KAP the Full Benefit of its Electricity Subsidies

5.79 Montenegro arbitrarily refused to respect the terms of its written commitment to KAP under the Settlement Agreement to provide EUR 60 million worth of electricity subsidies to EPCG. Montenegro asserted that the value of the EUR 60 million should be interpreted as inclusive of VAT. Montenegro's interpretation was arbitrary and defied common sense. The result was that, from early 2012 onwards, KAP was forced to pay EPCG for its electricity at a wholly unaffordable market rate.[486]

5. Montenegro Failed to Prevent a Reduction in KAP's Electricity Supply

5.80 Montenegro unfairly and arbitrarily failed to support KAP when EPCG systematically reduced and ultimately terminated KAP's supply of electricity in 2012. Despite knowing that any reduction in electricity supply had a severely negative impact on KAP's production and profitability, and despite Montenegro's continued influence over EPCG as majority shareholder, Montenegro:[487]

(a) failed to respond to KAP's request for assistance after EPCG reduced KAP's electricity supply by 20% in February 2012;

(b) failed to respond to KAP's request for assistance after EPCG further reduced KAP's electricity supply by around 50% in September 2012; and

(c) failed to support KAP when EPCG terminated KAP's supply of electricity altogether in October 2012.

[486] *See above* at Section III(J).
[487] *See above* at Section III(J).

5.81 Montenegro's only purported assistance was to propose the insertion of one of its own state-owned companies, Montenegro Bonus, as an intermediary between KAP and EPCG, an unworkable proposal because:[488]

(a) the tariff proposed by Montenegro Bonus was not affordable for KAP, and would not have resolved KAP's need to secure an affordable supply of electricity;

(b) the proposed arrangement would have required KAP to make prepayments to Montenegro Bonus, which Montenegro knew KAP was unable to do; and

(c) the proposed arrangement would have required a pledge of security over assets, such as the land on which KAP sat, in respect of which Montenegro had consistently refused to provide KAP with legal title.

6. Montenegro Refused to Allow an Operational Shutdown of KAP

5.82 Montenegro, acting through its second appointee to the KAP board of directors, Mr Nebojsa Dozić, caused Mr Dozić to exercise his veto arbitrarily and abusively on multiple occasions to prevent any attempt by the KAP board of directors to carry out an orderly shutdown of KAP's operations while the future of KAP's electricity supply was determined.[489]

5.83 The result was to cause further harm to KAP's financial solvency (because it was highly unprofitable for KAP to operate at reduced levels of production), create a risk of damage to KAP's plant and equipment at low levels of production, and prevent KAP from ceasing electricity consumption in circumstances where it could not discover where its electricity supply was coming from (which supply, it transpired, CGES was wrongfully taking from the European grid).[490]

7. Montenegro Created the Circumstances that Led to the Deutsche Bank Loan Acceleration

5.84 Montenegro, unfairly and abusively, created the conditions which led to Deutsche Bank's acceleration of the Deutsche Bank Loan Facility and demand for immediate repayment of more than EUR 23 million by KAP. As described above, Montenegro's conduct directly

[488] **CWS – 2**, Potrubach WS, at para.93.
[489] *See above* at Sections III(H) and III(J).
[490] **CWS – 2**, Potrubach WS, at para.97.

caused the three salient acts of default on which Deutsche Bank relied to accelerate the loan, namely:[491]

(a) KAP's failure to meet repayments to OTP Bank on time in February 2011 (because Montenegro failed to provide its consent in time for CEAC to loan funds to KAP to make the payments);

(b) KAP's failure to submit a compliance certificate in respect of its 2009 financial statements (because Montenegro, repeatedly and without reasonable justification, refused to approve the 2009 financial statements); and

(c) KAP's failure to submit a 2011 business plan (because Montenegro, acting through its appointee to KAP's board of directors, Mr Dozić, repeatedly and without reasonable justification, vetoed the adoption of the business plan by the board of directors).

8. Montenegro Harassed KAP's officials

5.85 Montenegro abusively exercised its powers of criminal sanction to target KAP's Chief Financial Officer, Mr Dmitry Potrubach, by accusing him of responsibility for the wrongful taking by state-owned electricity transmission company CGES of electricity from the European grid:

(a) Montenegro must have known that the criminal investigation it launched against Mr Potrubach had no legal foundation. Mr Potrubach had no influence over KAP's electricity procurement, and no ability to stop KAP consuming electricity by shutting down production. Moreover, only CGES, and not KAP, had access to a regional interconnector to the European grid. Accordingly, it was not possible that anyone other than CGES had taken the electricity from the European grid. That CGES, and not Mr Potrubach or KAP, was responsible for the taking of electricity was subsequently confirmed by the report of the public prosecutor's office.[492]

(b) The only possible explanation for Montenegro's conduct is that (a) Montenegro arbitrarily and abusively sought to target Mr Potrubach for harassment because of

[491] *See above* at Sections III(J) and III(K).
[492] *See above* at Sections III(J) and III(N).

his connection to KAP; and/or (b) Montenegro sought to use Mr Potrubach as a scapegoat to distract public attention from CGES's own wrongdoing.

(c) In pursuit of its campaign of harassment against Mr Potrubach, Montenegro abusively subjected Mr Potrubach to (a) unwarranted seizure and detention when he attempted to leave the country; (b) detention in harsh prison conditions in Podgorica for a week; (c) release on strict bail conditions which required him to pay a EUR 100,000 bond and prevented him from leaving Podgorica for seven months; (d) humiliation and reputational damage as a result of widespread media publicity of his arrest; and (e) the ongoing distress of criminal jeopardy. Montenegro's conduct was so egregious that it prompted Mr Potrubach to file a complaint with the European Court of Human Rights.

(d) Montenegro eventually concluded the investigation with a finding that Mr Potrubach was not guilty of any crime. By this time, however, Mr Potrubach had suffered personal humiliation, distress and reputational damage, for which he has never been compensated by Montenegro.[493]

F. Montenegro Wrongfully Commenced The Bankruptcy Proceedings

5.86 Montenegro's decision to present a petition for the commencement of bankruptcy proceedings in relation to KAP breached its obligations under Article 3(1) of the Treaty.

5.87 As explained in the Pavić/Živković Report, Montenegrin law recognises the concept of an abuse of rights. An abuse of right in the context of a bankruptcy would be an abuse of *procedural* rights, and would occur if Montenegro presented its petition for reasons other than "the collective satisfaction of the creditors of bankruptcy debtor by encashment of its property" under Article 2(1) of the Bankruptcy Law.[494] That Montenegro presented its petition not in accordance with the goals of Article 2(1) of the Bankruptcy Law, but to fulfil the mandate of the Montenegrin Parliament's Conclusions dated 29 February 2012 and 8 June 2012 that it "terminate cooperation with CEAC […] and take over control of KAP" is evident. The circumstances leading to the presentation of the bankruptcy petition on 14 June 2013 are described at Sections III(J) and III(K) above, and include:

[493] **CWS – 2**, Potrubach WS, at para.152.
[494] **CER-1**, Pavić /Živković Report at para.5.39.

(a) On 29 February 2012, Montenegro's parliament issued a decision that directed the government to "take over control" of KAP from Mr Deripaska.[495]

(b) On 1 March 2012, Montenegro gave notice that it required CEAC to transfer all of its shares in KAP to Montenegro, for no consideration. Montenegro asserted that it was entitled to exercise a call on the shares, pursuant to the Settlement Agreement. CEAC contested the call on shares and remained a shareholder in KAP. This was the contractually agreed method by which Montenegro was to assume control of KAP.

(c) Over the course of the following 15 months, Montenegro took no legal steps to enforce its asserted right to call CEAC's shares. It did not commence arbitration proceedings to enforce its asserted right to an immediate transfer of CEAC's shares under the Settlement Agreement or under the related Transfer Agreement.

(d) Instead, Montenegro engaged with Mr Deripaska in negotiation about a possible basis for restructuring of KAP's debts (including CEAC and En+'s significant positions as a creditor of KAP).

(e) Following acceleration by Deutsche Bank of its loan to KAP on 23 March 2012, Montenegro paid all amounts demanded by Deutsche Bank under a state guarantee on 5 April 2012.

(f) During the course of the restructuring negotiations, whilst En+ was working with Houlihan Lokey to develop restructuring models and was preparing for a planned meeting of shareholders, Montenegro, in furtherance of the parliamentary directive, presented, without notice or warning, its bankruptcy petition against KAP, on grounds of KAP's failure to repay to Montenegro the sums that Montenegro had paid to Deutsche Bank. The petition had the effect of terminating the negotiations to restructure KAP.

(g) Montenegro was in a unique position vis-à-vis other creditors to influence KAP's bankruptcy, by reason of its control over the Board of Creditors and its influence over the Montenegrin courts, before which KAP's bankruptcy proceeded.

5.88 Mr Deripaska was thus reasonably entitled to conclude (and did conclude) that Montenegro would not "take over control" of KAP, whether by way of calling on CEAC's shares in KAP or

[495] **Exhibit C-10**, Parliamentary Resolution, dated 29 February 2012.

otherwise. Instead, he believed and relied upon Montenegro's representations that it was committed to the restructuring of KAP.

5.89 Moreover, in assessing whether an abuse of rights has occurred, one must under Montenegrin law take into account subsequent events to assess whether there were elements of abuse in Montenegro's actions. Accordingly, here, one must consider the way KAP's bankruptcy proceedings were conducted. Montenegro conducted the bankruptcy proceedings in a manner which used them as the instrument by which Montenegro was able to expropriate Mr Deripaska's investment (*see* Section IV), breached his legitimate expectations that his investment would be accorded the protections prescribed by the Bankruptcy Law and international law (*See* Section V(C), and engaged in non-transparent behaviour to make itself KAP's largest creditor (*See* Section V(D)) and to engineer a sale at an undervalue to Uniprom (*See* Section III(L). Both collectively and each act individually constitutes a clear abuse of rights under Montenegrin law.

5.90 Montenegro thereby failed to comply with its obligations under Article 3(1) of the Treaty because it violated Mr Deripaska's legitimate expectation that it would comply with its obligations to act in good faith and to avoid conduct that was capricious, arbitrary or an abuse of right.

G. Montenegro Denied Mr Deripaska Justice

5.91 In his efforts to protect his investment in KAP, Mr Deripaska has been consistently denied justice by the Montenegrin courts in further breach of Montenegro's FET obligations under Article 3(1) of the Treaty. The doctrine of denial of justice provides that a state is internationally responsible if – in breach of its FET obligations – it administers its system of justice to aliens in an unfair, arbitrary, or discriminatory manner.

5.92 It is trite law that the wrongful acts of the courts and judges of a State are attributable to that State.

5.93 Article 4 of the ILC Articles provides that:

> "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive or judicial or any other functions." [496]

5.94 Similarly, Article 5 of the ILC Articles provides that:

> "[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." [497]

5.95 It is Mr Deripaska's case that whatever the status of the Bankruptcy Administrator under international law, the Montenegrin courts and judges exercising supervisory jurisdiction over the Bankruptcy Administrator and over KAP's bankruptcy process generally have denied Mr Deripaska justice and that their acts and omissions are properly attributable to the State.

5.96 A claim for denial of justice presumes that reasonable attempts have been made by the Claimant to secure the remedies available to him in the legal system of the host state. In this context, it is important to bear in mind that claimants like Mr Deripaska do not have to avail themselves of remedies that offer no reasonable prospect of success. The rule is a rule that, in the words of Sir Hersche Lauterpacht, has been and continues to be applied "with a considerable degree of elasticity". As will be apparent from the discussion in this section, and the numerous appeals that Mr Deripaska has made to the Appellate Court, the Supreme Court, and the Constitutional Court, Mr Deripaska has taken all steps that afford him a reasonable opportunity of an effective remedy. In doing so, he has satisfied any obligation that may require him to exhaust local remedies.[498]

5.97 When faced with claims of denial of justice, the starting point of many international courts and tribunals is a consideration of the judgment of the International Court of Justice in the *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*.[499] In the context of that case, which concerned the bankruptcy of a company in similar circumstances to those of KAP, the ICJ held that:

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[496] **Exhibit CLA-7**, ILC Articles, Art.4.
[497] **Exhibit CLA-7**, ILC Articles, Art.5.
[498] **Exhibit CLA-30**, Jan Paulsson, *Denial of Justice in International Law*, First Paperback Edition, 2010, p. 130.
[499] **Exhibit CLA-45**, *Elettronica Sicula S.p.A. (ELSI) Judgemnt,* ICJ Reports 1989, p. 15, as in Zachary Douglas, International Responsibility for domestic adjudication: Denial of justice deconstructed, ICLQ 63(4), 867.

> "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. … It is a wilful disregard of due process of law, ***an act which shocks, or at least surprises, a sense of judicial propriety***." [500]

5.98 The ICJ's reasoning in ELSI was expressly referred to by the tribunal in *Mondev International Ltd v United States of America*.[501] There, a NAFTA Tribunal sitting under the ICSID Additional Facility Rules noted that the ELSI dictum was "useful" in the context of consideration of a denial of justice, and then went on to hold that:

> "[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection." [502]

5.99 The tribunal in *Mondev* went on to address what it perceived to be the real question, namely:

> "… whether, at an international level, and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that that investment has been subjected to unfair and inequitable treatment." [503]

5.100 This formulation was adopted by the very eminent tribunal in another NAFTA case, *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*.[504] In Loewen, the tribunal additionally observed that:[505]

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[500] **Exhibit CLA-45**, *Elettronica Sicula S.p.A. (ELSI) Judgemnt,* ICJ Reports 1989, at para.128, as in Zachary Douglas, International Responsibility for domestic adjudication: Denial of justice deconstructed, ICLQ 63(4), 867.

[501] **Exhibit CLA-11**, *Mondev International Ltd v United States of America*, ICSID case ARB(AF)/99/2, Award, dated 11 October 2002.

[502] **Exhibit CLA-11**, *Mondev International Ltd v United States of America*, ICSID case ARB(AF)/99/2, Award, para. 127.

[503] **Exhibit CLA-11**, *Mondev International Ltd v United States of America*, ICSID case ARB(AF)/99/2, Award, para. 127.

[504] **Exhibit CLA-15**, *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2013, at para 133.

[505] **Exhibit CLA-15**, *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2013, at para.135.

> "A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law."

5.101 These formulations were all considered and adopted in the more recent award in *Dan Cake Portugal (S.A.) v Hungary*, made on 24 August 2015.[506] In evaluating whether a decision of the Metropolitan Court of Budapest, sitting as a bankruptcy court, constituted a denial of justice, the tribunal concluded, in the words of the ICJ in *ELSI* that its conduct "shock[ed] a sense of judicial propriety.

5.102 The Montenegrin courts have issued a series of decisions in relation to the bankruptcy of KAP which deny Mr Deripaska justice. They have done so in a manner that certainly surprises, if not shocks judicial propriety. Whether these denials of justice are substantive or procedural in origin, they constitute breaches of Montenegro's obligations under Article 3(1) of the BIT for which Mr Deripaska should be compensated.

5.103 Specifically, there were a series of decisions made by the Montenegrin courts that were so bizarre as to be unjustifiable – and therefore unjust. These decisions include:

(a) concerning the annulment of the Montenegro Bonus: Commercial Court Judgment No. 24/14, dated 20 February 2015 and Appellate Court Judgment No. Pž. 236/15, dated 24 March 2015;[507]

(b) concerning the formation and constitution of KAP's board of creditors: Commercial Court Judgment No. St. 199/13, dated 8 September 2013; Appellate Court Judgement No. Pž. 791/13, dated 21 November 2013; and Constitutional Court Judgment No. Už-III 73/14, dated 23 December 2016 – concerning the formation and constitution of KAP's Board of Creditors;[508]

(c) concerning the annulment of the Uniprom SPA, First Uniprom SPA Annex, and Second Uniprom SPA Annex:

[506] **Exhibit CLA-49**, *Dan Cake Portugal (S.A.) v Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, dated 24 August 2015, para.146.
[507] **Exhibit C-220,** Commercial Court Judgment No. 24/14, dated 20 February 2015; **Exhibit C-227,** Appellate Court Judgment No. Pž. 236/15, dated 24 March 2015.
[508] **Exhibit C-175**, Commercial Court Judgment No. St. 199/13, dated 8 October 2013; **Exhibit C-182**, Appellate Court Judgement No. Pž. 791/13, dated 21 November 2013; **Exhibit C-186**, Constitutional Court Judgment No. Už-III 73/14, dated 23 December 2016.

(i) Commercial Court Judgment P. No 733/14, dated 8 June 2015; Appellate Court Judgment Pž. 541/15, dated 15 September 2015; Supreme Court Decision No. Rev IP 148/15, dated 20 January 2016;[509]

(ii) Commercial Court Judgment P. No. 740/14, dated 8 June 2015; Appellate Court Judgment Pž. 540/15, dated 3 September 2015; and Supreme Court Decision, dated 21 January 2016;[510]

(d) concerning the annulment of the Uniprom BCA:

(i) Commercial Court Judgment P. No 690/15, dated 5 April 2016; Appellate Court Judgment Pž. 557/16, dated 2 June 2016; Supreme Court Decision, dated 15 November 2016;[511] and

(ii) Commercial Court Judgment P. No 945/14, dated 22 September 2015; Appellate Court Judgment Pž. 557, dated 12 November 2015; and Supreme Court Decision, dated 25 February 2016;[512] and

(e) concerning the settlement of Case P. 998/15 (brought by Uniprom against KAP), Commercial Court Decision No. St. 199/13, dated 1 February 2016; Appeal Court Judgment Pž. 596/16, dated 26 May 2016; Commercial Court Judgment No. St. 199/13, dated 9 February 2017.[513] and

5.104 There is a question under international law whether an action for denial of justice lies under an investment treaty in relation to decisions of national courts that are substantive in nature. Fitzmaurice, however, answered this question in his consideration of denial of justice and the appropriate test in such cases. In this regard, he observed specifically that:

[509] **Exhibit C-229**, Commercial Court Judgment P. No 733/14, dated 8 June 2015; **Exhibit C-236**, Appellate Court Judgment Pž. 541/15, dated 15 September 2015; **Exhibit C-244**, Supreme Court Decision No. Rev IP 148/15, dated 20 January 2016.

[510] **Exhibit C-228**, Commercial Court Judgment P. No. 740/14, dated 8 June 2015; **Exhibit C-235**, Appellate Court Judgment Pž. 540/15, dated 3 September 2015; **Exhibit C-245**, Supreme Court Decision No. Rev. I.P. 149/15, dated 21 January 2016.

[511] **Exhibit C-252**, Commercial Court Judgment P. No 690/15, dated 5 April 2016; **Exhibit C-253**, Appellate Court Judgment Pž. 557/16, dated 2 June 2016; **Exhibit C-255**, Supreme Court Decision, dated 15 November 2016.

[512] **Exhibit C-240**, Commercial Court Judgment P. No. 945/14, dated 22 September 2015; **Exhibit C-241**, Appellate Court Judgment No. Pž. 698/15, dated 12 November 2015; and **Exhibit C-251**, Supreme Court Decision, dated 25 February 2016.

[513] **Exhibit C-250**, Commercial Court Decision No. St. 199/13, dated 1 February 2016; **Exhibit C-295**, Appeal Court Judgment Pž. 596/16, dated 26 May 2016; **Exhibit C-257**, Commercial Court Judgment No. St. 199/13, dated 9 February 2017.

> "[t]he only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as 'Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?' … An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given." [514]

5.105 Fitzmaurice recognised that proof of bad faith may not be easy to adduce. In such cases, his view was that:

> "… the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. ***The question will then be, was the error of such a character that no competent judge could have made it?*** If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing competent judges." [515]

5.106 Whether international law recognises a separate doctrine of substantive denial of justice or whether substantive injustice is simply "conclusive or strong evidence of procedural injustice" is immaterial where, in the words of Professor Douglas, "there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error".[516] That is because the Tribunal is:[517]

> "… compelled, in conducting their review of domestic adjudication, to assess the reasonableness of the substantive outcome of the procedure."

5.107 In this case, there is clear evidence that "the substantive outcome of the procedure" is far from reasonable. Specifically:

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[514] **Exhibit CLA-45,** Sir Gerald Fitzmaurice, *The Meaning of the Term 'Denial of Justice'* (1932) 13 BYIL 93 at 112-113 as in Zachary Douglas, International Responsibility for domestic adjudication: Denial of justice deconstructed, ICLQ 63(4), 867.

[515] **Exhibit CLA-45,** Sir Gerald Fitzmaurice, *The Meaning of the Term 'Denial of Justice'* (1932) 13 BYIL 93 at 113 – 114 (emphasis added) as in Zachary Douglas, International Responsibility for domestic adjudication: Denial of justice deconstructed, ICLQ 63(4), 867.

[516] **Exhibit CLA-45,** Zachary Douglas, *International Responsibility for domestic adjudication: Denial of justice deconstructed,* ICLQ 63(4), 867 at 883-884.

[517] **Exhibit CLA-45**, Zachary Douglas, *International Responsibility for domestic adjudication: Denial of justice deconstructed,* ICLQ 63(4), 867 at 884.

(a) The Montenegro Bonus BCA: Montenegro's courts (i) accepted that the entry into the Montenegro Bonus BCA was a "significant action" within the meaning of Article 35(1) the Bankruptcy Law, (ii) also accepted that, as a "significant action", entry into the Montengro Bonus BCA required the prior consent of the Board of Creditors, but (iii) refused to uphold the objections of En+ and CEAC that Montengro Bonus BCA was accordingly null and void, on the irrational grounds that it had been entered into before the Board of Creditors had been constituted.[518]

(b) As explained by Professors Pavić and Živković, this reasoning is (i) patently flawed – because "it would allow a bankruptcy administrator to circumvent a statutorily mandated restriction on his or her actions by taking actions that 'significantly affect the bankrupt estate' within the meaning of Article 35(1) of the Bankruptcy Act prior to a board of creditors' formation" – and it would (ii) lead to an absurd result "if extrapolated to other aspects of the bankruptcy proceedings".[519] Proceeding in this manner makes a nonsense of the protections that are supposed to be afforded by obtaining a board of creditors' prior consent.

(c) Constitution of KAP's Board of Creditors: As Pavić and Živković, the Montenegrin courts' endorsement of the "one creditor, one vote" approach is wrong in principle because it fails to recognise that greater rights are to be accorded in proportion to the value of each creditor's claim – as otherwise enshrined in the Bankruptcy Law. It also is contrary to practice under Serbian law, which is persuasive in construing Montenegrin law. Furthermore, it embraces absurdity in bankruptcies where there is a large group of creditors with small claims (such as employees) by conferring control of the board to them and away from smaller numbers of larger creditors.[520] Bearing in mind that the board of creditors is to be constituted from the three or five creditors "with the largest unsecured or partly secured claims",[521] the "one creditor, one vote approach" is wrong.

(d) Escrow arrangements with Uniprom: Provessors Pavić and Živković themselves express surprise that the Montenegrin courts permitted Uniprom to pay a significant

[518] **Exhibit C-220,** Commercial Court Judgment No. 24/14, dated 20 February 2015; **Exhibit C-227,** Appellate Court Judgment No. Pž. 236/15, dated 24 March 2015.
[519] **CER-1**, Pavić /Živković Report, para. 5.8. As they observe: "if a bankruptcy judge were to die, a bankruptcy administrator could act unsupervised until a new judge was appointed".
[520] **CER-1**, Pavić /Živković Report, paras.5.20 – 5.28.
[521] **Exhibit C-294**, Bankruptcy Law, Art.44.

part of the purchase price into an escrow account. As they observe, these actions are contrary to Articles 81(1) and 33(13) of the Bankruptcy Law which logically that all monies collected in the bankruptcy process be held in a "special bankruptcy account in a bank approved by the court" and that all other accounts of the debtor be closed.[522]

(e) Transfer of legal title to Uniprom on payment into escrow: Even more shocking are the decisions of Montenegro's courts concerning the Uniprom sale, and in particular, the Second Uniprom SPA Annex.[523] As explained by Professors Pavić and Živković in their Joint Report, the transfer of a debtor's property pending full payment of consideration is in clear violation of Article 140 of the Bankruptcy Law, which requires payment of the full price before legal title is transferred. It also is contrary to a combined reading of Articles 2(1), 3, and 8 of the Bankruptcy Law, which collectively provides that "proceedings be conducted in a manner that satisfies creditors' claims expeditiously and protects creditors to their satisfaction".[524]

5.108 These substantive decisions by the Montenegrin courts are of such a character that, in accordance with international law, no competent court could, should, or would have made them. They fly in the face of the clear provisions of Montenegrin law, including the Bankruptcy Law and civil procedure. Indeed, the view of Professors Pavić and Živković is that they were so egregious that the bankruptcy judge should – of his own motion – have acted at the outset to replace the Bankruptcy Administrator when he entered into the Montenegro BCA without the consent of the (as then unformed) Board of Creditors. That he failed to do so, and then that the bankruptcy judges, the Commercial Court, the Appellate Court, and, as applicable, the Supreme Court and even the Constitutional Court have all consistently sanctioned the wrongful acts of the Bankruptcy Administrator over a period of four years and decisions strongly suggest that Montenegro's judicial organs have been – to put it at its most respectful – incompetent in adopting and then upholding a series of grave substantive errors of law.

[522] **CER-1**, Pavić /Živković Report, para. 5.41.
[523] **Exhibit C-229**, Commercial Court Judgment P. No 733/14, dated 8 June 2015; **Exhibit C-236**, Appellate Court Judgment Pž. 541/15, dated 15 September 2015; **Exhibit C-244**, Supreme Court Decision No. Rev IP 148/15, dated 20 January 2016; **Exhibit C-228**, Commercial Court Judgment P. No. 740/14, dated 8 June 2015; **Exhibit C-235**, Appellate Court Judgment Pž. 540/15, dated 3 September 2015; **Exhibit C-245**, Supreme Court Decision No. Rev. I.P. 149/15, dated 21 January 2016.
[524] **CER-1**, Pavić /Živković Report, paras.5.31 – 5.37 and 5.39.

5.109 The Tribunal also must take into account the procedural denials of justice shown to Mr Deripaska when considering whether his treatment during the bankruptcy proceeding was either fair or equitable, and whether he enjoyed a fair hearing. In this connection, and as the ICJ observed in its Advisory Opinion in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*:[525]

> "[a]n error in procedure is fundamental and constitutes 'a failure of justice' when it is of such a kind as to violate the official's right to a fair hearing … and in that sense to deprive him of justice. To put the matter in that way does not provide a complete answer to the problem of determining precisely what errors in procedure are covered … But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-a-vis the opponent; and the right to a reasoned decision."

5.110 In Mr Deripaska's case:

(a) The decisions of the Montenegrin courts were arbitrary: In *ELSI*, the ICJ held that arbitrariness was "something opposed to the rule of law … , an act which ***shocks, or at least surprises, a sense of judicial propriety***".[526] In this context, the treatment by the Commercial Court of the Appellate Court's Judgment Pz 596/2016 is surprising to the point of shocking.

(b) In Judgment Pz 596/2016, the Appellate Court upheld the appeals by En+ and CEAC in relation to the settlement reached between the Bankruptcy Administrator and Uniprom of Case P. 998/15. Contrary to the decision of the bankruptcy judge, the Appellate Court held that the settlement required the prior approval of the Board of Creditors pursuant to Article 35(1) of the Bankruptcy Law. Accordingly, it ordered the Commercial Court to issue a new judgment.[527]

[525] **Exhibit CLA-3**, *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion*, (1972) ICJ Reports at para 92.
[526] **Exhibit CLA-45**, *Elettronica Sicula S.p.A. (ELSI) Judgemnt*, ICJ Reports 1989, in Zachary Douglas, International Responsibility for domestic adjudication: Denial of justice deconstructed, ICLQ 63(4), 867.
[527] **Exhibit C-250**, Commercial Court Judgment No. St. 199/13, dated 1 February 2016; Exhibit **C-295**, Appellate Court Judgment No. Pz. 596/16, dated 26 May 2016.

(c) In this vein, Article 391(2) of the Montenegrin Law on Civil Procedure requires that:

> "[i]mmediately upon receipt of the ruling rendered by the court of second instance, the court of first instance shall schedule a deliberation for the main hearing which shall be held no later than 30 days from the day of receiving the ruling of the second instance court.
>
> The court of first instance shall conduct all litigation actions and ***clarify all disputed matters indicated in the ruling of the second instance court***."[528]

(d) Despite these instructions, the bankruptcy judge ignored the findings of the Appellate Court and repeated his first instance findings. In doing so, he used the same arguments of his original decision, in the same terms, and maintaining the ***same typographical errors.***[529] This is shocking to any sense of judicial propriety.

(e) That lower courts should respect and execute the decisions of the higher courts is axiomatic. In this regard, that a state has a duty to "*assurer l'administration de la justice*" is a fundamental tenet of international law. In failing in its duty to ensure that the Commercial Court enforced the decision of the Appellate Court, Montenegro breached Article 6(1) of the European Convention of Human Rights and its obligations to "[protect] the implementation of judicial decisions". To the extent that it failed in that duty, Montenegro allowed Mr Deripaska's "right to a court" under Article 6 to become "illusory". He "should not have to pay the price" of Montenegro's "omissions".[530]

(f) Mr Deripaska was denied the right to reasoned decisions: In the decision of the Commercial Court No. St 199/13 dated 8 October 2013 and Appellate Court Pz 791/13, Mr Deripaska's objections to the manner in which the Board of Creditors was formed were dismissed with a simple reference to Article 42 of the Bankruptcy Law and an accompanying statement that the sole role of the Bankruptcy Administrator is to chair the first meeting of creditors while constitution of the Board of Creditors is a matter for the creditors.[531] Neither the Commercial Court nor the Appellate Court provided any substantive discussion or analysis of the arguments and submissions made before it. Even when his appeal was dismissed by the Constitutional Court in Proceedings No. Uz-III 73/2014, no reasoning was

[528] **Exhibit C-293.** Article 391 of the Montenegrin Law on Civil Procedure.
[529] **Exhibit C-257**, Commercial Court Judgment No. St. 199/13, 9 February 2017.
[530] **Exhibit CLA-16**, *Timofyev v Russia*, 23 October 2003, [2003] ECHR 546 at para. 40.
[531] **Exhibit C-175**, Commercial Court Decision of St 199/13 made 8 October 2013; **Exhibit C-182**, Appellate Court Decision Pz 791/13.

contained in the arguments submitted to the Constitutional Court or in explanation of its decisions.[532]

(g) The lack of any, or any adequate reasoning in a court decision, is a breach of Article 367.1(15) of the Montenegrin Law on Civil Procedure. This provides that a judgment or decision will be deficient if:

> "in particular if the dictum of the judgment is incomprehensible, contradictory to the wording of the dictum itself or to the reasoning of the judgment, or if the judgment contains no reasoning at all, or if the judgment does not have argumentation about crucial facts or if this argumentation is unclear or contradictory, or if concerning the crucial facts there is contradiction between what was stated in the reasoning of the judgment on content of the documents or transcripts on statements given in the proceedings and that very same documents or transcripts."[533]

(h) To this extent, each of the decisions of the Commercial Court, the Appellate Court and the Constitutional Court amounts to a breach of Article 367.1(15) of the Law of Civil Procedure.

(i) Furthermore, the Montenegrin courts' lack of reasoning also amounts to a breach by Montenegro of its international obligations. As observed by the ICJ, "[n]ot only is it of the essence of judicial decisions that they should be reasoned",[534] but they are required to be reasoned by Article 6 of the European Convention of Human Rights and the Right to a Fair Trial.

5.111 The conduct of the Montenegrin Courts can be understood, if not explained, by reference to the Parliamentary Conclusions of 29 February and 8 June 2012. It will be recalled that these mandate the Government of Montenegro to "***take over control***" of KAP from "***the foreign partner***". That the decisions of the Montenegrin courts were in breach of the Bankruptcy Law, the Montenegrin Law of Civil Procedure, and international standards of justice is on any view incontrovertible. There has thus been "manifest injustice according to international law" within the meaning of *Loewen*, resulting in a denial of justice in breach of Article 3(1) of the BIT.

[532] **Exhibit C-186**¸ Uz-III 73/14, dated 10 April 2017.
[533] **Exhibit C-292**, Law on Civil Procedure, Art. 367.1(15).
[534] **Exhibit CLA-3**, Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion, (1973) ICJ Reports at para.94.

5.112 The above are examples of the many clear instances where the Montenegrin Courts' treatment of Mr Deripaska's objections to the way that KAP's bankruptcy has been conducted have been procedurally unfair. The Commercial Court has ignored the directions of the Appellate Court, and its courts at all level have issued unreasoned decisions that ignore both substantive provisions of Montenegrin law and also fail to comply with fundamental requirements of Montenegro's own procedural laws. This is conduct that is surprising, if not shocking, to any sense of judicial propriety. That conclusion is amplified when it is recalled that KAP's bankruptcy was commenced over four years ago on 8 July 2013 – and that there is still no end in sight. The excessive delays in concluding KAP's bankruptcy proceedings are in and of themselves evidence of procedural unfairness and a denial of justice. And if that is right, Mr Deripaska's claims for breach of Article 3(1) must succeed.

VI EXPROPRIATION

A. Overview of Mr Deripaska's Expropriation Case

6.1 Montenegro has engaged in a series of actions that had the cumulative effect of depriving Mr Deripaska of his entire investment in KAP and RBN. These actions commenced in 2010, and consisted of acts and omissions by Montenegro that frustrated Mr Deripaska's legitimate expectations (as more particularly described in Section V above) that Montenegro would co-operate with CEAC in the orderly and harmonious running of KAP, including in supporting CEAC in securing long-term supplies of electricity at an affordable price and to permit and assist in restructuring KAP's debt and its workforce, thus enabling KAP's business to operate efficiently.

6.2 Montenegro's acts and omissions in depriving Mr Deripaska of the benefit and economic use of his investment in KAP culminated in the bankruptcy proceedings commenced by Montenegro following presentation of its bankruptcy petition on 14 June 2013. At that point, Mr Deripaska lost not only the entire value of his equity investment in KAP, but also had his remaining powers of management and control over KAP and its assets removed in that:

(a) First, the Montenegrin Courts removed KAP's board of directors, including the directors appointed by Mr Deripaska and placed management of the company into the hands of a bankruptcy administrator, Mr Veselin Perišić. Mr Perišić, who is well-known for his role in the insolvency of ZN, ran KAP's bankruptcy proceedings in a manner that was prejudicial to foreign creditors such as Mr Deripaska. This includes through his hasty appointment of Montenegro Bonus, a company wholly owned by Montenegro, to run KAP's business and to take control of KAP's real and movable assets.

(b) Second, Montenegro itself moved to take control KAP's Board of Creditors and to exclude the influence of significant foreign creditors of KAP. Over the course of 2012 and 2013, Montenegro steadily assumed a number of debts owed by KAP, thereby increasing its claims to become KAP's single largest creditor. Following constitution of the Board of Creditors in September 2013 - in a manner that excluded significant foreign creditors such as Mr Deripaska's entity, En+ - Montenegro acted in concert

with EPCG, the State-controlled electricity producer, to outvote CEAC in all major decisions of the Board of Creditors.

(c) Third, when, through En+ and CEAC, Mr Deripaska brought complaints and objections against the manner in which KAP's bankruptcy proceedings were being conducted – including in relation to the sale at a significant undervalue of the large majority of KAP's assets to a single purchase, Uniprom (owned by Veselin Pejović, the Montenegrin businessman who managed the KAP plant before Mr Deripaska invested in KAP) – the Montenegrin Courts dismissed all of the objections and subsequent litigations filed by Mr Deripaska.

6.3 Ultimately, Montenegro's control over the bankruptcy proceedings resulted in Mr Deripaska losing not only his entire ownership and management interests in KAP and RBN, but also his ability to recover any element of his investment from the liquidation process. Indeed, four years since KAP entered into bankruptcy, Mr Deripaska has received – and expects to receive - nothing from KAP's estate.

B. Montenegro's Obligations

6.4 Article 4 of the Treaty states:[535]

> "Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to other measures having equivalent effects (hereinafter referred to as "expropriation"), except when such measures are taken for the public interest in the manner prescribed by the laws, are not discriminatory and are accompanied by prompt and adequate compensation. The compensation shall correspond to at least the market value of the expropriated investments immediately before the moment when the actual or impeding expropriation became official knowledge. The compensation shall be paid without undue delay in freely convertible currency and freely transferrable abroad. Until the payment is made, the amount of compensation shall be subject to accrued interest at an interest rate of the Contracting Party in the territory in which the investments were made."

6.5 Article 4 accordingly protects against both direct and indirect expropriation, the latter being satisfied by "measures having equivalent effects" to expropriation or nationalisation in the terms of the Treaty. This reflects the distinction between direct and indirect expropriation at

[535] **Exhibit C-1**, the Treaty, Art. 4.

customary international law. Indirect expropriation includes "creeping" expropriation, as set out below.

1. Indirect Expropriation

6.6 Mr Deripaska's primary case is that his investment in KAP has been indirectly expropriated as a result of cumulative measures taken by Montenegro. The measures taken by Montenegro in this regard include its frustration of Mr Deripaska's legitimate expectations, as more particularly described at Section V above, as well as the additional measures described below. The effect of those measures, taken together, has been to deprive Mr Deripaska of the use and enjoyment of his investment to the point that he has "truly lost all the attributes of ownership".[536]

6.7 It is well established under international law that expropriation can be creeping – i.e., that it may lie in a series of acts which, taken together, have the effect of expropriation. In such a case, the state's breach lies in a "composite act" (in the terms of the International Law Commission Articles), complete when the actions taken together have the necessary effect. Article 15 of the International Law Commission Articles states:

> "[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act." [537]

6.8 State responsibility for creeping expropriation has been recognised by a number of arbitral tribunals. In *Siemens v Argentina*, the tribunal defined a creeping expropriation as follows:

> "[b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks

[536] **Exhibit CLA-5**, *Compania del Desarollo de Santa Elena SA v Republic of Costa Rica* ICSID Case No. ARB/96/1, Award, dated 17 February 2000, para.76.
[537] **Exhibit CLA-7**, International Law Commission Articles, Art.15.

> the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."[538]

6.9 In *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, the tribunal confirmed that the accumulation of several acts may constitute a creeping expropriation, even if each in isolation could not be considered expropriatory:

> "[i]t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached."[539]

6.10 More recently, the tribunal in *Venezuela Holdings B.V., Mobil Cerro Negro Holding LTD et al v. Venezuela* stated that:

> "under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature."[540]

6.11 In determining whether indirect expropriation has occurred, the sole focus, in accordance with the language of the Treaty, must be on the "effects" of the measures in question. Neither the form nor the intention of the measures is determinative. In practical terms, therefore, it is the task of the tribunal:

> "to determine whether the dramatic losses of benefit are caused by the loss of one or all elements which constitute the essence of property."[541]

6.12 Notwithstanding this, arbitral tribunals have, however, recognised that where intention to expropriate is present it will make a finding of expropriation more likely. For instance, in *Compañia de Aguas de Aconquija and Vivendi Universal v Argentina*, the tribunal stated:

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[538] **Exhibit CLA-22**, *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Award, dated 17 January 2007, para.263.

[539] **Exhibit CLA-23**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina* ICSID Case Mo. ARB/97/3, Award dated 20 August 2007, para.5.3.16.

[540] **Exhibit CLA-46**, *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, 9 October 2014, para. 286.

[541] **Exhibit CLA-48**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania,* ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 579.

> "[w]hile intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the effect of the measure on the investor, not the state's intent, is the critical factor."[542]

6.13 In terms of Article 4 of the Treaty, the measures must have "equivalent effects" to an expropriation or nationalisation. Under international law, this has been held to require a substantial deprivation of the investor's use and enjoyment of the investment in whole or in substantial part.

2. Direct Expropriation

6.14 In the alternative to the above, Mr Deripaska's investment in KAP was directly expropriated by Montenegro when it commenced bankruptcy proceedings upon filing of its bankruptcy petition on 14 June 2013 and/or when Montenegro, acting in disregard of proper bankruptcy law and procedure and with the approval of the Commercial Court in Podgorica (and the Appellate Court, the Supreme Court and Constitutional Court of Montenegro), subsequently took effective control of KAP and its assets through the bankruptcy proceedings.

6.15 A direct expropriation occurs either by a mandatory legal transfer of title to property, or by its outright physical seizure. In contrast to an indirect expropriation, in the case of a direct expropriation, an open and deliberate intent is manifested by the state to deprive an investor of his or her property.

3. The Lawfulness of Expropriation

6.16 Under Article 4 of the Treaty, an expropriation can only be lawful "when such measures are taken for the public interest in the manner prescribed by the laws, are not discriminatory and are accompanied by prompt and adequate compensation."[543]

6.17 The requirements for lawful expropriation in Article 4 are expressed as cumulative. If any of these requirements is not met, the expropriation will be unlawful and in breach of the Treaty. This is consistent with the practice of other arbitral tribunals. [544]

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[542] **Exhibit CLA-23**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina* ICSID Case Mo. ARB/97/3, Award dated 20 August 2007, para.7.5.20.
[543] **Exhibit C-1**, the Treaty, Article 4.
[544] *See, e.g.,* **Exhibit CLA-50**, *Crystallex v Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, at para. 716.

C. Montenegro Expropriated Mr Deripaska's Investment

6.18 Mr Deripaska's investment in KAP and RBN has been indirectly expropriated as a result of a number of cumulative measures taken by the Respondent.

6.19 Beginning in 2010, Montenegro embarked on a campaign to disrupt KAP's ability to function and ultimately to wrest control of it from Mr Deripaska. As explained in Section V above, Mr Deripaska held a number of legitimate expectations that, other things, Montenegro would act in good faith to cooperate and provide its reasonable assistance in securing for KAP an affordable long-term electricity supply and enable a successful restructuring of KAP's debts and workforce.

6.20 Instead, however, Montenegro acted in bad faith in wresting from Mr Deripaska control over KAP and undermining its value by:

(a) preventing Mr Deripaska from injecting any meaningful amount of funds into KAP post-settlement (*see* Section III(H) above);

(b) refusing to pay the full value of the electricity subsidies it had promised (*see* Section III(J) above);

(c) refusing to support KAP and RBN's efforts to reduce their workforce to sustainable levels (*see* Section III(H) above);

(d) preventing KAP from complying with its obligations to international lenders, causing it to breach its covenants with OTP Bank and miss the deadline for payments (*see* Sections III(H) and III(J) above);

(e) creating the circumstances in which KAP incurred three events of default under the Deutsche Bank Loan Facility, including by knowing and wilfully (i) unreasonably withholding its consent to KAP's 2009 financial statements, (ii) vetoing KAP's 2011 business plan, (iii) refusing without justification to permit KAP to sell non-core assets, and (iv) preventing KAP from carrying out an orderly shutdown of the smelter (*see* Section III(J) above);

(f) as detailed further below, negotiating with Deutsche Bank on behalf of KAP without KAP's knowledge (*see* also Section III(J) above); and

(g) refusing to repay its own debts to KAP (*see* Section III(J) above).

6.21 Montenegro's strategy of wresting control of KAP from Mr Deripaska was disclosed in 2012 when the Montenegrin Parliament on 29 February and 8 June 2012 issued resolutions directing Montenegro to "take over control of KAP" for the purposes of preventing "permanent damage to the economic and social stability of Montenegro".[545] In satisfaction of Parliament's directives, Montenegro, in the exercise of its sovereign powers:

(a) failed to meet its obligation to assist KAP to secure a sustainable long-term supply of electricity, denying KAP the benefit of electricity subsidies that had been contractually bargained for, and permitting the state-owned energy company EPCG to reduce and ultimately terminate supply of electricity to KAP's plant (*see* Section III(J) above);

(b) withdrew unreasonably and unlawfully from its negotiations with CEAC to restructure KAP's external debt (*see* Section III(H) above);[546]

(c) took advantage of the State guarantee that it had given to Deutsche Bank by paying Deutsche Bank the amounts owed under the Deutsche Bank Loan Facility and, following its assumption of the debt owed by KAP to Deutsche Bank, acted in abuse of its rights by commencing bankruptcy proceedings against KAP, (*see* Section III(J) above);[547]

(d) acquired debts owed by KAP to other third parties (including some EUR 102,300,000 in the month after KAP's bankruptcy commenced), thereby increasing the amount of debt that it was able to prove in KAP's bankruptcy from some EUR 7,400,000 to approximately EUR 148,000,000, making it KAP's largest single creditor and thereby increasing Montenegro's influence over the bankruptcy proceedings (*see* Section III(L) above); and

(e) exercised its influence over the bankruptcy proceedings in a manner that denied Mr Deripaska any (or any proper) opportunity to protect his investment in the course of those bankruptcy proceedings (*see* Section III(L) above).[548]

[545] **Exhibit C-133** June 2012 Resolution; **Exhibit C-10**, February 2012 Resolution.
[546] **CER-1**, Pavić /Živković Report, at para.7.12.
[547] **CER-1**, Pavić /Živković Report, at para.6.17.
[548] **CER-1**, Pavić /Živković Report, at para.6.14.

6.22 The cumulative effect of the above measures was equivalent, in terms of Article 4 of the Treaty, to the expropriation of Mr Deripaska's investment in that it deprived him of the use and enjoyment of his investment in KAP and RBN.

6.23 In the alternative, Mr Deripaska's investment in KAP was directly expropriated by Montenegro through the placing of KAP into bankruptcy. This direct expropriation occurred either:

(a) on 14 June 2013, when Montenegro filed a petition for the bankruptcy of KAP with the Commercial Court, thereby initiating the process by which KAP was removed from Mr Deripaska's ownership and control; or

(b) on 8 July 2013, when the Commercial Court – a judicial organ of Montenegro – issued the Decision on Commencement of Bankruptcy, thereby formally negating Mr Deripaska's part-ownership and control of KAP by transferring management and control over it and its assets to Mr Perišić, the bankruptcy administrator appointed by the Podgorica Commercial Court; or

(c) at the very latest, when Montenegro (i) after it had acquired significant debts of KAP owed to other third parties and had become KAP's largest creditor, thereby contrived its position on the Board of Creditors, (ii) with EPCG, which it also controlled, used its position on the Board of Creditors to outvote CEAC in a manner that benefitted Montenegro and/or was to the detriment of Mr Deripaska and (iii) failed, through the Montenegrin courts, to sanction numerous violations of the Montenegrin Bankruptcy Law, the effects of which were to confirm the taking and exercise of title over KAP and its assets by Montenegro.

6.24 The effect of Montenegro's placing KAP into bankruptcy through these acts was to strip from Mr Deripaska his control and management rights over KAP and from KAP legal title to its own assets, and to place effective control of the company and of its assets in the hands of Montenegro and its state organs – namely, the Commercial Court in Podgorica; the bankruptcy administrator subject to the Commercial Court's supervision; the Board of Creditors controlled by Montenegro and its state-controlled entity, EPCG; and the state-owned company, Montenegro Bonus, as interim manager of KAP.

D. Montenegro's Expropriation Was Unlawful

6.25 Under Article 4 of the Treaty, an expropriation can only be lawful "when such measures are taken for the public interest in the manner prescribed by the laws, are not discriminatory and are accompanied by prompt and adequate compensation."[549] If any of these requirements are not met, the expropriation will be unlawful and in breach of the Treaty.

6.26 Moreover, even if Montenegro were acting in the performance of its police powers in expropriating KAP (which it was not), it is established in investment treaty jurisprudence that the exercise of such police powers by a sovereign "must not be arbitrary, discriminatory or disproportionate".[550]

6.27 Mr Deripaska submits that Montenegro's actions were unlawful. Far from proceeding in accordance with Montenegrin law, the expropriation took place in the context of abusive and arbitrary applications of Montenegrin law which were discriminatory against Mr Deripaska. In particular:

(a) In placing KAP into bankruptcy, Montenegro committed an abuse of its right to commence bankruptcy proceedings in violation of the proper purposes of Bankruptcy Proceedings as set out in Article 2(1) of the Bankruptcy Law – namely the "collective satisfaction of the creditors of bankruptcy debtor by encashment of its property".

(b) Rather, Montenegro's intent in doing so was set out clearly in the Conclusions of the Parliament of Montenegro dated 29 February 2012 and 8 June 2012: "to terminate cooperation with CEAC in the most efficient manner possible and ***take control of KAP***" (emphasis added) from CEAC (which is referred to be parliament as the "foreign partner").

(c) Montenegro benefited from if not encouraged the transfer to it of control over KAP and title to KAP's assets in that:

(i) its wholly owned entity, Montenegro Bonus, was appointed to manage KAP's ongoing production, movable property, and real estate without obtaining the prior consent of KAP's Board of Creditors as required by Article 35(1) of

[549] **Exhibit C-1**, the Treaty, Art. 4.
[550] **Exhibit CLA-47**, *Valeri Belokon v The Kyrgyz Republic* (UNCITRAL), Award, dated 24 October 2014, p. 201.

Bankruptcy Code (*See* Section III(L) above). Montenegro Bonus's appointment was a nullity and all transactions purportedly entered into pursuant to it are null and void; and

(ii) KAP's Bankruptcy Administrator adopted a principle of "one creditor, one vote" when conducting the vote to form KAP's Board of Creditors. The result was to give disproportionate influence to Montenegro and to EPCG, enabling Montengro to control the Board of Creditors, to the detriment of CEAC and En+ (and thus ultimately to Mr Deripaska). In doing so, and as explained in the Pavić/Živković Report, the Montenegrin courts endorsed an interpretation of the Bankruptcy Law that is wrong in principle and will lead to absurd results in practice (*See* Section III(L) above).[551]

(d) The Montenegrin Commercial Court (the Appellate Court, the Supreme Court and the Constitutional Court) have repeatedly acquiesced in procedural irregularities and outright unlawful behaviour throughout the course of KAP's bankruptcy, both in relation to the matters set out above, and in relation to dealings with Uniprom in that:

(i) KAP's Bankruptcy Administrator procured the sale of substantially all of KAP's property (valued as of 31 December 2012 at EUR 183,496,897) to Uniprom for EUR 28,000,000. To date, only EUR 18,700,000 has been received (*See* Section III(L) above);

(ii) despite the Uniprom sale not having completed, the Montenegrin courts acquiesced to the Bankruptcy Administrator transferring legal title in clear violation of Article 140 of the Bankruptcy Law – which the Bankruptcy Administrator and Uniprom themselves recognized in the Second Uniprom SPA Annex (*See* Section III(L) above));

(iii) the Montenegrin courts acquiesced to the Bankruptcy Administrator's transferral of production rights without having obtained the required prior consent of the Board of Creditors pursuant to Article 35(1) of the Bankruptcy Law (*see* Section III(L) above); and

(iv) the Montenegrin courts acquiesced to an escrow arrangement to be entered into in connection with the Uniprom sale, in clear violation of Articles 81 and

[551] **CER-1**, Pavić /Živković Report, at para.7.12.

33(13) of the Bankruptcy Law, which has further deprived KAP's bankrupt estate of funds (*see* Section III(L) above).

6.28 As held in *Belokon v Kyrgyz*,

> "[a] State cannot be said to be acting in the public interest and exercising its police powers when it takes actions that are not authorised by its internal laws."[552]

6.29 In the circumstances, the clear and numerous violations of Montenegrin law give rise to the clear inference that the expropriation was unlawful. Indeed, the actions of Montenegro in pursuance of the Conclusions of the Montenegro Parliament very clearly:

> "do not appear to have been taken in the interests of the public but to promote the narrower interests of the government in obtaining by seizure … what could not otherwise have been achieved under the law".[553]

6.30 Such actions require compensation, both under customary international law and under the Treaty. Both require that compensation be prompt, adequate and effective. Yet four years since Montenegro commenced bankruptcy proceedings, Mr Deripaska has received nothing.

6.31 Moreover, although much time has now passed since KAP's assets were sold by the bankruptcy manager, principally to Uniprom, and despite CEAC and En+ being major creditors in KAP's bankruptcy, Mr Deripaska has not received any distributions from the bankruptcy process. Indeed, owing to the significant undervalue at which KAP was sold to Uniprom, and the size of the debt owed by KAP to Montenegro (as a result of Montenegro having acquired various debts owed by KAP to third parties to make it KAP's single largest creditor), it is almost certain that Mr Deripaska will receive nothing from KAP's bankruptcy.

6.32 Montenegro's actions have resulted in "a total loss of the investment's value" to Mr Deripaska and "a total loss of control" by Mr Deripaska in his investment.[554] expropriation of Mr Deripaska's investment in KAP and RBN was consequently unlawful, without compensation and therefore in breach of Article 4 of the Treaty.

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[552] **Exhibit CLA-47**, *Valeri Belokon v The Kyrgyz Republic* (UNCITRAL), Award, dated 24 October 2014, at para. 204.

[553] **Exhibit CLA-47**, *Valeri Belokon v The Kyrgyz Republic* (UNCITRAL), Award, dated 24 October 2014, at para. 212.

[554] **Exhibit CLA-46**, *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, 9 October 2014, para. 286.

E. Conclusion on Expropriation

6.33 Between 2010 and 2013, the Respondent took a number of measures with the cumulative effect of indirectly expropriating Mr Deripaska's investment in KAP and RBN. Alternatively, the Respondent directly expropriated Mr Deripaska's investment in KAP by placing KAP into bankruptcy.

6.34 All such measures were in breach of Montenegrin law and have been unaccompanied by compensation, whether prompt, adequate and effective as required by the Treaty, or at all.

6.35 Montenegro is accordingly in breach of Article 4 of the Treaty, and liable to compensate Mr Deripaska. While the Treaty provides that Montenegro must pay compensation that corresponds to "at least the market value" of his investment, plus applicable interest, Mr Deripaska reserves the right to submit further as to the basis on which such compensation should be assessed.

VII REPARATION AND LOSS

A. General Principles

7.1 It is a settled principle of customary international law that a State is obliged to compensate a national of another state in respect of any damage suffered by that national, where such damage results from breach by a State of its obligations under international law. Customary international law recognises a broad and comprehensive basis for the restitution of, or compensation for, the loss sustained by a foreign national. These basic principles of reparation receive their classic articulation in the *Factory at Chorzów* case of 1929, which acknowledged that a state in breach of its international obligations is liable "as far as possible, [to] wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." [555]

7.2 This customary position has, to a considerable extent, been codified in the ILC Articles. The ILC Articles address the obligations of a state that is responsible for an "internationally wrongful act" (such acts expressly including breach by that State of its obligations arising under a treaty). The ILC Articles confirm, *inter alia*:

(a) the breaching state's basic obligation to compensate per Article 31(1):

> "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act";

(b) the wide scope of 'injury' in respect of which the state is required to make reparation, per Article 31(2):

> "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State";

(c) the available forms or standards of reparation to be made, per Article 33:

> "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter;" and

[555] **Exhibit CLA-1**, *Case Concerning the Factory at Chorzow*, Permanent Court of International Justice, dated 26 July 1927, 1928 P.C.I.J. (ser. A) No. 17, dated 13 September 1928, at para. 125.

(d) that *per* Articles 34 and 35, the State shall, so far as possible, make reparation by means of restitution, and shall pay compensation insofar as compensation by means of restitution is not possible.[556]

7.3 It is therefore uncontroversial that, as a matter of international law, Montenegro is obliged to make reparation to Mr Deripaska, if Mr Deripaska succeeds in establishing that (i) Montenegro is in breach of any of its obligations under the Treaty; and (ii) such breach caused him injury within the meaning of Article 31(2) of the ILC Articles. In the circumstances of the present case, such reparation is only capable of being achieved on the basis of payment by Montenegro of compensation for the loss that Mr Deripaska has sustained as a consequence of Montenegro's wrongful conduct.

B. Quantum

7.4 By agreement of the parties, and as specified in PO1, the parties shall reserve their submissions on the quantum of damage until service of their respective reply submissions.[557]

[557] PO1 at para. 3.5.

VIII CONCLUSION AND RELIEF

A. Summary of Points in Issue

8.1 For all of the reasons set out for this Statement of Claim, Montenegro has breached its obligations under the Treaty and is liable to Mr Deripaska as a result.

B. Relief Requested

8.2 Mr Deripaska requests an award granting the following relief:

(a) a declaration that Montenegro has breached its (a) obligations under the Treaty;

(b) an order that Montenegro shall make reparation to Mr Deripaska for the injury that he has suffered as a consequence of such breaches by payment of compensation in an amount that reflects the extent of loss of and damage to his investment;

(c) all costs of these proceedings, including lawyers' fees and expenses; [558]

(d) interest on sums awarded, at a rate determined by the Tribunal and effective from the date of breach and accruing on a compound basis until full and final satisfaction of the award; and

(e) any other relief that the Tribunal may deem appropriate.

[558] Pursuant to Article 38 UNCITRAL Arbitration Rules, the Tribunal is required in its award to fix the costs of the proceedings. Pursuant to Article 38(e), the Award shall reflect the costs of legal representation of the successful party, if those costs are claimed in the proceedings and to the extent the Tribunal determines those costs to have been reasonable.

Respectfully submitted

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