IN THE MATTER OF
AN ARBITRATION UNDER THE UNCITRAL RULES

between

1. En+ Group Limited (Channel Islands) and
2. CEAC Holdings Limited (Cyprus)

Claimant and Counter-Respondents

v.

1. The State of Montenegro,
2. Fund for Development of Montenegro (*Fond za Razvoj Crne Gore*) (Montenegro),
3. Republic Fund for Pension and Disability Insurance (*Republički Fond za Penzijsko i Invalidsko Osiguranje*) (Montenegro),
4. Bureau for Employment of Montenegro (*Zavod za Zapošljavanje Crne Gore*) (Montenegro), and
5. Kombinat Aluminijuma Podgorica A.D. (Montenegro).

Respondents and Counter-Claimants

FINAL AWARD

Arbitral Tribunal:
Juan Fernández-Armesto (Presiding Arbitrator)
Prof. Dr. Rolf Trittmann (Arbitrator)
Dr. Stefan Rützel (Arbitrator)

Arbitral Secretary:
Ms. Mélanie Riofrio Piché

Vienna (Austria) – January 12, 2017

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LIST OF ABBREVIATIONS

2011 MoU	Memorandum of Understanding signed by Montenegro and the En+ Group on June 10, 2011
BGH	German Federal High Court
Business Plan	Business plan for the next two years after the Closing Date, to be delivered by CEAC to Montenegro under Clause 30.2 of the Settlement Agreement
CDA	Montenegrin Central Depository Agency
CEAC	CEAC Holdings Limited (Claimant and Counter-Respondent 2)
Closing Certificate	Document, dated October 26, 2010, confirming that all closing conditions and closing activities provided in Clause 30 of the Settlement Agreement were fulfilled or performed
Closing Date	October 26, 2010
Contractual Penalties Claim	Montenegro and its agencies' claim for contractual penalties
DB Facility	Loan agreement signed Deutsche Bank AG, London Branch, as lender, Deutsche Bank Luxembourg S.A., as agent, and KAP, as borrower, on June 25, 2010
Default Interest Rate	A variable interest rate, fixed for each calendar half year on the first day of such half year, equal to a margin of 7% above the interest rate published by the European Central Bank for main refinancing operations
En+	En+ Group Limited (Counter-Respondent 1)
EPCG	Elektroprivreda Crne Gore A.D. Nikšić
ERAM	Energy Regulatory Agency of Montenegro
Failure Events	List of the actions that, under Clause 28 of the Settlement Agreement, Montenegro is entitled to effect if any of the events described therein come to occur

KAP	Kombinat Aluminijuma Podgorica A.D. (Respondent 5)
KAP Sales Agreement	Agreement for the Sale and Purchase of KAP's Shares, closed on November 30, 2005
KAP's Shareholders' Agreement	Agreement between CEAC and Montenegro, signed on October 26, 2010, under which CEAC transferred 50% of its shares in KAP to Montenegro
KAP Transfer Agreement	Agreement on Conditional Transfer of the KAP Forfeiture Shares, creating a security on CEAC's shares in KAP in favour of Montenegro, signed on October 26, 2010
First Arbitration	Arbitral proceedings brought by CEAC against Montenegro and its agencies in Frankfurt am Main, Germany, in November 2007
LCT	Montenegro's Law on Contracts and Torts
Letter Agreement	Letter listing KAP's breaches, signed by Deutsche Bank, KAP, and Montenegro on December 22, 2011
MB Cooperation Agreement	Agreement entered by KAP with Montenegro Bonus, entrusting Montenegro Bonus with the management of KAP business during its bankruptcy
MBL	Montenegro's Bankruptcy Law
MLC	Montenegrin Law on Companies
MoU	Memorandum of Understanding between En+ and Montenegro, signed on June 2, 2009
November 2009 Business Plan	Document entitled "Business Plan 2010-2012," delivered by CEAC and dated November 2009
para.	paragraph
Primary Damage Claim	CEAC's damages claim based on claims arising from the First Arbitration
RBN	Rudnici Boksita A.D. Niksic
RBN Sales Agreement	Agreement for the Sale and Purchase of RBN's Shares, closed on November 30, 2005
Request	Request presented by KAP to Montenegro on December 22, 2010, seeking authorization that CEAC increases the

	inter-company loan granted to KAP up to a principal amount of € 75.6 million
Responsible Party	Party that caused a Failure Event in accordance with Clause 28.4.7 of the Settlement Agreement
Secondary Damage Claim	CEAC's subsidiary damage claim based on the hypothetical value of KAP.
Settlement Agreement	Agreement executed on November 16, 2009, between En+ (Claimant 1), CEAC (Claimant 2), and Respondents 1 to 5, effective on October 26, 2010
Subsidies and Guarantees Claim	Montenegro and its agencies' claim for subsidies paid to KAP and guarantees to KAP called
UNCITRAL Rules	UNCITRAL Arbitration Rules

I. PRELIMINARY PART

1. STRUCTURE OF THIS FINAL AWARD

1. This Final Award comprises ten parts. Part I presents the persons and institutions involved in this arbitration, the arbitration agreements, the substantive and procedural laws applicable, and a summary of the proceedings. Part II provides a general overview of the dispute, describing its main actors, the contracts at stake, and the factual background. Part III reproduces the Parties' prayers for relief. Part IV presents, as a preliminary but central issue, the facts and legal effects regarding KAP's Failure of Restructuring and the subsequent liability of each Party. Part V and Part VI address and resolve the merits of CEAC's claims and Respondents' counterclaims, respectively. Part VII determines the interest to be applied to the amounts awarded. Part VIII establishes the costs of this arbitration. Part IX offers a summary of the Tribunal's decisions on each claim and counterclaim. Finally, Part X sets forth the Arbitral Tribunal's final decision.

2. PERSONS AND INSTITUTIONS INVOLVED IN THIS ARBITRATION

A. Claimant and Counter-Respondents

2. Claimant and Counter-Respondent 2 is CEAC Holdings Limited ["**CEAC**"], a company registered in Cyprus with its offices at Dimosthenous, 4, P.C. 1101, Nicosia, Cyprus.

3. Counter-Respondent 1 (initially, Claimant 1) is En+ Group Limited ["**En+**"], a company registered in Jersey with its offices at Whiteley Chambers, Don Street, St. Helier, Jersey, JE4 9WG.

4. En+ and CEAC are represented in this arbitration by the following counsel:

Dr. Matthias Menke (mmenke@goerg.de)
Mr. Florian Wolff (fwolff@goerg.de)
Dr. Lars Weber (lweber@goerg.de)
Görg Partnerschaft von Rechtsanwälten mbB
Neue Mainzer Straße 69
60311 Frankfurt am Main, Germany

B. Respondents and Counter-Claimants

5. At the time of the closure of the proceedings there are five Respondents left in this arbitration, namely:

The **State of Montenegro** (Respondent 1 and Counter-claimant 1)

Government of Montenegro
General Secretary of the Government of Montenegro
Attention to: Žarko Šturanović
Jovana Tomaševića bb,
81000 Podgorica, Montenegro

Fund for Development of Montenegro
(Respondent 2 and Counter-claimant 2)
Fond za razvoj Crns Gore
Attention to: Zoran Vukčević
11 Bulevar Revolucije,
81000 Podgorica, Montenegro

Republic Fund for Pension and Disability Insurance
(Respondent 3 and Counter-claimant 3)
Republički fond za penzijsko i invalidsko osiguranje
Attention to: Dušan Perović
64 Bulevar Ivana Crnojevića,
81000 Podgorica, Montenegro

Bureau for Employment of Montenegro
(Respondent 4 and Counter-claimant 4)
Zavod za zapošljavanje Crne Gore
Attention to: Vukica Jelić
5 Bulevar Revolucije,
81000 Podgorica, Montenegro

Kombinat Aluminijuma Podgorica A.D. ["**KAP**"] (Respondent 5)
Attention to: Veselin Perišić
Dajbabe bb,
81000 Podgorica, Montenegro

6. The Claimants' Notice of Arbitration included one more respondent, **Rudnici Boksita Niksic A.D.** ["**RBN**"] (Respondent 6), with the following contact details:

Rudnici Boksita Niksic A.D.
Attention to: Milorad Djurovic
13th of July Str., No. 30
81400 Niksic, Montenegro

By Procedural Order No. 2, of April 23, 2015, the Arbitral Tribunal terminated the proceedings in respect of Respondent 6.

7. Respondents 1 to 4 are jointly represented by the following counsel:

Dr. Christoph Lindinger (ch.lindinger@schoenherr.eu)
Ms. Anne-Karin Grill (grill@schoenherr.eu)

Schönherr
Schottenring 19, A-1010 Vienna, Austria

Mr. Srećko Vujaković (s.vujakovic@schoenherr.rs)
Mr. Slaven Moravčević (s.moravcevic@schoenherr.rs)
Ms. Jelena Bezarević Pajić (j.bezarevic@schoenherr.rs)
Ms. Tanja Šumar (t.sumar@schoenherr.rs)
Moravčević Vojnović and Partners (in cooperation with Schönherr)
Dobračina 15, Belgrade, Serbia

8. Respondents 5 and 6 were first represented by the same attorneys as Respondents 1 to 4. On June 24, 2014, Ms. Melanie van Leeuwen, from the law firm Derains & Gharavi, and Mr. Vesko Božović, a Montenegro-based attorney, took over jointly their legal representation. On December 22, 2014 Ms. Van Leeuwen and Mr. Božović notified that the judge overseeing Respondent 5's bankruptcy had revoked their powers of attorney due to the company's lack of resources.[1] Respondent 6 was eventually excluded from the proceedings a few months later, in accordance with Art. 30(1) UNCITRAL Rules. Respondent 5 has remained a party to these proceedings but without designating new counsel.

9. Claimants and Respondents will be referred hereinafter as the "Parties."

3. ARBITRAL TRIBUNAL

10. The Arbitral Tribunal is composed of three arbitrators: Prof. Dr. Rolf Trittmann, Dr. Stefan Rützel, and Juan Fernández-Armesto, as Presiding Arbitrator.

11. On December 18, 2013 Claimants appointed Prof. Dr. Rolf Trittmann as Arbitrator under Art. 7(1) UNCITRAL Rules (1976 version),[2] with the following contact details:

Prof. Dr. Rolf Trittmann
Freshfields Bruckhaus Deringer
Bockenheimer Anlage 44
60322 Frankfurt am Main, Germany
(rolf.trittmann@freshfields.com)

[1] R-18.
[2] Claimants' Notice of Appointment, dated December 18, 2013. The reason why the Claimants based this request on the 1976 version of the UNCITRAL Rules lies in Clause 34.3 Settlement Agreement and Clause 16.2 KAP's Shareholders' Agreement, which similarly provide that "any dispute, controversy or claim arising out of or relating to this . . . Agreement . . . shall be settled by arbitration **in accordance with the UNCITRAL Rules as at present in force.**" (emphasis added) Both agreements were entered into at the time the 1976 version of UNCITRAL Rules were in force. Accordingly, this set of rules controlled the proceedings until the Parties agreed to submit to the 2010 version in paragraph 27 of the Terms of Appointment.

12. Pursuant to Art. 7(2) UNCITRAL Rules (1976 version), Respondents had 30 days after the receipt of this notification to appoint an arbitrator. Respondents missed the deadline. On January 24, 2014 Claimants formally asked the Secretariat of the ICC International Court of Arbitration to appoint an arbitrator in lieu of the Respondents. This request was based on the arbitration agreements set out in Clause 34.3 Settlement Agreement and Clause 16.2 KAP's Shareholders' Agreement, which named the ICC International Court of Arbitration as appointing authority. On February 27, 2014, the ICC International Court of Arbitration appointed Dr. Jernej Sekolec as Arbitrator on behalf of the Respondents.[3]

13. On April 8, 2014 Prof. Dr. Trittmann and Dr. Sekolec informed the Parties of their designation of Juan Fernández-Armesto as Presiding Arbitrator, who accepted the appointment. His contact details are the following:

    Juan Fernández-Armesto
    General Pardiñas 102
    28006 Madrid, Spain
    (jfa@jfarmesto.com)

14. On September 7, 2015 Claimants submitted a notice of challenge against Arbitrator Dr. Jernej Sekolec.[4] Respondents agreed to this challenge and Dr. Sekolec resigned.[5] On September 11, 2015, the Tribunal thanked Dr. Sekolec for his valuable work in the proceedings and invited Respondents to designate another Arbitrator.[6]

15. On September 17, 2015 Respondents jointly appointed Dr. Stefan Rützel as Arbitrator,[7] with the following address:

    Dr. Stefan Rützel
    Gleiss Lutz
    Taunusanlage 11
    60329 Frankfurt am Main, Germany
    (stefan.ruetzel@gleisslutz.com)

[3] The arbitration agreements executed by the Parties provide, with identical language, that "[t]he appointing authority shall be the ICC International Court of Arbitration in Paris." Clause 34.3 Settlement Agreement and Clause 16.2 KAP's Shareholders' Agreement. The appointment procedure was carried out in accordance with Article 3(4) of the *Rules of ICC as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings.*
[4] C-28.
[5] R-27 (Respondents 1 to 4) and R-30 (Respondent 5).
[6] A-17.
[7] R-28 and R-29.

4. ARBITRAL SECRETARY

16. With the express assent of the Parties, the Arbitral Tribunal designated Ms. Mélanie Riofrío Piché as Arbitral Secretary.[8] On May 30, 2014 the Parties received Ms. Riofrío's *curriculum vitae*, her statement of impartiality and independence, and the following contact details[9]:

Ms. Mélanie Riofrio Piché
Armesto & Asociados
General Pardiñas, 102
28006 Madrid, Spain
(mrp@jfarmesto.com)

5. PERMANENT COURT OF ARBITRATION AS MANAGER OF THE FUNDS

17. As set out in the Terms of Appointment, the Permanent Court of Arbitration (PCA) has served as manager of the funds deposited by the Parties to cover the Arbitral Tribunal's fees and the expenses incurred in this arbitration.[10]

18. The contact details of the PCA are the following:

Permanent Court of Arbitration
Attn: Mr. Martin Doe
Peace Palace
Carnegieplein 2
2517 KJ The Hague, The Netherlands
(mdoe@pca-cpa.org; bureau@pca-cpa.org)

6. ARBITRATION AGREEMENTS

19. This arbitration has been brought under the arbitration clauses set out in the two contracts from which the dispute arises: the Settlement Agreement ["**Settlement Agreement**"] and the KAP Shareholders' Agreement ["**KAP's Shareholders' Agreement**"].

20. The Settlement Agreement was executed on November 16, 2009, between En+ (Claimant 1), CEAC (Claimant 2), and Respondents 1 to 5,[11] and came into effect on October 26, 2010.[12] Its Clause 34.3 provides the following arbitration agreement:

[8] A-2, para. 8, C-6, and Respondents' letter dated June 5, 2014.
[9] C-6 and Respondents' communication of June 5, 2014.
[10] Terms of Appointment, paras. 38–42.
[11] Rudnici Boksita A.D. Niksic—initially, Respondent 6—was a signatory of the Settlement Agreement as well. Exh. C-9, para. 2.
[12] Exh. C-10.

> "a) Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Rules as at present in force without recourse to the ordinary courts of law. The appointing authority shall be the ICC International Court of Arbitration in Paris. The number of arbitrators shall be three (3). The place of arbitration shall be in Vienna. The language to be used in the arbitral proceedings shall be English."

21. The KAP's Shareholders' Agreement was signed by CEAC (Claimant) and the State of Montenegro (Respondent 1) on October 26, 2010.[13] Clause 16.2 KAP's Shareholders' Agreement contemplates an arbitration agreement in the following terms:

> "Any dispute, controversy or claim arising out of or in connection with this KAP Shareholders' Agreement, including, but not limited to, its termination or invalidity, shall be settled by arbitration proceedings in accordance with the UNCITRAL Rules as at present in force without recourse to the ordinary courts of law. The appointing authority shall be the ICC International Court of Arbitration in Paris. The number of arbitrators shall be three (3). The place of arbitration shall be in Vienna. The language to be used in the arbitral proceedings shall be English."

22. The Tribunal notes that none of the Parties has asserted any jurisdictional objection.

7. PROCEDURAL RULES

23. The Parties agreed in the Terms of Appointment that the 2010 version of the UNCITRAL Arbitration Rules governs the conduct of these proceedings.[14]

8. SUBSTANTIVE LAW

24. Clause 34.1 of the Settlement Agreement and Clause 15.1 KAP's Shareholders' Agreement designate the law applicable to the merits of the dispute.

25. Clause 34.1 of the Settlement Agreement provides the following:

> **"34.1. Governing Law.**
>
> (a) This Agreement, including the arbitration clause, is governed by the **laws of Montenegro**, **excluding international private law and the CISG**, except as provided in the next provision of this clause.

[13] Exh. C-12, page 2.
[14] Terms of Appointment, para. 27.

> (b) The provision of this Agreement on the termination of the SPAs (clause 17), on the termination of the Arbitration Proceedings (clause 26) and on the waiver of claims in the Arbitration Proceedings (clause 27) shall be governed by the **law of the Federal Republic of Germany, excluding international private law and the CISG**." (emphasis added)

26. Clause 15.1 of the KAP's Shareholders' Agreement reads as follows:

> "This KAP Shareholders' Agreement and the rights of the Parties hereto shall be governed by and construed with **the laws of Montenegro**." (emphasis added)

9. PLACE OF ARBITRATION AND THE LANGUAGE OF THE PROCEDURE

27. The place of this arbitration is Vienna, Austria,[15] and its language, English.[16]

10. SUMMARY OF THE ARBITRAL PROCEEDINGS

A. Commencement of the arbitration

28. On November 12, 2013 En+ and CEAC, as Claimants 1 and 2, served on Respondents 1 to 6 a Notice of Arbitration pursuant to Art. 3 UNCITRAL Rules.[17]

29. On July 21, 2014 the Tribunal and the Parties held a preliminary conference call, where they discussed the terms of appointment, the first procedural order, and the procedural timetable.[18]

30. The Arbitral Tribunal made its Procedural Order No. 1 on August 22, 2014. Based on the Parties' agreement,[19] the order set the procedural timetable and other particulars concerning the conduct of the proceedings, such as the scope and number of submissions, document production, time extensions, language or the tribunal's powers.

31. On the same day the Parties and the Arbitral Tribunal adopted the Terms of Appointment,[20] describing the positions of each Party, the relief sought, the arbitral agreement, the applicable substantive law, the place and language of the arbitration, and the remuneration of the tribunal, together with some other matters of procedure. The Parties further agreed that the 2010 version of the UNCITRAL

[15] Terms of Appointment, para. 28.
[16] Terms of Appointment, para. 30.
[17] C-1.
[18] A-7 and A-8.
[19] C-13 and R-13.
[20] R-12, R-14, R-15, and C-15.

Arbitration Rules should govern the conduct of the proceedings,[21] and designated the Permanent Court of Arbitration to manage the funds deposited to cover the costs.[22]

B. First submissions on the merits

32. On September 30, 2014 Claimant 2 (CEAC) submitted its Statement of Claims, advising that it was not bringing any claims against RBN (Respondent 6), and that En+ (Claimant 1) was not asserting any claims in this arbitration. Claimants thus asked the Tribunal to issue an order terminating the arbitral proceedings with regard to En+ (Claimant 1). Attached to the brief were 195 exhibits on facts and 17 on legal authorities.

33. On January 30, 2015 Respondents 1 to 4 submitted their Statement of Defence and Counterclaim, together with 105 exhibits on facts and 22 on legal authorities.[23] Respondents 5 and 6 did not submit any pleadings.

C. Applications for termination as to some Parties

34. On April 23, 2015 the Tribunal issued Procedural Order No. 2, ruling on the Parties' requests[24] to terminate the proceedings with regard to Claimant 1 and Respondents 5 and 6 as follows:

- The Tribunal refused to terminate the proceedings as to En+ (Claimant 1). Pursuant to Art. 30(1)(a) UNCITRAL Rules, where a claimant has failed to communicate its statement of claim—like Claimant 1 in these proceedings—the arbitral tribunal shall issue an order for the termination of the arbitral proceedings as to the claimant, "unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so." Here, Respondents 1 to 4 had brought a counterclaim against both Claimants, contending they were jointly and severally responsible for the alleged damages. The Tribunal found this counterclaim to be one of such "remaining matters" under Art. 30(1)(a) UNCITRAL Rules that had to be resolved in the merits of the dispute. A termination as to Claimant 1 was therefore not warranted.
- The Tribunal did terminate the proceedings as to Respondent 6. Also based on Art. 30(1)(a) UNCITRAL Rules, the Tribunal found no "remaining matters" existed here because neither the Claimants had brought a claim against Respondent 6 nor Respondent 6 had asserted any counterclaim against the Claimants.

[21] Terms of Appointment, para. 27.
[22] *See* Terms of Appointment, paras. 38–42.
[23] R-21 and R-22.
[24] R-20, C-20, and C-21.

– Finally, the Tribunal ordered the proceedings to continue in respect of Respondent 5. Under Art. 30(1)(b) UNCITRAL Rules, the fact that Respondent 5 failed to file a response to the notice of arbitration, nor a statement of defense, does not affect the continuation of the arbitral proceedings.[25]

D. Second submissions on the merits

35. On April 30, 2015 CEAC and En+ submitted a Statement of Reply and Defence to the Counterclaims.[26]

36. On July 30, 2015 Respondents 1 to 4 submitted their Statement of Rejoinder and Reply to Defence to Counterclaims.[27]

37. On September 30, 2015 En+ and CEAC (as Counter-Respondents 1 and 2) submitted a Statement of Rejoinder to the Counterclaim.[28]

38. By letter of the same day,[29] En+ and CEAC submitted the names and statements of six fact witness (Mr. Dmitry Potrubach,[30] Mr. Pavel Priymakov,[31] Mr. Yuri Moiseev,[32] Mr. Vyacheslav Krilov,[33] Mr. Sergey Pechenin,[34] and Mr. Igor Ermilin[35]) together with expert reports prepared by Profs. Drs. Vladimir Pavić and Milean Dordević,[36] Wood Mackenzie Ltd.,[37] and KPMG AG.[38]

39. On October 7, 2015 Respondents 1 to 4 submitted[39] written statements by witnesses Mr. Branko Vujović,[40] Mr. Boris Bušković,[41] and Mr. Mitar Bajčeta,[42]

[25] Article 30(1)(b) UNCITRAL Rules reads as follows: "If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause: The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations . . . ."
[26] C-22 (cover letter) and C-23 (pleading).
[27] R-24 (cover letter) and R-25 (pleading).
[28] C-29.
[29] C-30.
[30] CWS1.
[31] CWS2.
[32] CWS3.
[33] CWS4.
[34] CWS5.
[35] CWS6.
[36] CEX1.
[37] CEX2, CEX3, and CEX4.
[38] CEX5.
[39] R-31.
[40] RWS1.
[41] RWS2.
[42] RWS3.

together with two expert opinions: one prepared by Assistant Professor Sanja Radovanović,[43] and another by Prof. Vladimir Savković.[44]

E. Hearing

40. On October 30, 2015 En+ and CEAC, jointly, and Respondents 1 to 4, jointly, submitted their Final Pre-Hearing Statements.[45]

41. On November 30, 2015 En+ and CEAC decided to call to the hearing and cross-examine all the fact witnesses and expert witnesses presented by Respondents 1 to 4.[46] On the same day Respondents 1 to 4 said they were calling to the hearing, and intended to cross-examine, all persons who had produced a witness statement, opinion, or report on behalf of En+ and CEAC.[47]

42. Based on the Parties' agreements[48] the Arbitral Tribunal issued Procedural Order No. 3 on December 1, 2015. The order specified certain details of the evidentiary hearing, such as place and time, list of attendants, schedule for each session, time allocation, order of examination of witnesses, transcription and simultaneous interpretation, post-hearing submissions, and allocation of costs.[49]

43. On December 4, 2015 En+ and CEAC stated that the fact witnesses Mr. Sergey Pechenin and Mr. Igor Ermilin would not be available at the evidentiary hearing due to "unforeseen and indispensable reasons."[50] By letter of the same date Respondents 1 to 4 objected to the witnesses' failure to appear.[51]

44. The Tribunal and the Parties held an evidentiary hearing in Vienna, Austria, from December 7 to 11, 2015.

45. On December 16, 2015 the Arbitral Tribunal issued Procedural Order No. 4, covering a number of issues agreed by the Parties at the evidentiary hearing and listing a number of exhibits added to the file.

46. The Parties submitted their post-hearing briefs on February 29, 2016,[52] and their statements on costs on March 14, 2016.[53]

[43] REX1.
[44] REX2.
[45] C-33 and R-32.
[46] C-37.
[47] R-35.
[48] A-24 and C-34.
[49] A-25.
[50] C-39.
[51] R-37.
[52] C-41 and R-43.
[53] C-44 and R-47.

F. Further motions: updated prayers for relief and additional evidence

47. On May 13, 2016 the Parties submitted, at the Tribunal's request,[54] an updated version of their prayers for relief.[55]

48. On April 29, 2016, the Tribunal asked the Parties a few questions about the "New Business Plan" mentioned in Clause 15 of the Settlement Agreement, namely, if such document existed and if it had been already introduced as evidence.

49. On May 13, 2016, CEAC replied to the Tribunal's inquiry that the business plan had not been introduced in this arbitration yet but it was unable to locate it after a thorough review of its records and electronic archives.[56] On the other hand, Montenegro's reply, filed on the same date, conveyed that Montenegro never received from CEAC any document that would have complied with the requirements of Clause 15 of the Settlement Agreement.[57]

50. One week later, on May 20, 2016, CEAC sought the Tribunal's leave to introduce three emails, which would prove, in its view, that the business plan was actually provided.[58]

51. By communication of May 20, 2016, the Tribunal asked Montenegro to react to CEAC's request by May 26, 2016.[59]

52. On May 26, 2016, Montenegro objected to CEAC's request to introduce the three emails into the record because they are "irrelevant." Attached to their communication, Montenegro proffered a slide presentation in Montenegrin language that – under the title of "Business Plan 2010-2012" – is dated November 2009. Montenegro declared it is "in possession of no other document bearing a date closer to the hearing," and asked the Tribunal to admit into evidence an English translation of this document.[60]

53. On June 14, 2016, after consulting the Parties, the Tribunal admitted into evidence the exhibits proffered by both Parties. The Tribunal set time limits for the parties to submit the exhibits formally and to comment on them, which they did in due course.[61]

54. On September 15, 2016, the Tribunal declared the proceedings closed.

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[54] A-29.
[55] C-47 and R-49.
[56] C-47.
[57] R-49.
[58] C-48.
[59] A-30.
[60] R-50.
[61] A-32, C-50, R-52, C-51, and R-53.

11. RENDERING OF THIS FINAL AWARD

55. Upon the Parties' agreement, the Tribunal undertook to render this Final Award on January 12, 2017.[62]

56. This Final Award is issued on the requested date.

[62] A-34.

II. FACTUAL BACKGROUND

1. *DRAMATIS PERSONAE*

57. **CEAC** Holdings Limited (Claimant and Counter-Respondent 2) is a company established in 2005 under the laws of Cyprus and a fully owned subsidiary of En+ Group Limited.[63]

58. **En+** Group Limited (Counter-Respondent 1) is a corporation registered under the laws of the Bailiwick of Jersey in 2006, as a holding company of the worldwide investments of the group. En+'s investments consist mostly of energy-related companies, located predominantly in Russia.[64]

59. The **State of Montenegro** (Respondent 1) is a sovereign state.

60. Fund for Development of Montenegro, Republic Fund for Pension and Disability Insurance, and Bureau for Employment of Montenegro (Respondents 2, 3, and 4, respectively) are three Montenegrin state entities.

61. **Kombinat Aluminijuma Podgorica A.D. – KAP** (Respondent 5) is a company incorporated under Yugoslav law in 1960, mainly engaged in the production of alumina, lime and aluminum. KAP's facilities include an anode plant, a primary aluminum smelter, and casting facilities located outside Podgorica, the capital of Montenegro. In December 2012 its main shareholders were CEAC—with a 29.4% stake—and Montenegro—with another 29.4% of KAP's equity. The remaining shares were publicly traded in the Montenegro Stock Exchange.[65]

62. **Rudnici Boksita A.D. Nikšić – RBN** (initially, Respondent 6) is a bauxite mines company also located in Montenegro.

63. **Elektroprivreda Crne Gore A.D. Nikšić** ["**EPCG**"] is a Montenegrin energy company established in 1998 with the purpose of generating and supplying electricity in the region. EPCG is majority owned (55%) by Montenegro. Its second largest shareholder is A2A, a publicly listed Italian utility provider, which holds 43.7% of EPCG's shares. Minority shareholders own the remaining stock.[66]

[63] CEX-5, p. 7.
[64] CEX-5, p. 7.
[65] CEX-5, p. 7.
[66] CEX-5, p. 8.

2. SUMMARY OF THE DISPUTE

64. This dispute arises from the alleged breach of a Settlement Agreement ["**Settlement Agreement**"] signed by the State of Montenegro and three of its agencies, on the one hand, and En+ and its subsidiary CEAC, on the other. The settlement terminated an ongoing arbitration between the parties concerning CEAC's purchase of a majority shareholding in KAP, an aluminum smelter formerly owned by the State and its agencies. In addition to settling all claims, the agreement created new rights and duties on the signatories, meant to achieve the financial recovery of KAP. Notwithstanding these commitments, a few years later KAP went bankrupt. CEAC has now brought this arbitration asserting that Montenegro breached its main duties under the Settlement Agreement. In turn, Montenegro seeks to exact contractual penalties for CEAC's and En+'s alleged breaches of some provisions of the Settlement Agreement.

3. PRIVATIZATION OF KAP AND RBN

65. In 2004 the State of Montenegro launched a tender offer to sell its majority shareholding in KAP, the aluminum smelter company located in Montenegro. The company had been created in the 1960s as a "socially-owned company," at a time when Montenegro was still a Republic within the Socialist Federal Republic of Yugoslavia. For decades KAP played an important role in the country's economy.

66. CEAC won the tender, and acquired 65% of KAP's shares from three Montenegrin state entities that were formally the owners of the shares (Fund for Development of Montenegro, Republic Fund for Pension and Disability Insurance, and Bureau for Employment of Montenegro).

67. The parties formalized the purchase in an Agreement for the Sale and Purchase of KAP's Shares, which closed on November 30, 2005 [the "**KAP Sales Agreement**"].[67]

68. Around this time CEAC also bought from the same state entities 32% of the shares in RBN, a mining company located in Montenegro.[68] The RBN mines had long provided KAP with bauxite, the ore out of which alumina is extracted. The parties closed an Agreement for the sale and purchase of RBN's shares on November 30, 2005 [the "**RBN Sales Agreement**"], the same date the KAP Sales Agreement was closed.[69]

[67] C-16, paras. 8 and 9. Exh.C-2 (SPA-KAP including its Annexes), Exh.C-3 (Amendment of October 24, 2005), Exh.C-4 (Closing Documents), and Exh. C-5 (Appendix to Annex 10).
[68] C-16, para. 6. Exh. C-1 (SoM's Privatization Strategy of June 2004).
[69] C-16, para. 10. Exh. C-6 (SPA-RBN including its Annexes), Exh. C-7 (Closing Documents), and Exh. C-8 (the Supplement to the SPA-RBN).

69. In 2008 CEAC acquired some additional shares in KAP, reaching a 58.7% capital participation.[70]

4. FIRST ARBITRATION

70. About two years after the KAP Sales Agreement, in November 2007, CEAC initiated arbitral proceedings against Montenegro and its agencies in Frankfurt am Main, Germany ["**First Arbitration**"]. CEAC claimed that numerous representations made by Montenegro in the KAP and RBN Sales Agreements were wrong or had been breached by the sellers.[71]

71. Two years down the road, and after lengthy negotiations, the Parties reached an agreement ending the arbitration and settling all their outstanding claims. The settlement was formalized in two steps:

- first in a Memorandum of Understanding [the "**MoU**"] between En+ and Montenegro, signed on June 2, 2009 and then

- in the Settlement Agreement executed on November 16, 2009.

5. MEMORANDUM OF UNDERSTANDING

72. The Memorandum of Understanding ["**MoU**"] is a three-page document that summarizes the basic aspects of the compromise reached by the parties: [72]

- En+ undertakes to transfer 50% of its shares in KAP and RBN to Montenegro, for free, so that En+ and Montenegro own the same amount of shares in both companies. Montenegro is entitled to designate a person of its choosing as member of the board of directors, who will have a right to veto certain corporate decisions.[73]

- In exchange, Montenegro undertakes (i) to issue State guarantees to loans to KAP in an amount of € 135 million and (ii) to subsidize the price of electricity for the period 2009–2012.[74]

- En+ shall have the right to repurchase the shares in KAP and RBN if the restructuring is successful.[75]

[70] C-16, para. 16.
[71] C-16, para. 16 and 18.
[72] Exh. R-11.
[73] Clauses 1 and 9.
[74] Clauses 4 and 5.
[75] Clause 2.

- If KAP and RBN still show an operating loss "part of that loss shall be covered by En+ with the implementation of other measures. [Montenegro] would have no obligation to cover the remainder of the loss."[76]

- Both parties waive all claims from the First Arbitration.

6. THE SETTLEMENT AGREEMENT

73. On November 16, 2009 all the entities involved in the First Arbitration – En+, CEAC, KAP, RBN, Montenegro and its three public agencies – executed a Settlement Agreement,[77] which closed and came into effect about a year later, on October 26, 2010, once the parties had signed the closing certificates.[78]

74. The aim of the Settlement Agreement is to "[fulfill] the intentions of the MoU," which is described as "outlining the cornerstones of this Agreement."[79] The parties specifically agreed that the Settlement Agreement would replace and supersede the MoU.[80] Clause 34.7 of the Settlement Agreement contains a merger clause, stating that the text of the contract, together with all the documents referred therein, constitute the final and complete integration of the Parties' bargain:

> "34.7. Entire Agreement.
>
> This Agreement (together with any documents referred to of this Agreement) contains the entire agreement and understanding of the Parties and supersedes all prior agreements, understandings or arrangements (both oral and written) relating to the subject matter of this Agreement. Side-letters or supplementary agreements to this Agreement do not exist."

Termination of the First Arbitration

75. The immediate effect of the Settlement Agreement was to terminate the First Arbitration. In accordance with Clause 26, the Parties jointly requested the arbitral tribunal to terminate the arbitration proceedings.[81] The tribunal did so on November 16, 2010.[82]

76. Further, the parties agreed under Clause 27 of the Settlement Agreement to waive "any rights or claims they may have against each other and asserted" in the First

[76] Clause 6 c).
[77] Exh. C-9 (Settlement Agreement), paras. 2 and 3.
[78] Exh. C-10 (Closing certificates).
[79] Recital M.
[80] "Therefore" Clause and Clause 34.7.
[81] Exh. C-9, Clause 26.1 Settlement Agreement.
[82] C-16, para. 36.

Arbitration.[83] The waiver expressly concerned "any claim regardless of whether such claim is accepted or disputed, known or unknown, due or not due yet."[84]

77. In addition to settling the First Arbitration and waiving all the parties' claims, the Settlement Agreement created a new catalogue of rights and duties, mostly of financial nature, aimed at restructuring KAP and overcoming its difficult situation. The performance of some of these new rights and duties are the subject matter from which the present dispute arises.

An overview of the Settlement Agreement

78. Most claims and counterclaims in this arbitration turn on the alleged breach of the Settlement Agreement (although Claimant's Primary Damage Claim is based on the First Arbitration). This section provides a general overview of the Settlement Agreement.

79. The Settlement Agreement comprises 34 numbered clauses. These clauses are preceded by 13 recitals, a definition section, and a list of the 13 appendixes attached.[85] The document was executed in English. The recital section summarily describes the circumstances surrounding the agreement, its contents, and the general intent of the parties.

80. The Tribunal will now turn to the specific provisions of the Settlement Agreement that are material to the present dispute.

A. Recitals

81. The recitals show that the general thrust of the MoU found its way into the Settlement Agreement: CEAC sells 50% of its shares in KAP and RBN to Montenegro, for a purchase price of € 1, and the relationship between Montenegro and CEAC as joint shareholders of KAP (with around 29.4% each) is formalized in a Shareholders' Agreement [the "**Shareholders' Agreement**"].[86] In exchange, Montenegro "intends to subsidize KAP's electricity supply and to issue State guarantees to KAP in the aggregate amount of up to EUR 135.000.000."

[83] Exh. C-9, Clause 27.1 Settlement Agreement.
[84] Exh. C-9, Clause 27.1 Settlement Agreement.
[85] The annexes listed in and attached to the Settlement Agreement are the following: Appendix 1: Protocol Performance Bond 1; Appendix 2: Protocol Performance Bond 2; Appendix 3: Shareholders' Agreement KAP; Appendix 4: Shareholders' Agreement RBN Appendix 5: EPCG Framework Agreement; Appendix 6: New Concession Agreement; Appendix 7: Minimum Investment Programme; Appendix 8: Baseline Reports of KAP and RBN; Appendix 9: New Performance Bond; Appendix 10: Closing Certificates; Appendix 11: Agreement on Transfer of the Forfeiture Shares; Appendix 12: KAP Social Programme and RBN Social Programme; and Appendix 13: Joint letter of the Parties to the Arbitral Tribunal.
[86] Exh. C-12. There would be a second Shareholders' Agreement for RBN, which is irrelevant for this arbitration.

82. The purpose of the transaction is outlined by the important Recital D, which must be quoted in full:

> "D. 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 [State of Montenegro]. 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. Transfer to Montenegro of 50% of the shareholding in KAP

83. Clause 1 provides that CEAC will transfer to Montenegro for free (technically, for € 1) half of the shares that CEAC owned in KAP, so that both parties reach the same number of shares in the company (around 29.4% each). The relationship between the co-shareholders was to be formalized in the KAP's Shareholders' Agreement, which was duly executed on October 26, 2010.[87]

84. CEAC has an option, in accordance with Clause 2, to repurchase after January 1, 2010, the shares sold to Montenegro at the higher of stock exchange price, fair market value or nominal value. The exercise of such option is conditional on the fulfillment of the following requisites (which act as an indicator that the restructuring has been successful):

- First, the State guarantees have been released and repaid;
- Second, KAP has no outstanding liability towards EPCG (the Montenegro electricity supplier, controlled by the State);
- Third, the Framework Agreement to be signed between KAP and EPCG has expired or ended;[88]
- Fourth, the future supply of electricity to KAP has been secured, either (i) because KAP agreed with EPCG to pay the electricity at the price stipulated by the Energy Regulatory Agency of Montenegro ["**ERAM**"] for major electricity consumers or (ii) at any other price or (iii) KAP has an electricity supply agreement with other suppliers.

C. State guarantees

85. Pursuant to Clauses 4 through 9 Montenegro promises, as a closing condition, to issue at least five sovereign guarantees on KAP's loans with different lenders, for

[87] Exh. C-12 (KAP's Shareholders Agreement).
[88] Exh. C-55. KAP and EPCG were to sign a "Framework Agreement" for the supply of electricity from January 1, 2009, to December 31, 2012. This Agreement was eventually signed on February 23, 2010.

a minimum total amount of € 131 million. Relevant to this case is Montenegro's commitment, under Clause 8 of the Settlement Agreement, to issue a sovereign State guarantee for a "new working capital facility" with a future lender in the amount of € 22 million.[89]

86. KAP undertakes in Clause 10.1 to indemnify Montenegro from and against any payments that Montenegro could be forced to make if the State guarantees are executed.

87. In turn, CEAC pledges all of its shares in KAP as security for the indemnity granted by KAP. Under Clauses 28.1(g) and 28.4.2, if the amount disbursed by Montenegro under the State guarantees exceeds € 40 million, Montenegro is entitled, among other options, to request that "CEAC shall transfer immediately to [Montenegro] all shares it owns in [KAP and RBN]."

D. Electricity supply

88. Clause 11 is devoted to the supply of electricity to KAP.

89. The parties agree that KAP and EPCG would sign a "**Framework Agreement**" for the supply of electricity from January 1, 2009, to December 31, 2012. This Agreement was eventually signed on February 23, 2010.[90]

90. Under Clause 11.4 Montenegro also agreed to pay a subsidy for the electricity supplied by EPCG to KAP in the years 2009–2012, in accordance with a certain formula, up to an annual cap, which was agreed as follows:

- € 15 million in 2009,
- € 20 million in 2010,
- € 18 million in 2011, and
- € 7 million in 2012.

Best endeavours obligation

91. Finally, in Clause 11.5 both parties assumed the following "best endeavours" obligation with regard to the supply of electricity to KAP:

> "For the purpose of achieving the maximum production quantities and optimal price, the Parties intend to use, within the terms and conditions of the Montenegrin legislation, their best endeavours to enable supplying of the electric energy, to KAP."

[89] *See* Clause 8 Settlement Agreement (titled "New Working Capital Facility").
[90] Exh. C-55.

E. CEAC's undertakings

92. Clauses 18, 19, 20, and 21 include a long list of obligations, positive undertakings, and negative undertakings assumed by CEAC. Relevant to this arbitration are the following items:

Positive undertakings

93. Clause 20.1 lists CEAC's "positive undertakings," with regard to which CEAC undertakes to "take all action necessary to do, or cause to be done or taken." Two are relevant to this case:

94. The first positive undertaking in Clause 20.1.a) is that CEAC "ensures that not less than the amounts as set out in more detail in the Minimum Investment Programme" are invested by KAP within the agreed timeframe; the clause then adds that "any investment shall not be made by way of a capital contribution."

95. The second positive undertaking requires "that CEAC provides for the New Performance Bond" in an amount of € 2 million before December 31, 2012.[91]

96. Clause 19.1.a) lists an additional positive undertaking. CEAC commits "to take all action necessary to do, or cause to be done or taken" to ensure that KAP submits to Montenegro within one month after the last day of each investment period a so-called "Investment Report," prepared by an internationally reputable accounting firm approved by the State, stating the measures taken by CEAC to comply with its minimum investment obligations. In case of non-compliance, the report has to describe clearly the reasons for such non-compliance.

Negative undertakings

97. Clause 21.1 lists a number of negative undertakings, which "CEAC will not carry out, nor permit or allow […] to be carried out or otherwise occur, without the prior written consent of [Montenegro], that shall not be unreasonably withheld." Among these undertakings the following two are relevant to this arbitration:

98. Under Clause 21.1.e) CEAC undertakes not to permit "any voluntary liquidation, bankruptcy or administration (or similar proceeding) of KAP." And under Clause 21.1.l) CEAC promises to not allow "any delay in fulfilling obligations of KAP to EPCG exceeding three months' electricity supply bills."

Penalties

99. The Agreement imposes significant penalties on CEAC for breaching its commitments relating to the Minimum Investment Programme. The reasoning is explained in Clause 22.1:

[91] Clause 23.1.

> "22.1. CEAC acknowledges and confirms that the SoM acting in the general interest, has attached significant importance to CEAC's commitments made under this Agreement in relation to the Minimum Investment Programme with a view to, inter alia, advancing the overall economic and social development of the SoM in the five (5) year period immediately following the Closing Date. The SoM is entitled to claim damages for any breach of this Agreement including any loss or damage to the environment and economy of Montenegro."

100. Under Clause 22.2 CEAC undertakes to pay a "penalty" of € 5,000 per day for any breach of its investment obligation, and of € 1,000 per day for any breach of its obligation to deliver the annual Investment Report; such penalty does not release CEAC from fulfilling its obligations (Clause 22.3).

Pledge and Call Option in Shares

101. Under Clause 22.6 Montenegro may exercise a pledge or a call option on the shares in KAP held by CEAC, if CEAC breaches any of its positive or negative undertakings.

F. Failure of Restructuring and limitation of liability

102. Both parties were aware that restructuring of KAP was fraught with difficulties. This is the reason why the Settlement Agreement devotes an entire section, under the title of **"Failure of Restructuring,"** to deal with such scenario.

103. Clause 28.1 foresees that it is Montenegro—and Montenegro only —who can trigger the failure of the restructuring, by giving written notice to CEAC that a so-called "**Failure Event**" has occurred.

104. Again, it must be stressed that the Failure Event can only be invoked by Montenegro. Clauses 28.2 and 28.3 describe the procedure that Montenegro must follow.

105. If a Failure Event occurs Montenegro is entitled to "exercise its right to effect the consequences" of such Failure Event, by declaring a so-called "Failure of Restructuring," with the following consequences:

- First, CEAC "shall transfer immediately to [Montenegro]" all the shares it owns in KAP; and Montenegro "shall not be obliged to provide any payment, including indemnification, for any share."[92]
- Second, the Call Option that Montenegro granted to CEAC under Clause 2 expires.

[92] Clause 28.4.8.

- Third, Clause 28.4.7 mandates that each Party shall be liable to the other for any damage (i) that "occur[ed] as a consequence" of the Failure Event, and (ii) "that was caused by that Party."
- Fourth, all obligations of the Parties under the Settlement Agreement are terminated (but the termination of the First Arbitration and of the SPAs remains unaffected).

106. Clauses 28.5 and 28.6 contain two important additional rules:

107. First, these clauses clarify that the liability arising from a Failure of Restructuring is limited to any damage caused to the other Party (as provided for in Clause 28.4.7), "any other legal consequences of the Failure of this Agreement [being] expressly excluded."

108. Second, reinforcing such principle, it is expressly agreed that no party shall have any "claim of whatsoever kind" against any other party resulting from the Failure of Restructuring or, in general, arising "out of this Agreement," with the exception that[93]

- if the Failure of Restructuring "was caused" by Montenegro, Montenegro will be liable to CEAC, and
- *vice versa*, if it "was caused" by CEAC, CEAC will be liable to Montenegro for any damage.

G. Invalidity and omissions

109. Clause 34.9 provides as follows:

> "34.9 Invalidity and Severability. If one or several provisions of this Agreement are or become invalid or unenforceable, the remaining provisions hereof shall not be affected thereby, and instead of the invalid or unenforceable provision such valid and enforceable provision shall be deemed to be agreed as the Parties would have chosen on entering into this Agreement in order to reach the economic effect of the provision to be replaced, if they had foreseen the invalidity or unenforceability. The foregoing shall apply accordingly to matters on which this Agreement is silent."

110. Clause 34.9 covers two discrete issues:

- First, it regulates partial invalidity of the Agreement: if a clause is invalid or unenforceable, it shall be deemed replaced by the clause the parties would have chosen in order to reach the same economic effect.

[93] Clause 28.4.7.

– Second, it regulates matter "on which this Agreement is silent" and provides that the same rule be applied, *i.e.*, that the Agreement is deemed to include the clause the parties would have chosen in order to reach the same economic effect.

H. Miscellanea

111. The Settlement Agreement also provides for, *inter alia*, the repayment of several debts to KAP's suppliers and State authorities (Clause 12), some waivers of the outstanding liabilities and claims between KAP, RBN, CEAC, En+, and Montenegro (Clause 13), the presentation by CEAC of a 5-year investment programme and action plan for KAP (Clauses 18 and 20), or the provision by CEAC of a renewable performance bond in favor of Montenegro (Clause 23).

7. CLOSING OF THE SETTLEMENT AGREEMENT

112. Although the Settlement Agreement was signed on November 16, 2009, it did not immediately enter into force: Clauses 29 and 30 provide that the Settlement Agreement shall come into effect upon the "cumulative occurrence" of a number of "closing conditions" and "closing activities."[94] It took almost one year for all these conditions and activities to occur. It was only on October 26, 2010 [the "**Closing Date**"] that the Parties finally were able to sign the closing certificate ["**Closing Certificate**"][95] and to proceed with the closing.

8. KAP'S SHAREHOLDERS' AGREEMENT

113. One of the closing conditions was that the Parties enter into a shareholders agreement. On the Closing Date CEAC and Montenegro eventually entered into the KAP's Shareholders Agreement.[96]

114. Since CEAC alleges the breach of some of its provisions, it may be useful to make a short presentation of the contract and the relevant clauses.

115. The KAP's Shareholders Agreement comprises 18 clauses, preceded by a 4-paragraph preamble.[97]

[94] Exh. C-9, Clauses 29.1 and 30.1 Settlement Agreement. Exh. C-9, Clause 30.1(a)(i) Settlement Agreement. Exh. C-9, Clause 30.1(a)(iii) Settlement Agreement. Exh. C-9, Clause 30.2(i) Settlement Agreement. Exh. C-9, Clause 30.2(iii) Settlement Agreement. Exh. C-9, Clause 30.2(ix) Settlement Agreement.
[95] Exh. C-10 (Closing certificates).
[96] Exh. C-12 (KAP's Shareholders Agreement).
[97] Exh. C-12 (KAP's Shareholders Agreement), pages 2 and 3.

A. Transfer of 50% of shares

116. Pursuant to Clause 2 of KAP's Shareholders Agreement, CEAC transfers 50% of its shares in KAP – over 3 million shares – to Montenegro, so that CEAC and Montenegro hold the same quantity of shares. Pursuant to Clause 2.2 the total purchase price was agreed to be one Euro (€ 1). The nominal value of each share in KAP was around € 5 (*i.e.* total nominal value amounted to approximately € 15 million).[98]

B. Board of Directors

117. Under Clause 3.1 the Parties agree that KAP's board of directors consists of five members. CEAC can nominate three directors (Clauses 3.1.b) and d)) and Montenegro, one (Clause 3.1.c)). In accordance with Clause 3.2, CEAC is entitled to nominate the chairman of the board and the executive director of the company.

C. Pooling agreement

118. Under Clause 4 CEAC and Montenegro agree to exercise their voting rights jointly (in the general assembly or in the board of directors) with regard to certain important matters, after having agreed a common position in writing. These important matters, requiring previous written agreement between the parties, include, among others, the following:

- do or permit or suffer to be done any act whereby KAP may be wound up (whether voluntarily or compulsorily) (Clause 4.1 c));
- pass decisions on the restructuring, liquidation or bankruptcy of KAP (Clause 4.1.c));
- enter into any contract or transaction, except (i) in the ordinary and proper course of business, (ii) at arm's length, and (iii) the amount does not exceed € 5 million (Clause 4.1.i)).

D. Veto right

119. Clause 5.1 gives to Montenegro a "veto right" on some specific matters to be approved by the board of directors and the general assembly. The matters in which Montenegro has a veto right include:

- appointment of auditors, of the executive director and the chairman of the board of directors (Clause 5.1. a) and b));
- adoption of business plan, remuneration of employees, payment of debts, closing or winding up of plants, levels of production (Clause 5.1.c) and d));

[98] Exh. C-12, Clause 2.2(b) KAP's Shareholders' Agreement.

- disposals or encumbrances of assets in an amount of more than € 5 million (Clause 5.1.f));
- contracts or transactions in a value of more than € 5 million, if not included in the business plan (Clause 5.1.g)); and,
- borrowing or raising money, except for loans set out in the Settlement Agreement (Clause 5.1.h)).

120. The compliance by both parties of the pooling arrangements and of Montenegro's veto rights is protected by penalty clauses (Clause 13).

E. Covering of losses

121. The Shareholders' Agreement also includes some provisions on the accrual of losses, a situation likely to arise due to the hard economic situation of KAP. Clause 8 provides two rules for this scenario:

- First, it was agreed that KAP's loss "shall be covered in the manner prescribed by Montenegrin law" (Clause 8.1).
- Second, Montenegro will "not have an obligation to cover any losses of the Company" (Clause 8.2).

122. Clause 8.2 clarifies an important issue, which had already been anticipated in the MoU: Montenegro was assuming certain obligations to provide support to KAP, but apart from those obligations, the State rejected any obligation to cover any additional loss incurred by KAP[99].

F. Invalidity and omissions

123. The Shareholders' Agreement also contains a clause addressing the partial invalidity and omissions of the contract. Clause 18.2 provides as follows:

> "18.2. Should individual provisions of this KAP Shareholders' Agreement be or become ineffective or should it transpire that this KAP Shareholders' Agreement contains an omission, this shall not affect the effectiveness of the remaining provisions of this KAP Shareholders' Agreement. In such an event the Parties undertake to replace the invalid or missing provision by a valid provision which, as far as possible, reflects the economic purpose of the invalid or missing provision."

124. Although the wording in the Shareholders' Agreement is slightly different, its general thrust is the same as in the Settlement Agreement: missing provisions must be deemed filled in by the provision the parties would have agreed upon "reflect[ing] the economic purpose of the […] missing provision."

[99] *See* Clause 6.c) MoU.

9. AGREEMENT ON THE TRANSFER OF THE KAP SHARES

125. Another document signed on the Closing Date was the "Agreement on Conditional Transfer of the KAP Forfeiture Shares" ["**KAP Transfer Agreement**"],[100] an agreement creating a security on CEAC's shares in KAP in favour of the State of Montenegro.

126. In accordance with this Agreement, CEAC undertook to transfer all of its KAP shares to Montenegro if CEAC incurred in any breach of the positive or negative undertakings assumed in the Settlement Agreement.[101] CEAC went so far as to sign orders to the Montenegrin Central Depository Agency ["**CDA**"], authorizing this Agency to transfer to Montenegro the shares upon the occurrence of a Failure Event and at Montenegro's request.[102]

127. Under Clause 6.1 of the KAP Transfer Agreement "CEAC hereby unconditionally and irrevocably agrees that the CDA registers [Montenegro] as the unconditional owner of the KAP Forfeiture Shares" upon submission of a decision of the Government, providing details of the breach, and a copy of the notice given to CEAC.

128. Any dispute arising from the KAP Transfer Agreement was to be settled by *ad hoc* arbitration, seated in Podgorica, "provided that the transfer of the KAP Forfeiture Shares to [Montenegro], in accordance with the clause 6.1 herein, shall have been completed in time"[103]. Furthermore, the scope of this arbitration

> "shall be limited to establishing whether a breach of clause 6.1. of this Agreement has occurred and, if so, declaring that the transfer of the KAP Forfeiture Shares to [Montenegro] null and void and ordering the CDA the transfer back to CEAC of all or some of the KAP Forfeiture Shares, as the case may be"[104]

10. CEAC'S INITIAL BUSINESS PLAN

129. One of the closing activities provided for in Clause 30.2 of the Settlement Agreement was the delivery by CEAC to Montenegro of a business plan [the "**Business Plan**"] for the two years following the Closing Date:

> "30.2 The activities to be performed by the Parties before the Closing shall be: . . . (iv) Provision of the business plans for the Companies for the next two (2) years after the Closing Date by CEAC to the SoM . . . ."

[100] Exh. R-169.
[101] Clause 2.5.
[102] Appendix C.
[103] Clause 7.1.
[104] Clause 7.1.

130. On Closing Date the Parties signed the Closing Certificate,[105]

> "certify[ing] and confirm[ing] that all Closing Conditions and Closing Activities provided in clause 30 of the Settlement Agreement have been either fulfilled or performed . . . except for the Closing Conditions and Closing Activities waived in this Closing Certificate."

131. The Business Plan does not appear among the closing activities expressly waived in the closing certificate. Consequently, the documents seem to indicate that the Business Plan was actually delivered by CEAC to Montenegro before the Closing Date.

132. In the present arbitration Montenegro has produced a document entitled "Business Plan 2010-2012," delivered by CEAC and dated November 2009 [the "**November 2009 Business Plan**"]. (*Pro memoria*: the Settlement Agreement was signed on November 16, 2009, and closed on October 26, 2010.) Montenegro declares it is "in possession of no other document bearing a date closer to the hearing."[106]

133. CEAC admitted that it could not find the final business plan in its archives, but averred that the document submitted by Montenegro was a preliminary version of such business plan.[107]

134. The Tribunal has examined the Parties' exhibits carefully. Its conclusion is that, in all probability, the document introduced as evidence by Montenegro is not the business plan required by Clause 15 of the Settlement Agreement. While the November 2009 Business Plan submitted by Montenegro was probably issued sometime between November 16, 2009,[108] and the first weeks of 2010, the emails introduced by CEAC show that in February 2010 the Parties were still working on

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[105] Exh. C-10.
[106] R-49 y R-50.
[107] C-50.
[108] The exact date of the November 2009 Business Plan can only be guessed. And the role of this document in the dealings of the parties is far from clear. The November 2009 Business Plan was prepared by Houlihan Lokey, the consulting firm that advised Montenegro and CEAC in KAP's restructuring. The logo of the firm appears on every page of the document. There is no further evidence regarding personal authorship.
The November 2009 Business Plan was issued after the Parties signed the Settlement Agreement on November 16, 2009. This is certain because the first line of the document explains that "[i]n November 2009, a Settlement Agreement was signed between CEAC and the Government of Montenegro."
The November 2009 Business Plan was probably issued right after the signing (in the second half of November) or at some time soon after because: (a) the cover of the presentation reads: "Kombinat Aluminijuma Podgorica │ November 2009," and below: "Biznis Plan 2010-2012;" and (b) some charts of the plan include a column titled "Prediction for 2009," (*See* pages 15 and 21 in the English translation). Others, displaying projections and future scenarios, include a first column titled "Dec. 2009" (*See* pages 3 and 23 in the English translation).
In conclusion, it is very likely that Houlihan Lokey issued this November 2009 Business Plan sometime between November 16, 2009 (date of the signature of the Settlement Agreement) and the following weeks after.

the Clause 15 business plan.[109] Whether the presentation submitted by Montenegro could be a draft version of the final, closing document is not clear from the evidence.

11. KAP'S LOAN FROM DEUTSCHE BANK

135. In the years leading up to the execution of the Settlement Agreement, KAP had borrowed significant amounts of money from two international banks: OTP Bank and VTB Bank. These loans did not solve the company's permanent need for funds. On the contrary, the accumulated debt worsened the company's liquidity problems and its chances to find a willing lender. To help KAP obtain one more loan, Montenegro undertook to issue, under the Settlement Agreement, a sovereign State guarantee securing a "new working capital facility" with a "future lender" in the amount of € 22 million (Clause 8 of the Settlement Agreement).

136. On June 25, 2010 (*i.e.* before the Closing Date), Deutsche Bank AG, London Branch, as lender, Deutsche Bank Luxembourg S.A., as agent, and KAP, as borrower, entered into a € 22 million facility agreement [the "**DB Facility**"], to be repaid in equal semi-annual instalments of € 3 million.[110]. The loan was secured by the State guarantee granted by Montenegro in accordance with the Settlement Agreement.

12. ELECTRICITY SUBSIDY AND VAT

137. All aluminum smelters, including KAP, consume significant amounts of electric energy, and the price of electricity is one of the main cost drivers in the aluminum industry. Under the Settlement Agreement, Montenegro undertook to grant KAP up to € 60 million in subsidies, to be used from 2009 to 2012 in order to reduce KAP's electricity costs.

138. Clause 11.3 of the Settlement Agreement provides that, from 2009 to 2012, Montenegro shall pay EPCG the difference between the general, public electricity tariff established by the Energy Regulatory Agency of Montenegro ("**General Tariff**") and KAP's electricity special tariff, which is to be calculated according to a formula specified in Clause 11.2. Montenegro's payment is capped at € 60 million.

[109] Exhs. C-223 to C-225: the three emails introduced by CEAC show that in February 2010 the Parties were still working on the Clause 15 business plan. They also show that, by April 2010, KAP officers considered that the final version of the Clause 15 business plan was ready.
[110] Exh. C-41 (Facility Agreement Deutsche Bank/KAP).

139. In February 2010 Montenegro and KAP concluded a framework agreement with EPCG (KAP's electricity provider) establishing the price and quantity of energy that EPCG had to deliver to KAP from January 1, 2009, to December 31, 2012. [111]

140. On December 31, 2010, the Energy Regulatory Agency of Montenegro published in the Official Gazette of Montenegro the electricity price table that EPCG would apply to KAP as from January 1, 2010. The price table was revised and published every year.[112]

141. From 2009 to the early months of 2012, EPCG issued every month two invoices:

- An invoice to KAP, for the electricity it consumed that month, calculated according to the special price set out in the Settlement Agreement;[113]
- Another invoice to the Ministry of Economy, for the difference between the calculation according to the formula agreed upon in the Settlement Agreement and the calculation according to the General Tariff.[114]

142. EPCG charged VAT on each invoice. Montenegro paid every invoice it received from EPCG, and detracted the full amount disbursed—that is, net price plus VAT—from the € 60 million of subsidies available.

143. In January 2012 these subsidies approached exhaustion. KAP then wrote to the Ministry of Economy that the subsidies should not be used to pay the VAT attached to each invoice.[115] According to its own calculations, if the VAT detractions were excluded, the subsidies spent from January 2009 to December 2011 amounted to € 47,220,117. Thus € 12,779,883 were still available to KAP.[116]

144. The following month, February 2012, KAP sent a letter to EPCG, reasserting that "the implication is that the EUR 60,000 [*sic*] is exclusive of VAT" and therefore,

> "as of 1 March 2012, out of EUR 60 million worth of subsidies, EUR 50,709,005 has been availed of (including EUR 3,488,888, which is the subsidy used in January-February 2012), and not EUR 59,329,536 as stated in EPCG's cover letter to the invoice for March 2012."

[111] Exh. C-55 (EPCG Framework Agreement).
[112] Exh. C-56 (Decisions of the Energy Regulatory Agency of Montenegro setting forth the prices for the "direct consumer KAP" for 2010, 2011, and 2012).
[113] Exh. R-154 (invoice to KAP for February 2010).
[114] Exh. R-155 (invoice to the Ministry of Economy for February 2010). R-43, para. 36.
[115] Exh. C-57 (Letter of KAP to the Ministry of Economy of 12 January 2012).
[116] Exh. C-57 (Letter of KAP to the Ministry of Economy of 12 January 2012).

On this assumption, KAP asked EPCG to "correct the invoice for the electricity supplied in March 2012" accordingly.[117]

13. 2011 NEGOTIATIONS

145. For years KAP had struggled with serious liquidity and structural problems.[118] The financial difficulties stemmed, among other causes, from the high expenditures on electricity, an excessive headcount, and environmental concerns.[119]

146. The execution of the Settlement Agreement did not solve KAP's financial problems. The company continued to face serious economic trouble. For about three years after the Settlement Agreement became operative (from October 2010 to July 2013) CEAC, En+, and Montenegro repeatedly sat at the negotiation table and tried to come up with a restructuring plan. CEAC presented various alternative solutions, which Montenegro rejected for a variety of reasons.

A. Houlihan Lokey's 2011 restructuring plan

147. At the beginning of 2011 the management of KAP commissioned Houlihan Lokey, an international investment bank, to design a restructuring plan to save the company.[120]

148. CEAC and KAP tried to involve Montenegro in their efforts to save the company. Montenegro had a direct interest in saving KAP; first, because historically the company had been one of the largest industries in the country, and second, because its collapse would involve huge amounts of liabilities that Montenegro would have to pay in accordance with the Settlement Agreement. Saving KAP was, therefore, in all parties' best interests.

149. Against this backdrop, Montenegro's government showed willingness to help CEAC in its efforts to restructure and save KAP. At the invitation of the company, in April 2011 the Montenegrin Minister of Economy attended one of KAP's shareholders' meetings,[121] where officers of Houlihan Lokey and KAP delivered a presentation on the potential scenarios for restructuring KAP.[122]

[117] Exh. C-58 (Letter of KAP of 6 April 2012 to EPCG, cc to the Minister of Finance).
[118] C-16, para. 19.
[119] C-16, paras. 20–23.
[120] C-16, para. 65.
[121] C-16, para. 66. Exh. C-18 (KAP's letter of April 14, 2011, inviting the government officials to KAP stakeholders' meeting).
[122] C-16, para. 67. Exh. C-19 (Presentation April 2011).

150. KAP's and Houlihan Lokey's staff met again with Montenegro's representatives in June 2011 and furnished them with more details about the options available.[123]

151. In the following weeks conversations ensued between Montenegro, KAP, and CEAC on how to implement Houlihan Lokey's proposals and which financial burdens, if any, each party was willing to assume.[124]

B. The 2011 MoU

152. In furtherance of a final agreement, Montenegro and the En+ Group signed a Memorandum of Understanding on June 10, 2011 [the "**2011 MoU**"].[125] Among the joint understandings reached by the parties were to use "their best efforts to ensure KAP's long-term operational viability and financial solvency" and to reach an agreement by October 31, 2011, on how to restructure KAP's debts and reduce its electricity costs.

153. The 2011 MoU is a short document, with just six clauses and a brief preamble. The most important provision is Clause 6, in which Montenegro and CEAC commit to use their "best efforts to ensure KAP's long-term operational and financial solvency by agreeing terms no later than 31 October 2011." These terms would include:

- a financial restructuring of the DB Facility and of the bank financings from OTP and VTB, plus
- an introduction of measures to reduce KAP's expenditures for electricity consumption "until at least 31 December 2015."

154. Under Clause 3 of the 2011 MoU En+ undertook to grant an additional loan to KAP "of at least € 1 million," but the MoU added that En+ disbursement was "subject to written consent of GoM." There is no evidence in the file whether Montenegro eventually gave the consent and whether En+ actually disbursed the loan.

155. Clauses 1 and 2 refer to the electricity consumption: Montenegro undertakes to accelerate disbursement of the 2011 electricity subsidies, and KAP promises "to use all reasonable efforts to secure a standstill agreement" with EPCG.[126]

156. Despite the fact the parties were able to sign the 2011 MoU in June, a few weeks later the talks came to a dead end. Montenegro was not willing to consent to CEAC's project arguing it entailed excessive amounts of public funds.

[123] C-16, para. 68. Exh. C-20 (Presentation June 9, 2011).
[124] C-16, para. 76.
[125] C-16, para. 78. Exh. C-21 (Memorandum of Understanding of June 10, 2011).
[126] Note that KAP was not a signatory to the 2011 MoU.

157. The conversations between Montenegro and CEAC resumed toward the end of 2011 and continued in 2012, as explained below. Before that, it is necessary to address Montenegro's decision to declare a Failure Event in November 2011.

14. MONTENEGRO DECLARES A FAILURE EVENT AND A FAILURE OF RESTRUCTURING

158. Clause 28 of the Settlement Agreement authorizes Montenegro to declare a Failure Event *inter alia* if there are[127]

> "(f) Overdue liabilities of KAP to EPCG in an aggregate amount of more than three (3) monthly electricity supply bills."

159. On November 3, 2011 Montenegro declared a Failure Event invoking this provision.[128]

A. Declaration of a Failure Event

160. As of November 2, 2011 KAP owed EPCG the principal amount of € 19 million for unpaid due electricity supply bills for February, March, May, June, July, August, and September 2011. These bills had not been settled, or only partially settled, by KAP. In addition, KAP's unpaid electricity bill for October 2011 was €3.6 million. Moreover, KAP owed € 655,000 in interest to EPCG for late payments[129].

161. Given that the amount of KAP's overdue liabilities towards EPCG exceeded the amount of three monthly bills for electricity supply, Montenegro declared on November 3, 2011 that a Failure Event had occurred, and asked CEAC to remedy such Failure Event within 45 calendar days.[130]

162. On December 11, 2011 CEAC reacted and provided Montenegro with a "plan of remedial actions," meant to cure the Failure Event. CEAC also informed Montenegro that the company was negotiating with EPCG a postponement of its 2011 debt that would fully remedy the Failure Event.[131]

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[127] Clause 28.1(f).
[128] Exh. R-99.
[129] Exh. R-99.
[130] Exh. R-99. *Pro memoria*, Clause 28 requests Montenegro to notify CEAC in writing: "its intention to effect the consequences" and "require [CEAC] to rectify the Failure Event within a period of 45 Calendar Days. The notice must indicate details of the Failure Event.
The letter also informs about the penalties incurred by CEAC: "In addition, for the breach of the Agreement described above, from the date of this Notice, CEAC is obliged to pay daily penalties to the SoM, the amount of which is specified in Clause 22.2(e)."
[131] Exh. R-100. *Pro memoria*, Clause 28 requests CEAC to deliver to Montenegro a plan of remedial actions (in writing) aimed at curing the Failure Event within 25 calendar days of the receipt of such notice.

163. On January 9, 2011 Montenegro replied that CEAC needed to furnish without delay a comprehensive plan of remedial actions,[132] including, *inter alia*, specific actions to be taken in relation to the Failure Event, the relevant agreement – if any – reached with EPCG, and an analysis evidencing that the remedial actions in the plan would not result in more liquidity problems for KAP or new Failure Events.[133]

164. Montenegro sent another letter on February 16, 2012, notifying that CEAC had failed to take any action to remedy the failure event:

> "Although more than 3 months has passed since receipt of the First Notice by CEAC, CEAC has still not provided a reasonable remedial action plan or remedied the Failure Event."[134]

Montenegro gave CEAC seven days to remedy the Failure Event. Otherwise the government would enforce its rights under Clause 28.4 of the Settlement Agreement, including CEAC's obligation to transfer immediately all its shares in KAP to Montenegro.

165. CEAC's reply came on February 23, 2012. In a short letter, CEAC excused its inaction by referring to the difficult financial situation of KAP:

> "As [Montenegro] is aware, [KAP] spends every effort in order to secure the operational process and to respect all the financial obligations including obligations to the major suppliers. Beside the difficult financial situation KAP is now facing with extreme operational problems due to the weather conditions.
>
> In that situation KAP is forced to prioritise the matters of the surviving of the factory above the other commercial obligations. At present the intentions of SoM to implement the consequences set forth in Clause 28.4 of the Agreement are very untimely and making a great damage to the company.
>
> Please be aware that the actions of SoM to change control at KAP will cause defaults under the credit facilities and make all the outstanding debts and interests immediately due and payable by KAP that consequently will lead to

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The letter also informs about the penalties incurred by CEAC: "In addition, for the breach of the Agreement described above, from the date of this Notice, CEAC is obliged to pay daily penalties to the SoM, the amount of which is specified in Clause 22.2(e)."

[132] Exh. R-165.

[133] *Pro memoria*, under Clause 28, Montenegro had to use "reasonable endeavours to agree" on the proposed plan of remedial actions.

The letter discusses again the penalties incurred by CEAC: "In addition to Clause 28 of the Agreement, we kindly remind you that CEAC failed to fulfil its obligation set forth under Clause 21.1 (l) of the Agreement. Such breach of the Agreement requires, notwithstanding Clause 28 and parties' actions in relation to the Failure Event, that CEAC pay a daily penalty of EUR 1,000 (Clause 22.2(e)). CEAC is obliged to pay such penalty from the date of the Notice."

[134] Exh. R-166.

> the insolvency of a company and call on the sovereign guarantees provided by SoM."[135]

B. Parliament passes a Resolution

166. On February 29, 2012 Montenegro's Parliament discussed the situation affecting KAP and passed a Resolution which was published in the Official Gazette. The text of the Resolution included the following request to the Government:[136]

> "1. The 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."

167. The Parliament was also aware at that time that the potential bankruptcy of KAP was being discussed, and declared it to be an "undesirable possible option":

> "2. The Parliament of Montenegro tasks the Government of Montenegro with hiring top-caliber management and taking all necessary measures focused on maintaining production, while recognizing KAP's importance for the Montenegrin economy, including those related to the supply of electricity, the resolution of social aspects and debts issues, as well as efforts to avoid bankruptcy as an undesirable possible option."

168. The Parliament finally required a full audit of KAP's operations:

> "4. The Parliament of Montenegro tasks the Government of Montenegro with ensuring that a full and independent audit of KAP's operations from the day it was acquired by CEAC is conducted, which will be submitted to Parliament."

169. The request was reiterated by another Resolution in June 2012.[137]

C. Montenegro declares a Failure of Restructuring

170. The day after the Parliament approved the first Resolution, Montenegro formally notified CEAC that all the preconditions for Montenegro to "effect the consequences" set forth in Clause 28 of the Settlement Agreement had been met for the government to call a "Failure of Restructuring" (in the language of the Clause).

171. As a consequence of this declaration, CEAC was obliged to transfer all its shares in KAP to Montenegro without further delay.[138] Attached to this letter was a chart,

[135] Exh. R-167.
[136] Exh. C-15.
[137] Exh. C 16.
[138] Under Clause 28, Montenegro may exercise its "right to effect the consequences" (a) by written notice to CEAC, (b) with copy to the other Parties of this Agreement, and (c) (scenario 1) the proposed

prepared by EPCG, listing "KAP liabilities for electricity invoices and interests on 31.01.2012." KAP's total debt for electricity from 2009 to 2012 amounted to € 30 million. Montenegro gave CEAC 14 calendar days to rectify this state of things.[139]

172. Once the 14 day period lapsed, on March 22, 2012, Montenegro urged CEAC to meet with Montenegro representatives at the Montenegrin Central Depository Agency on March 23, 2012, at 14 CET, in order to complete and sign the securities transfer order and other relevant documents necessary for the transfer of CEAC's shares in KAP. The letter attached an official form, titled "Order for the transfer of securities," for the Parties to fill in.[140]

173. CEAC did not appear at the Montenegrin Central Depository Agency and the transfer of the shares was not formalized. On March 30, 2012, Montenegro sent CEAC a letter memorializing these facts:

> "we consider CEAC to be in deliberate breach of the Settlement Agreement and the Transfer Agreements, not only due to the occurring Failure Event and other breaches of the Settlement Agreement . . ."

174. Further, Montenegro would "no longer refrain from resorting to all available legal remedies and initiating adequate proceedings to enforce the rights conferred upon it by the Settlement Agreement."[141]

175. Despite this announcement, Montenegro in fact never initiated arbitral proceedings against CEAC.

176. On April 2, 2012, CEAC replied with the following explanations:[142]

- KAP is in a disastrous financial condition that cannot be resolved without the involvement of Montenegro and EPCG and the approval of KAP's lenders. CEAC believes that, thanks to the ongoing negotiations of a term sheet with Montenegro and other entities, a "reasonable solution may be found in the nearest future, which will allow KAP to recover from the position it currently is in."
- Secondly, Montenegro's demand to have all KAP shares owned by CEAC transferred "at these times might be detrimental to KAP and RBN."

177. "Nonetheless," CEAC declared that it was "ready to transfer the shares" against "adequate compensation":

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plan of remedial actions is not agreed by negotiations in good faith between CEAC and Montenegro within 30 calendar days after it had been submitted, or (scenario 2) The remedial plan was agreed but the Failure Event is still existing for a period of at least 25 calendar days after the period of time assigned to the remedial actions by the agreed remedial plan has expired.

[139] Exh. R-113.

[140] Exh. R-114.

[141] Exh. R-115.

[142] Exh. R-116.

> "if no reasonable solutions can be found in the near future and the adequate compensation is offered for our shares in KAP and RBN, we are ready to transfer the shares and procure a smooth transition."

15. 2012 NEGOTIATIONS

178. In parallel, the Parties reinitiated their negotiations regarding the financial restructuring of KAP and the supply of electricity.

A. 2012 term sheet

179. In March 2012 CEAC sent Montenegro a term sheet with new restructuring proposals.[143] CEAC suggested to resolve KAP's financial crisis through a debt-to-equity swap in the amount of € 200 million and $ 80 million.[144] The plan included the following steps:[145]

- KAP's debt with its three major lenders (Deutsche Bank, OTP Bank, and VTB Bank) were to be assumed by Montenegro and converted into shares in KAP, to be held by Montenegro;
- Further, CEAC would assume the claims of En+ against KAP and, thereafter, all of CEAC's claims against KAP would be capitalized; in turn, EPCG's claims against KAP would also be converted into new shares;
- Additionally, CEAC proposed an extension of the existing electricity supply agreement between EPCG and KAP in order to secure a long-term supply of cheap electricity.

180. In the weeks after CEAC sent its proposal, the parties exchanged a sizeable amount of correspondence,[146] including a mark-up version of the term sheet.[147] The parties even met once to shape the contours of a potential agreement.[148]

181. On April 5, 2012, Montenegro wrote to CEAC in the following terms:[149]

- First, Montenegro confirmed that a term sheet on a comprehensive restructuring of KAP's debts was presently being negotiated and that the current draft provided for CEAC to acquire more shares in KAP.
- Second, although Montenegro had already gained the right to request such transfer and "shall not waive it," the government might be

[143] C-16, paras. 84 to 95. Exh. C-22 (Term Sheet 2-12).
[144] Exh. C-22 (Term Sheet 2-12), Clauses 1 and 4 and Schedule 1.
[145] Exh. C-22 (Term Sheet 2-12), Clauses 2.1, 3.3, and 7 and Schedule 2.
[146] Exhs. C-23 to C-35. C-16, paras. 95–110.
[147] Exh. C-24 (Mark-up Term Sheet).
[148] C-16, para. 101.
[149] Exh. R-168.

willing to regulate this matter within the term sheet itself depending on the further course of negotiations.

– Third, Article 28.4.7 of the Settlement Agreement and Article 1.2 of the Transfer Agreement[150] establish that the transfer of CEAC's shares in KAP is to be performed free of charge, and Montenegro was "by no means obliged to reimburse CEAC for transfer of such shares."

182. Finally, in order to further secure KAP's best interest, Montenegro was "available and willing" to discuss in more detail the relevant issues, including KAP's restructuring.

B. 2012 electricity negotiations

183. As explained earlier, electricity is typically the most important cost factor in a smelter. Without electricity supply at a competitive price, KAP would be unable to survive.

184. As the negotiations between CEAC and Montenegro regarding the general restructuring of KAP developed, another dispute emerged between the Parties: in the first months of 2012 the electricity subsidies provided for in the Settlement Agreement were depleted.

185. This problem had already been anticipated by the Parties; in Clause 11.5 of the Shareholders' Agreement the Parties already agreed to commit their "best endeavours" to provide KAP with energy at an "optimal price."[151] And in the 2011 MoU the Parties reiterated their best effort obligation "to reduce the Company's expenditures for electricity consumption at least until 31 December 2015."[152]

186. Despite the € 60 million subsidy, the hard facts were that KAP was unable to pay its electricity bills to ECPG, its electricity provider. This had moved Montenegro to declare a Failure Event in November 2011. In fact, the year 2012 started with KAP having a debt of more than € 30 million in electricity bills with EPCG.[153] Throughout the rest of the year KAP continued to default on its payment obligations.

187. Once the subsidies were depleted, CEAC repeatedly demanded Montenegro to provide KAP with an affordable, long-term electricity supply agreement with EPCG. On different occasions KAP, Montenegro, and CEAC engaged, without success, in negotiations to find a solution.

[150] This Transfer Agreement has been introduced as Exh. R-169. Its relevance is discussed below.
[151] Clause 11.5.
[152] Clause 6.b).
[153] R-22, para. 203. Exh. R-71 (Letter from EPCG to Ministry of Economy dated February 29, 2012).

188. In April 2012 KAP informed the Montenegro Ministry of Economy that, due to the "current financial situation," KAP was unable to pay € 5.1 million for the electricity supplied in March. KAP asked again to receive the amount of subsidies "withheld without merit" as soon as possible, or to adopt "a new electricity price reduction programme for KAP."[154]

189. In May 2012 EPCG threatened to reduce the electricity supply if the outstanding bills were not paid. As a consequence, KAP alerted the Ministry that, unless a new electricity price-reduction program with EPCG was established, the smelter would be forced to adopt a shutdown plan in the near future.[155]

C. Breakdown of the negotiations

190. The negotiations reached an impasse at the end of May 2012, when Montenegro informed CEAC that the Government refused the terms and condition set out in the latest version of the term sheet.[156]

191. Without the implementation of any restructuring measures, KAP's situation worsened dramatically throughout 2012. Towards the end of the year the board of directors began to consider a total shutdown of production. In a final attempt to save the company from collapse, talks between CEAC and Montenegro rekindled.

192. To prevent the interruption of KAP's operations, Montenegro concluded in July 2012 an Agreement with EPCG, undertaking to pay EPCG € 15 million for the electricity supplied to KAP from June to December 2011 that remained unpaid.[157]

193. Despite Montenegro's support, KAP continued to pile up unpaid electricity bills.

194. In August 2012 EPCG reduced the electricity supply to KAP to 120 MWh/h and in September 2012, to 86 MWh/h.[158] In October 2012, EPCG terminated KAP's electricity supply.[159]

195. Around this time KAP proposed to EPCG concluding a long-term electricity supply agreement for the period 2013–2028. EPCG rejected the 15 year agreement arguing that KAP was one of the biggest consumers but also one of the most delinquent.[160] As an alternative, Montenegro proposed an agreement with a

[154] Exh. C-59 (Letter of KAP to the Ministry of Economy of 27 April 2012).
[155] Exh. C-61 (Letter of KAP of May 8, 2012).
[156] Exh. C-34 (Email of Schoenherr of June 1, 2012) and Exh. C-35 (Email of Alexey Kuznetsov of June 1, 2012).
[157] R-22, para. 205. Exh. R-76 (Assignment Agreement dated July 16, 2012).
[158] C-16, para. 177. R-22, para. 204. Exh. R-74 (Letter from EPCG to KAP dated August 8, 2012); Exh. R-75 (Letter from KAP to Ministry of Economy dated August 21, 2012).
[159] C-16, para. 178 and R-22, para. 206.
[160] R-22, para. 209. Exh. R-78 (Letter from EPCG to KAP dated November 27, 2012).

state-owned company, Montenegro Bonus, which was to buy the required electricity from EPCG and then supply it to KAP.[161] KAP refused the proposal.[162]

196. In December 2012 CEAC continued to seek the Ministry of Economy's support in its negotiations with EPCG.[163]

197. Around the same time CEAC sent the Government of Montenegro a presentation on a new financial model for KAP.[164] Montenegro officials considered the material submitted, and expressed their desire to get back to the term sheet discussed back in April 2012.[165]

198. In December 2012 the parties also exchanged a number of letters. Two of these letters are particularly relevant, insofar as they give an idea of where every party stood at the time.

199. The first letter was sent by CEAC to the Government on December 13, 2012. It offers a summary of CEAC's own account of the recent past events:[166]

- First, CEAC denied having breached the Settlement Agreement; therefore it was not willing to transfer its shares in KAP to Montenegro without being paid a fair compensation.
- Second, CEAC contended that the term sheet negotiated with Montenegro in April 2012 was not signed because Montenegro's Parliament failed to approve it. Thereafter Montenegro and CEAC started to explore other options to resolve the "uneasy situation." In particular, CEAC welcomed Montenegro's idea of selling the shares to a new investor. CEAC even conducted negotiations with the two investors introduced by Montenegro, provided information to these investors for their due diligence, and even reached an agreement with both on selling their shares in KAP. This agreement was and – in CEAC's view – continued to be subject to Montenegro's agreement with either of these investors.
- Third, CEAC was confident that, by restarting negotiations with the Government, a mutually acceptable solution for KAP could be found, in particular, by agreeing on a new financial model. "Should the financial model be agreed," the letter concludes, "the respective legal

[161] R-22, para. 209. Exh. R-78 (Letter from EPCG to KAP dated November 27, 2012).
[162] R-22, para. 210. Exh. R-79 (Letter from KAP to Montenegro Bonus dated April 9, 2013); R-70 (E-mail from Nebojsa Dozic to Goran Martinovic et al. dated December 24, 2012); Exh. R-80 (E-mail from Nebojsa Dozic to Goran Martinovic et al. dated January 31, 2013).
[163] C-16, para. 180. Exh. C-62 (Email of Ms. Elena Mironova of December 14, 2012).
[164] C-16, para. 111. Exh. C-36 (CEAC's letter of December 21, 2012) and Exh. C-37 (Presentation Further Scenarios November 2012).
[165] C-16, para. 117.
[166] Exh. C-63.

representatives of both parties, will frame such agreement in a proper legal document."

200. Montenegro replied to this letter ten days later, on December 25, 2012:[167]

- First, Montenegro says that the events causing the breaches of the Settlement Agreement were "completely undisputable." Even CEAC's previous correspondence—Montenegro states—did not dispute this fact. The Settlement Agreement unambiguously prescribes a transfer of shares without payment of compensation to CEAC.
- Second, with regard to the term sheet that the Parties discussed in April 2012, such document was never signed, and the drafts exchanged clearly stated that the term sheets were not binding and did not imply a waiver of Montenegro's rights.
- Third, as for the negotiations with potential investors in KAP, Montenegro's relations with prospective investors were a separate issue from the Settlement Agreement: CEAC was still obliged to transfer its shares in KAP and RBN to Montenegro without further delay or compensation. If CEAC had a potential investor in mind, Montenegro kindly invited CEAC to provide the key terms to negotiate with such investor.

201. Two months later, in February 2013, a meeting took place between representatives of KAP, Montenegro, and CEAC, in order to discuss the presentation on the new financial model for KAP, prepared by CEAC in December 2012. The government officials at the meeting did not agree to the proposed model, and suggested a different structure, which CEAC adopted in another presentation a few weeks later.[168]

202. However, the following months showed no progress toward an agreement.

16. ENFORCEMENT OF MONTENEGRO'S GUARANTEE UNDER THE DB FACILITY

203. The supply of electricity was only one of the many problems surrounding KAP. Starting in 2011 KAP also incurred in a number of events of default under the DB Facility.

Events of default

204. On March 1, 2011 KAP asked Deutsche Bank for a first waiver because a few days earlier KAP was late in paying an instalment of its loan with OTP Bank.[169]

[167] Exh. R-171.
[168] C-16, para. 118. Exh. C-38 (Presentation 5-2-13).
[169] Exh. C-47 (KAP letter to Deutsche Bank of March 1, 2011).

Under the Facility Agreement with Deutsche Bank, such occurrence constituted an event of default that KAP had to notify and that the bank could waive. In May 2011 KAP asked Deutsche Bank for a second waiver, this time due to KAP's inability to submit the business plan on time.

205. Deutsche Bank replied to these requests on December 22, 2011. In its letter, the bank listed other events of default that, in its judgment, had also occurred:[170]

- KAP had failed to pay on time an instalment to one of its lenders, OTP Bank.
- KAP had failed to deliver a business plan for 2011.
- KAP had failed to deliver a compliance certificate by June 30, 2011.
- KAP had commenced negotiations with other creditors – Montenegro, OTP Bank, CEAC, VTB Bank, and EPCG – without notifying Deutsche Bank.

206. Deutsche Bank declared that it was willing to waive all these violations, provided that the Facility Agreement be amended, so that Montenegro – until then, the guarantor of the facility – became the primary obligor.

207. CEAC, Montenegro, Deutsche Bank, and KAP initiated negotiations in this direction. In January 2012 KAP received a first draft of the proposed arrangement. As requested by the bank, Montenegro would become a new borrower of Deutsche Bank under the Facility Agreement. Montenegro would next lend the amount to KAP.

208. A few weeks later KAP submitted its mark-ups on the draft agreement.[171] Yet, ten days later, KAP informed Deutsche Bank and Montenegro that the overall restructuring concept was unacceptable to KAP's management.[172]

209. As these negotiations unfolded, Montenegro requested that KAP reimburse the € 1 million "restructuring fee" that, as early as December 2011, Montenegro had already paid to the bank for the preparation of the draft.[173] KAP refused to pay.

Montenegro pays under the guarantee

210. The negotiations led to no success. On March 23, 2012 Deutsche Bank went ahead and served on KAP a notice of acceleration, demanding immediate repayment of the entire loan.[174]

[170] Exh. C-49 (DB letter to KAP).
[171] C-16, para. 143. Exh. C-50 (Email communication SoM/KAP end of January 2012) and Exh. C-51 (Mark up of KAP of draft loan facility SoM/KAP).
[172] C-16, para. 144.
[173] C-16, para. 148. Exh. R-49 (Swift regarding payment to Deutsche Bank dated December 23, 2011).

211. KAP was not able to pay the amount requested.[175] On April 2, 2012,[176] Deutsche Bank enforced the State guarantee and Montenegro paid the amount requested in a single instalment three days later.[177] The payments made by Montenegro amounted to € 22 million plus € 1.4 million for associated costs. The loan receivable against KAP was transferred to Montenegro.

212. KAP now owed Montenegro over € 23 million.[178]

213. In May 2012 the Minister of Finance invited KAP to meet and discuss the manner and timeline for repayment.[179] The discussions led nowhere.

17. KAP'S BANKRUPTCY

214. In February 2013 KAP's board of directors discussed an orderly shutdown plan for all the aluminum operations if no electricity supply agreement could be secured.[180] The proposal was not approved, because Montenegro's representative on the KAP board blocked it by making use of his veto right.[181]

215. KAP continued to operate until June 2013 without a formal agreement regarding the supply of energy. Montenegro Bonus, a fully state-owned oil trading company, was buying the electricity from the grid, and supplying it to KAP.[182]

216. In April 2013 the Parliament of Montenegro approved a third resolution with regard to KAP:

> "Noting that the foreign partner breached key contractual obligations, the transfer of CEAC's shares to the state of 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."

217. The Parliament understood that CEAC breached the contracts entered into with Montenegro, and urged the Government to terminate the relationship without paying any compensation.

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[174] C-16, para. 153– 155. Notice of Acceleration dated 23 March 2012 (Doc. R 61).
[175] C-16, para. 156.
[176] Notice of demand under guarantee dated 2 April 2012 (Doc. R 62).
[177] Swifts regarding payment to Deutsche Bank dated 5 April 2012 (Doc. R 63).
[178] C-16, para. 157.
[179] Exh. R-64 (Letter from Ministry of Finance to KAP dated May 18, 2012) and R-65 (Letter from Ministry of Finance to KAP dated November 13, 2012). Letter from Ministry of Finance to KAP dated 5 June 2013 (Doc. R 66).
[180] C-16, paras. 185–193.
[181] C-16, para 185.
[182] C-16, para 186.

218. One month later, on June 14, 2013, Montenegro filed a petition for bankruptcy against KAP with the Commercial Court in Podgorica.[183] The request was based on KAP's failure to reimburse Montenegro, after more than one year, the € 23 million Montenegro had paid to Deutsche Bank under the State guarantee. A month later the Court officially commenced bankruptcy proceedings.[184]

219. One day later, KAP, now represented by a judicially-appointed administrator, entered into an agreement with Montenegro Bonus ["**MB Cooperation Agreement**"].[185] The MB Cooperation Agreement entrusted Montenegro Bonus with "the management of KAP business during bankruptcy" and entirely deprived CEAC of the control of KAP.[186] The bankruptcy judge gave his express consent to the execution of this contract.[187]

220. The insolvency administrator sold KAP to a Montenegrin buyer, Mr. Veselin Pejovic, owner of the Uniprom Group, who made a fresh start without debts and implemented a restructuring of the enterprise.[188]

18. ASSESSMENT OF THE FACTS BY THE PARTIES

221. Both CEAC and Montenegro submit that the proven facts show that its counterparty was following a hidden agenda.

CEAC

222. CEAC avers that Montenegro designed and followed a secret strategy to regain full control of KAP, and that in order to succeed with its plans it did not shy away from using illegitimate means.[189] The plan allegedly consisted of a number of stages:

- During the first stage, running from 2011 to 2013, Montenegro undermined CEAC's efforts to carry out a much-needed, long-term restructuring of the company; it also made use of its veto right under the Shareholders' Agreement to block important decisions' of KAP's board of directors.
- Thereafter Montenegro obstructed the work of KAP's board of directors by vetoing the adoption of its business plan and the approval

[183] Exh. C-17 (Bankruptcy Petition filed by the SoM).
[184] C-16, para. 60 and 194.
[185] Exh. C-64 (MB Cooperation Agreement).
[186] Exh. C-64 (MB Cooperation Agreement), Art. 2 of the MB Cooperation Agreement.
[187] Exh. C-64 (MB Cooperation Agreement), page 5.
[188] C-33, para. 12.
[189] C-16, para. 52.

of its financial statements, which in turn caused an event of default under the loan facility with Deutsche Bank.[190]

– This default, and the subsequent execution of the State guarantee, allowed Montenegro to force KAP into bankruptcy, and to retake control through the judicially appointed administrator and through Montenegro Bonus, the state-owned company that was hired to manage KAP during the procedure.[191]

223. CEAC concludes that Montenegro's breach of the Settlement Agreement and the KAP's Shareholders' Agreement was driven by a nationalistic bias,[192] and that if Montenegro had cooperated in the restructuring efforts, instead of engaging in lawless behavior, KAP could have been saved and would by now be a profitable company. Had Montenegro participated in a debt restructuring by way of a debt-equity swap, had Montenegro agreed to decrease the number of employees and had it contributed to decrease the extraordinarily high price of electricity, then KAP would have turned into a successful aluminum production facility, with Montenegro and CEAC as fellow shareholders, not opposing parties in court proceedings.[193]

Montenegro

224. Montenegro sees things differently.

225. Montenegro avers that the facts prove that CEAC and En+ tried to misuse their superior bargaining power to impose unreasonable demands on Montenegro's government. Due to KAP's significance in the country's economy, CEAC and En+ expected Montenegro to put up with all requests, such as

– assuming hundreds of millions of Euros of KAP's debt,

– granting considerable amounts of additional public aid, and

– forcing EPCG to enter into a one-sided and detrimental electricity supply agreement.[194]

19. COMMENCEMENT OF THE PRESENT ARBITRATION

226. On November 12, 2013, a few months after the start of the bankruptcy proceedings, CEAC and En+ served on Montenegro (Respondent 1) and

[190] C-16, para. 59.
[191] C-16, para. 58.
[192] C-16, para. 57.
[193] C-33, para. 13.
[194] R-22, para. 133.

Respondents 2 to 6 a Notice of Arbitration pursuant to Art. 3 UNCITRAL Rules.[195] The present arbitration had commenced.

[195] C-1.

III. PARTIES' PRAYERS FOR RELIEF

1. RELIEF AND REMEDIES SOUGHT BY CEAC

227. The final version of CEAC's prayer for relief reads as follows:[196]

> "**A. Prayers for Relief regarding Claimant's Claims**
>
> **1. Primary Damage Claims: First Arbitration Claims**
>
> **1.1.**
>
> The Tribunal shall order the Respondents, jointly and severally, to pay to Claimant
>
> a) the amounts of EUR 287,012,394.99 and USD 27,790,234.00,
>
> b) interest (i) on the amount of EUR 205,910,367.00 at 8 percentage points above the Base Rate from 26 May 2006 until the date of full payment and (ii) on the amounts of EUR 81,102,027.99 and USD 27,790,234.00 at 7 percentage points above the interest rate of the European Central Bank for main refinancing operations from 1 October 2014 until the date of full payment.
>
> plus
>
> interest on the amount of unpaid interest on EUR 205,910,367.00 pursuant to lit. b) (i) above at 7 percentage points above the interest rate. of the European Central Bank for main refinancing operations from 1 October 2014 until the date of full payment.
>
> **1.2.**
>
> The Tribunal shall further order the Respondents 1-4. jointly and severally, to pay to KAP
>
> a) the amounts of EUR 101,200,000.00 and USD 2,057,987.44,
>
> b) interest on EUR 101 ,200,000.00 and USD 2,057,987.44 in the amount of 8 percentage points above the Base Rate from 26 May 2006 until the date of full payment,
>
> plus
>
> interest on the amount of unpaid interest on EUR 101,200,000.00 and USD 2,057 ,987.44 pursuant to lit. b) above at 7 percentage points above

[196] C-47, pp. 3–6.

the interest rate of the European Central Bank for main refinancing operations from 1 October 2014 until the date of full payment.

1.3.

The Tribunal shall further order the Respondents 1-5, jointly and severally, to pay to RBN

a) the amount of EUR 40,183,000.00,

b) interest on EUR 40,183,000.00 at 8 percentage points above the Base Rate from 26 May 2006 until the date of full payment,

plus

interest on the amount of unpaid interest on EUR 40,183,000.00 pursuant to lit. b) above at 7 percentage points above the interest rate of the European Central Bank for main refinancing operations from 1 October 2014 until the date of full payment.

1.4.

a) The Tribunal shall further order Respondent 1 to duly declare in a written document to KAP a waiver of the receivables against KAP which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit C 183 in the column "RoM budget" in the amount of EUR 20,686,141.61 plus any interest due on this amount.

b) The Tribunal shall further order Respondent 1 to duly declare in a written document to KAP that they assume as their own debt the following payables of KAP towards third parties, plus any interest due on the following amounts:

(i) an amount of EUR 4,696,904.25 of the payables of KAP towards the company Elektroprivreda EPCG A.D. Niksic, Montenegro, which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "Elektroprivreda";

(ii) an amount of EUR 1,563,106.88 of the payables of KAP towards the RBN, which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "URBN";

(iii) an amount of EUR 74,909.34 of the payables of KAP towards the company Luka Bar A.D., Montenegro, which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "Luka Bar";

(iv) an amount of EUR 872,129.31 of the payables of KAP towards the Respondent 1, which are set forth in the enclosed Exhibit Doc C 181

to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "Fond za Razvoj";

(v) an amount of EUR 2,213,510.88 of the payables of KAP towards the Montenegro Bank, Podgorica, Montenegro, which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "MN Banka".

c) The Tribunal shall further assert towards Respondent 1 that the receivables against KAP which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "RoM budget" in the total amount of EUR 71,777,035.44 are not due for repayment at present.

d) The Tribunal shall further assert towards Respondent 1 that the receivables against KAP which are set forth in the enclosed Exhibit Doc C 181 to the extent as summarized in the enclosed Exhibit Doc C 183 in the column "Fond za Razvoj" in the total amount of EUR 3,026,125.28 are not due for repayment at present.

e) The Tribunal shall further order Respondent 1 to duly declare in a written document to RBN a waiver of the receivables against RBN which are set forth in Annex 8 to the Agreement for the Sale and Purchase of the Shares of the company Rudnici Boksita AD Niksic (Exhibit Doc C 6) in the amount of EUR 7,745,396.11 plus any interest due on this amount.

2. Secondary Damage Claim: Hypothetical Value of KAP

In the event that the Prayer for Relief under no. 1.1 is not or not fully granted, as secondary Prayer for Relief, the Tribunal shall order Respondents, jointly and severally, to pay to Claimant

a) the amount of EUR 104,000,000.00, or, respectively,

b) the difference between the amount granted pursuant to the Prayer for Relief under no. 1.1 and the amount of EUR 104,000,000.00,

plus interest on the amount pursuant to lit. a) or lit. b) above, respectively, at 7 percentage points above the interest rate of the European Central Bank for main refinancing operations from 9 July 2013 until the date of full payment

B. Prayers for Relief regarding Counterclaims

The Tribunal shall dismiss the counterclaims in their entirety.

C. Costs of Arbitral Proceedings

The Tribunal shall order the Respondents to jointly and severally pay the costs of these arbitral proceedings, including the costs and expenses set out

in our emails to the Tribunal of March 14 and March 31, 2016 (C 44 and C 46)."

2. RELIEF AND REMEDIES SOUGHT BY MONTENEGRO

228. In their Pre-Hearing Brief, Montenegro requested the Tribunal to render an award in the following terms:[197]

> "(A) Claimant's claims shall be dismissed in their entirety.
>
> (B) Counter-Respondents, jointly and severally, shall be ordered to pay to the State of Montenegro the amount of EUR 12,367,993.00 plus interest as specified in Section III of Rejoinder, from 30 September 2015 until payment.
>
> (C) Counter-Respondents, jointly and severally, shall be ordered to pay to the State of Montenegro damages in the amount of EUR 231,728,900 plus interest as specified in Section III of Rejoinder, from 30 September 2015 until payment.
>
> (D) Counter-Respondents, jointly and severally, shall be ordered to bear all costs of the present arbitral proceedings and, in particular, pay to Respondents all costs and expenses incurred in connection with these arbitral proceedings, including, but not limited to, legal fees, disbursements and internal costs of Respondents to be further specified in a cost submission before closing of the proceedings,
>
> or, alternatively, in case the Arbitral Tribunal decides not to award Montenegro relief referred to in (B) above:
>
> (A) Claimant's claims shall be dismissed in their entirety.
>
> (B) Counter-Respondents, jointly and severally, shall be ordered to pay to the State of Montenegro damages in the amount of EUR 234,027,447 plus interest as specified in Section III of Rejoinder, from 30 September 2015 until payment.
>
> (C) Counter-Respondents, jointly and severally, shall be ordered to bear all costs of the present arbitral proceedings and, in particular, pay to Respondents all costs and expenses incurred in connection with these arbitral proceedings, including, but not limited to, legal fees, disbursements and internal costs of Respondents to be further specified in a cost submission before closing of the proceedings."[198]

[197] R-32, para. 202.
[198] This prayer for relief was expressly confirmed by communication R-49.

IV. MERITS (I): FAILURE OF RESTRUCTURING

229. CEAC avers that Montenegro and its agencies incurred in nine different breaches:[199]

- First, Montenegro thwarted Claimant's efforts to restructure KAP.
- Second, Montenegro failed to provide the full amount of electricity subsidies to KAP.
- Third, Montenegro failed to safeguard KAP's electricity supply.
- Fourth, Montenegro caused the acceleration of the DB Facility.
- Fifth, Montenegro filed a petition for the commencement of bankruptcy proceedings against KAP.
- Sixth, Montenegro compromised its joint venture with Claimant by taking over control of KAP.
- Seventh, Montenegro refused consent to CEAC's granting of further inter-company loans to KAP.
- Eighth, Montenegro obstructed important decisions regarding financial statements, shutdown of the smelters, and sale of non-core assets.
- Ninth, Montenegro failed to support reduction of KAP's workforce.

230. Montenegro and its agencies disagree and request that all claims be dismissed.[200]

231. Montenegro and its three agencies (as Counter-Claimants 1 to 4) assert five counterclaims against En+ and CEAC (as Counter-Respondent 1 and 2), alleging that CEAC breached some of the clauses of the Settlement Agreement and incurred in the penalties provided for in such Agreement.[201]

232. Montenegro and its agencies also say that CEAC and En+ are jointly and severally liable for the damages.[202]

233. CEAC and En+ reply that they did not breach any clause and that all the counterclaims must be dismissed.[203]

[199] C-41, para. 192.
[200] R-49, page 2.
[201] R-22, paras. 273 and 274.
[202] R-22, para. 343.
[203] C-47, para. 11.

234. Before addressing CEAC's claims and Montenegro's counterclaims, the Tribunal must address a preliminary question: whether a Failure of Restructuring under Clause 28 of the Shareholders Agreement has occurred and whether the exclusion of claims and liability agreed upon in Clauses 28.5 and 28.6 are apposite.

235. The contractual and legal provisions governing the Failure of Restructuring and the subsequent liability of each party are of paramount importance for this case. In addition to all the arguments made in previous pleadings, the Tribunal explicitly instructed the Parties, at the end of the evidentiary hearing[204] and in its Procedural Order No. 4,[205] to elaborate further in their post-hearing briefs on a number of specific issues connected to this topic, in particular: the negotiation history and Clause 28 of the Settlement Agreement, the facts and procedure of a Failure of Restructuring, and the interaction between Clause 28 with Montenegro's counterclaims. Following the Tribunal's instructions, the Parties submitted their post-hearing briefs on February 29, 2016,[206] where they addressed these matters at length.[207]

Contractual provisions

236. Clause 28.1 of the Shareholders Agreement provides:

> "28. FAILURE OF RESTRUCTURING.
>
> 28.1. The SoM shall be entitled to effect the consequences set forth in this Clause 28.4–28.6 below by written notice to CEAC with copy to the other Parties of this Agreement if any one of the following events occurs after Closing, unless based on written consent of the SoM: . . .
>
> (f) Overdue liabilities of KAP to EPCG in an aggregate amount of more than three (3) monthly electricity supply bills."

237. Clause 28.4 defines the consequences of the declaration of a Failure of Restructuring:

> "28.4. Should the SoM effect the consequences set forth in this Clause:
>
> 28.4.1. The Failure of Restructuring shall have *ex tunc* effect and all obligations fulfilled by the Parties in accordance with this Agreement, unless specifically agreed otherwise in this Agreement, shall be considered duly fulfilled and the Parties shall not have the obligation to reverse them.
>
> 28.4.2. CEAC shall transfer immediately to the SoM all shares it owns in the Companies at the day of receipt of the written notice of the SoM pursuant to

[204] *See* Transcript, Day 5, 163:5–176:11.
[205] *See* Procedural Order No. 4, para. 14.
[206] *See* C-41 and R-43.
[207] *See* C-41, paras. 3–9, 56–83, and 212–214; and R-43, paras. 8–32, 54–99, and 298–339.

clause 28.3 this Agreement. The nominal value, but in any event not more than the fair value, of such shares in the Companies is deducted from any claim the SoM might have against CEAC.

28.4.3. The Call Option pursuant to Clause 2 expires.

28.4.4. CEAC and the SoM shall use reasonable commercial efforts to effect the release of the State Guarantees.

28.4.5. The Restructuring Agreements pursuant to clause 12 of this Agreement, the waivers pursuant to clause 13 of this Agreement, the termination of the SPAs pursuant to clause 17 of this Agreement, and the termination of the arbitration proceedings pursuant to clause 26 of this Agreement shall remain effective.

28.4.6. Unless specifically agreed otherwise in this Agreement, all obligations of the Parties under this Agreement are terminated with effect of the day of receipt by CEAC of the notice that the SoM terminates this Agreement.

28.4.7. Each Party shall be liable for any damage that occurs as a consequence of the Failure Restructuring of this Agreement that was caused by that Party.

28.4.8 The SoM shall not be obliged to provide any payment, including indemnification, for any share in RBN. KAP or KAP's subsidiaries acquired in accordance with this Agreement."

238. Clauses 28.5 and 28.6 then establish a limitation of claims and subsequent liability:

"28.5. Safe for the provisions of the clause 28.4.7, herein any other legal consequence of the Failure of this Agreement is expressly excluded. CEAC, En+, KAP and RBN shall have no claim of whatsoever kind against the SoM or the Parties 1-3 as a result of such Failure or out of this Agreement.

28.6 Safe for the provisions of the clause 28.4.7 herein, any other legal consequence of the Failure of this Agreement is expressly excluded. SoM and the Parties 1-3 shall have no claim of whatsoever kind against the KAP or RBN, CEAC and En+ as a result of such Failure or out of this Agreement."

1. CEAC'S POSITION

239. Claimant acknowledges that it received a letter from Respondent's counsel, dated November 3, 2011,[208] in which Montenegro claimed the existence of a Failure Event.[209]

240. Claimant avers that, notwithstanding such letter, in fact no Failure Event within the meaning of Clause 28 of the Shareholders' Agreement has occurred, for the following reasons:

241. First, the late payment of KAP's electricity bills was caused by Montenegro, in particular through its failure to approve fresh loans offered by CEAC and by its refusal to support the restructuring.[210]

242. Second, Montenegro agreed to the postponement of the payment to EPCG and therefore is not allowed to claim a Failure Event.[211]

243. Third, Montenegro did not give proper notice pursuant to Clause 28.3.[212] Montenegro's letter of November 3, 2011,[213] was not only the starting point but also the end point of Respondent's path through the Clause 28 procedure. Pursuant to Clause 28.3 of the Settlement Agreement, the next step should have been a "written notice" stating that Montenegro "exercises its right to effect the consequences set forth in this Clause below." However such notice was never given by Montenegro:[214]

- Respondents' counsel's letter of February 16, 2012[215] states that if CEAC fails to remedy the alleged Failure Event within seven days, "then this letter may be considered as [Montenegro's] notification of the exercise of the consequences set forth in Clause 28.4"; however, a notice pursuant to Clause 28.3 requires that in the notice itself "the right to effect the consequences set forth in this Clause" be exercised; a declaration which is subject to a condition precedent cannot be deemed to be such notice. Furthermore, the February 16 letter only refers to the consequences pursuant to Clause 28.4, not to Clauses 28.5 and 28.6. And finally, the February 16 letter was not copied to all parties.

[208] Exh. R-99.
[209] C-41, para. 57.
[210] C-41, para. 212.
[211] C-41, para. 212.
[212] C-41, para. 213.
[213] Exh. R-99.
[214] C-41, para. 61.
[215] Exh. R-166.

– Respondent's counsel's letter of March 1, 2012[216] is not a notice by which Montenegro "exercised its right to effect the consequences" under Clause 28, but rather a "notice to transfer all shares in KAP to Montenegro"; the same applies to further letters.[217]

244. Fourth, if there had been a Failure Event, and Montenegro had duly invoked the consequences of Clauses 28.4–28.6, one of the consequences would have been that all the obligations of the parties would have been terminated – this is provided for in Clause 28.4.6.[218] Montenegro did not want that the complete list of consequences set forth in Clauses 28.4–28.6 took effect. In particular, Montenegro did not want to effect the termination of CEAC's obligations under the Settlement Agreement as provided in Clause 28.4.6. This is shown by Montenegro's request for penalties for the alleged breach of obligations, which became due at the end of 2012 and in 2013, i.e. after the February 16, 2012 letter. Montenegro's position would be completely self-contradictory if it wanted to establish that it exercised its right to effect the consequences set forth in Clause 28.4–28.6.[219]

245. Fifth, Montenegro's behaviour also shows that it knew that no Failure Event had occurred.[220]

246. Under the KAP Transfer Agreement the transfer of the shares could have been enforced rather easily through a fast-track arbitration. However, Montenegro decided not to initiate this arbitration, but to "solve" the problem by way of filing the petition for KAP's insolvency. A reason for this might be that, under the share transfer agreement, CEAC would have remained as a major creditor of KAP.[221] Another reason might be that Montenegro, after studying the legal situation, came to the conclusion that the contractual prerequisites for demanding the transfer of shares were not met.[222]

247. Sixth, there is evidence of Claimant's contemporary rejection of the Failure Event. In an email dated April 25, 2012,[223] and in its letter dated December 13, 2012,[224] CEAC already denied that a Failure Event occurred.[225]

[216] Exh. R-113.
[217] Exhs. R-114, R-115 and R-168.
[218] C-41, para. 66.
[219] C-41, paras. 66-69.
[220] C-41, para. 70.
[221] C-41, paras. 72-74.
[222] C-41, para. 78.
[223] C-33.
[224] Exh. R-170.
[225] C-41, para. 59.

2. MONTENEGRO'S POSITION

248. Respondents aver that the occurrence of a Failure Event, as set out in the Settlement Agreement, is not a procedure, but an event.[226] Such event is caused by one Party, in breach of its duties under the Settlement Agreement, entitling the other Party to effect certain consequences.[227] If a Failure Event occurs and is not remedied, the consequence is a Failure of Restructuring. A Failure Event need not be declared; it simply occurs. But Montenegro must declare to Claimant its intention to call a Failure of Restructuring and to provoke the agreed consequences.[228]

249. The primary consequence following a Failure of Restructuring is that Montenegro may request Claimant to transfer all of its shares in KAP.[229] This transfer is not automatic: it requires the cooperation of CEAC.[230] CEAC can block the process by refusing to transfer its shares.[231]

250. The Failure of Restructuring also causes certain ancillary consequences, namely:

- no obligation to reverse the Parties' fulfilled obligations;
- expiry of Claimant's call option;
- obligation to attempt a release of the State guarantees;
- survival of certain clauses;
- no further obligations under the Settlement Agreement;
- liability for damages for causing a Failure of Restructuring; and
- no compensation for the shares transferred to Montenegro.

251. All other consequences are expressly excluded; the Parties agreed that except for the above, there would be no mutual claims whatsoever, including as a result of a Failure of Restructuring.[232]

252. Even if Claimant's refusal to cooperate resulted in its shares not being transferred to Montenegro, and Montenegro was thus unable to effect the main consequence of a Failure of Restructuring, the ancillary consequences, vis-à-vis Claimant, of a Failure of Restructuring would nevertheless be presumed to have come into effect.[233]

[226] R-43, para. 54.
[227] R-43, para. 55.
[228] R-43, para. 58.
[229] R-43, para. 60.
[230] R-43, para. 62.
[231] R-43, para. 68.
[232] R-43, paras. 66–67.
[233] R-43, para. 72.

Claimant breached its duty to transfer its KAP shares

253. In November 2011, after Montenegro notified Claimants of a Failure Event, Claimant half-heartedly replied with what they considered a remedial plan. However, the plan was unspecific, uncertain, and unfit even for consideration.[234]

254. Montenegro could not accept the remedial plan and replied on January 9, 2012, rejecting it. On February 16, 2012 Montenegro once again contacted Claimant and gave them an additional seven days to remedy the Failure Event.[235] On February 23, 2012 Claimant replied, without disputing Montenegro's rights, and simply stating that Montenegro's action would be detrimental. On March 1, 2012 Montenegro requested the immediate transfer of Claimant's shares in KAP. Claimant simply ignored Montenegro's request.[236] On March 23, 2012 Montenegro informed Claimant that it would exercise its call option. It invited Claimant to meet the Government's representatives at the Montenegrin Central Depository Agency, to execute the transfer. Again, Claimant deliberately ignored Montenegro's attempt to pursue its rights.[237] Claimant insisted that they would only transfer the shares for compensation.[238]

255. Contrary to Claimant's assertions, there was no need for Montenegro to initiate arbitration proceedings to obtain the shares in KAP.[239]

256. Claimant effectively prevented Montenegro from effecting the consequences of a Failure of Restructuring: Montenegro never received the shares in KAP. As a consequence, Montenegro was prevented from taking control of KAP, continuing the restructuring efforts itself.[240] The process following the Failure of Restructuring never stopped: it was obstructed by Claimant's actions, but it never stopped until KAP's bankruptcy, which occurred over 16 months later, in July 2013. Displaying bad faith, Claimant breached its duty to transfer the shares. As a result the transfer could not be effected. Montenegro summarizes the situation with these words:[241]

> "Thus Claimant *cannot* rely on the damages and exclusion provisions of the Settlement Agreement –clauses 28.4.7 and 28.5/28.6– not becoming effective" (emphasis in the original).

[234] R-43, para. 74.
[235] R-43, para. 81.
[236] R-43, para. 84.
[237] R-43, para. 85.
[238] R-43, para. 88.
[239] R-43, para. 90.
[240] R-43, para. 96.
[241] R-43, para. 98.

3. THE TRIBUNAL'S DECISION

257. The Tribunal is faced with the question whether a Failure Event occurred and, if so, whether it resulted in a Failure of Restructuring. The Tribunal will find that Montenegro validly indeed called a Failure of Restructuring **(6.)** and will then analyse the three legal consequences of such declaration:

- the transfer of shares in KAP to Montenegro **(7.1)**;
- KAP's responsibility for the damage caused to Montenegro and its agencies as a consequence of the Failure **(7.2)**; and,
- CEAC's and En+' exclusion of liability for any claim based on the Failure of Restructuring or on any breach of the Settlement Agreement **(7.3)**.

258. But before doing so, the Tribunal will summarize the contractual regulation (**4.**) and the proven facts **(5.)**.

4. CONTRACTUAL REGULATION

259. The Settlement Agreement devotes a full section (entitled "Failure of Restructuring") to the possibility that the restructuring of KAP would result not in a success but in a failure, a possibility which both Parties must have foreseen as not impossible.

260. Clause 28.1 provides that it is Montenegro, and only Montenegro, who can trigger the Failure of the Restructuring by given written notice to CEAC that a so-called "**Failure Event**" has occurred.

261. The Failure Events range

- from a reduction of KAP's annual production to less than 50,000 tons of aluminum,[242]
- to overdue liabilities of KAP from a restructuring agreement over € 7 million,[243]
- to overdue liabilities of KAP to EPCG in excess of three monthly electricity supply bills.[244]

262. The Failure Event actually invoked by Montenegro is the last one: the existence of overdue liabilities of KAP to EPCG in excess of three monthly electricity supply bills.

[242] Exh. C-9, Clause 28.1(a) Settlement Agreement.
[243] Exh. C-9, Clause 28.1(d) Settlement Agreement.
[244] Exh. C-9, Clause 28.1(f) Settlement Agreement.

4.1 OCCURRENCE OF A FAILURE EVENT

263. A Failure Event can be invoked only by Montenegro. Clauses 28.2 and 28.3 describe the procedure which Montenegro must follow:

264. The first step is that Montenegro must notify CEAC in writing "its intention to effect the consequences" and to "require [CEAC] to rectify the Failure Event within a period of 45 Calendar Days."

265. In a second phase, CEAC must deliver to Montenegro, within 25 calendar days of the receipt of such notice, the plan of remedial actions (in writing) aimed at curing the Failure Event.

266. The third step is that Montenegro shall use "reasonable endeavours to agree" on the proposed plan of remedial actions.

267. Finally, at a fourth stage, Montenegro may exercise its "right to effect the consequences" of the Failure Event by written notice to CEAC, provided that

- the proposed plan of remedial actions is not agreed by negotiations in good faith between CEAC and Montenegro within 30 calendar days after it had been submitted, or
- the remedial plan was agreed, but the Failure Event is not remedied and the failure continues 25 calendar days after the period of time assigned to the remedial actions by the agreed remedial plan has expired.

4.2 CONSEQUENCES OF A FAILURE EVENT: THE FAILURE OF RESTRUCTURING

268. If a Failure Event occurs Montenegro is entitled to "exercise its right to effect the consequences" of such Failure Event, by declaring a so-called "**Failure of Restructuring**" with the following consequences:

A. Transfer of shares

269. First, CEAC "shall transfer immediately to [Montenegro]" all the shares it owns in KAP and Montenegro "shall not be obliged to provide any payment, including indemnification, for any share."[245]

270. The first and foremost consequence of a Failure Event is thus that Montenegro is entitled to require that CEAC promptly transfers all its shares in KAP to Montenegro, the state taking full control of the enterprise. As a general rule, Montenegro is entitled to acquire these shares for free; as an exception, if

[245] Clause 28.4.8.

Montenegro has a claim for damages or otherwise against CEAC, the lower of nominal and fair value of the shares "is deducted from [such] claim."[246]

B. Expiration of CEAC's Call Option

271. Second, the Call Option that Montenegro granted to CEAC under Clause 2 expires[247] and consequently, CEAC loses any possibility to regain control of KAP. This second consequence reinforces the basic message: a Failure Event leads to Montenegro's taking full control of KAP.

C. Responsible Party to indemnify Innocent Party

272. Third, Clause 28.4.7 mandates that each Party shall be liable to the other for any "**Indemnifiable Damage**," i.e., the damage

- "that occur[ed] as a consequence" of the Failure of Restructuring and
- "that was caused by that Party."

273. This provision echoes Clause 22.1, which entitles Montenegro "to claim damages for any breach of this Agreement including any loss or damage to the environment and economy of Montenegro."

274. This is an important conclusion: if a Failure Event occurs, and Montenegro chooses to call a Failure of Restructuring, the Agreement requires to identify the Party "that caused" the Failure Event [the **"Responsible Party"**]. The Responsible Party is then obliged to keep the "**Innocent Party**" indemnified for any Damage caused by the Failure Event affecting KAP.

D. Termination of other obligations, except First Arbitration and SPAs

275. Fourth, all obligations of the Parties under the Settlement Agreement are terminated - but the termination of the First Arbitration and of the SPAs is not affected.[248]

* * *

276. Summing up, the occurrence of a Failure Event permits Montenegro to call a Failure of Restructuring, with the consequence that Montenegro takes full control of KAP, without making an additional disbursement; CEAC becomes obliged to tender its shares, and the Responsible Party is under an obligation to keep the Innocent Party indemnified for any Indemnifiable Damage, i.e. which occurred as a consequence of the Failure of Restructuring and that was caused by that Party.

[246] Clause 28.4.2.
[247] Exh. C-9, Clause 2 Settlement Agreement.
[248] Clause 28.4.5.

4.3 EXCLUSION OF CLAIMS AND OF RESPONSIBILITY

277. Clauses 28.5 and 28.6 contain two additional important rules:

278. First, these clauses clarify that the responsibility arising from a Failure of Restructuring is limited to any Indemnifiable Damage caused to the Innocent Party (as provided for in Clause 28.4.7), "any other legal consequences of the Failure of this Agreement [being] expressly excluded."

279. Second, reinforcing such principle, it is expressly agreed that no party shall have any "claim of whatsoever kind" against any other party

- resulting from the Failure of Restructuring or
- in general arising "out of this Agreement,"

with the exception that [249]

- if the Failure of Restructuring "was caused" by Montenegro, and Montenegro consequently is the Responsible Party, it will be liable for any Indemnifiable Damage caused to CEAC as the Innocent Party, and
- *vice versa*, if the Failure of Restructuring "was caused" by CEAC, CEAC as the Responsible Party will be liable for any Indemnifiable Damage caused to Montenegro and its agencies as the Innocent Party.

5. PROVEN FACTS

280. Clause 28 of the Settlement Agreement authorizes Montenegro to declare a Failure Event if there are "[o]verdue liabilities of KAP to EPCG in an aggregate amount of more than three (3) monthly electricity supply bills."[250]

A. Declaration of a Failure Event

281. On November 3, 2011 Montenegro declared that a Failure Event occurred because KAP failed to satisfy more than three monthly electricity bills, and asked CEAC to remedy such Failure Event within 45 calendar days.[251]

282. On December 1, 2011 CEAC reacted and provided Montenegro with a "plan of remedial actions," meant to cure the Failure Event. KAP was negotiating with EPCG a postponement of its 2011 debt, which would be paid in 2012, thus remedying the Failure Event.[252]

[249] Clause 28.4.7.
[250] Clause 28.1(f).
[251] Exh. R-99.
[252] Exh. R-100.

283. On January 9, 2011 Montenegro replied that CEAC needed to furnish without delay a comprehensive plan of remedial actions, including, *inter alia*, specific actions to be taken in relation to the Failure Event, the relevant agreement—if any—reached with EPCG, and an analysis evidencing that the remedial actions in the plan would not result in more liquidity problems for KAP or new Failure Events.[253]

284. Claimant did not react to Montenegro's letter of January 9, 2011.

285. Montenegro sent another letter on February 16, 2012, notifying that CEAC had failed to take any action to remedy the failure event:

> "Although more than 3 months has passed since receipt of the First Notice by CEAC, CEAC has still not provided a reasonable remedial action plan or remedied the Failure Event."[254]

286. Montenegro gave CEAC seven days to remedy the Failure Event. Otherwise the Government would enforce its rights under Clause 28.4 of the Settlement Agreement, including CEAC's obligation to transfer immediately all its shares in KAP to Montenegro.

B. CEAC's letter dated February 23, 2012

287. CEAC's reply came on February 23, 2012. In a short letter, CEAC excused its inaction by referring to the difficult financial situation of KAP:

> "As SoM is aware, [KAP] spends every effort in order to secure the operational process and to respect all the financial obligations including obligations to the major suppliers. Beside the difficult financial situation KAP is now facing with extreme operational problems due to the weather conditions.
>
> In that situation KAP is forced to prioritise the matters of the surviving of the factory above the other commercial obligations. At present the intentions of SoM to implement the consequences set forth in Clause 28.4 of the Agreement are very untimely and making a great damage to the company.
>
> Please be aware that the actions of SoM to change control at KAP will cause defaults under the credit facilities and make all the outstanding debts and interests immediately due and payable by KAP that consequently will lead to the insolvency of a company and call on the sovereign guarantees provided by SoM."[255]

288. CEAC's letter of February 23, 2012 is important because:

[253] Exh. R-165.
[254] Exh. R-166.
[255] Exh. R-167.

- it does not dispute Montenegro's right to call a Failure of Restructuring and to take control of the Company, simply stating that the Government's plan of action is "untimely" and "will cause great damage to the Company," plus defaults under the credit agreements;
- there is no reference at all to the Failure Event having been caused by Montenegro, e.g., by denying authorization for CEAC to provide additional loans to KAP.

C. Montenegro calls a Failure of Restructuring

289. On March 1, 2012 Montenegro formally notified CEAC that all the preconditions for Montenegro to effect the consequences set forth in Clause 28 of the Settlement Agreement had been met. Given such Failure of Restructuring, CEAC was requested to transfer all its shares in KAP to Montenegro within a final period of grace of 14 days.[256]

290. On March 22, 2012, once the 14 day period had lapsed without CEAC having transferred the shares, Montenegro urged CEAC to meet with its representatives at the Montenegrin Central Depository Agency on March 23, 2012, at 14 CET, in order to complete and sign the securities transfer order. The letter attached an official form, titled "Order for the transfer of securities," for the Parties to complete.[257]

291. CEAC did not appear at the Montenegrin Central Depository Agency and the transfer of the shares was not formalized. On March 30, 2012, Montenegro sent CEAC a letter memorializing these facts:

> "we consider CEAC to be in deliberate breach of the Settlement Agreement and the Transfer Agreements, not only due to the occurring Failure Event and other breaches of the Settlement Agreement . . ."

D. CEAC's letter dated April 2, 2012

292. On April 2, 2012, CEAC replied with the following explanations:[258]

- KAP is in a disastrous financial condition which cannot be resolved without the involvement of Montenegro and EPCG and approval of the KAP's lenders;
- Montenegro's demand to have all KAP shares owned by CEAC transferred "at these times might be detrimental to KAP and RBN";
- "Nonetheless," CEAC declared that it was "ready to transfer the shares" against "adequate compensation."

[256] Exh. R-113.
[257] Exh. R-114.
[258] Exh. R-116.

293. CEAC's April 2, 2012 letter is relevant for a number of factors:

- The letter again does not dispute Montenegro's right to call a Failure of Restructuring and to take control of the Company, simply restating that the Government's plan might be detrimental to the interests of all concerned;
- Again, there is no reference at all to the Failure Event having been caused by Montenegro's actions;
- CEAC declares itself ready to transfer the shares, but only against adequate compensation; Claimant does not provide any contractual argument to support this claim.

294. Montenegro reacted on April 5, 2012, acknowledging that restructuring negotiations were ongoing, that such negotiations might lead to an overall solution for KAP to be formalized in a term sheet, but that it was not waiving its contractual rights:

> "although the SoM already gained the right to request such transfer and shall not waive it, depending on the further course of negotiations on the respective term sheet, the SoM might be willing to regulate this matter within the term sheet itself."

295. Montenegro added that the Settlement Agreement clearly provided for a transfer of shares without compensation.[259]

296. (Claimant have drawn the attention of the Tribunal to an email sent by CEAC's lawyers on April 25, 2012,[260] and aver that in this communication Claimant rejects Montenegro's position. As a matter of fact, this is not accurate: in its email CEAC simply states that "our views regarding the emerging failure event remain different." There is no material difference with regard to CEAC's letter of April 2, 2012. In particular, CEAC does not – at least not clearly – dispute Montenegro's right to invoke a Failure of Restructuring.)

297. The negotiations between CEAC and Montenegro continued during 2012, but no term sheet was eventually agreed upon. CEAC also tried to sell its shareholding in KAP to new investors, identified by the Government, but the negotiations did not succeed. No agreement having been reached, on December 4, 2012 Montenegro sent a letter to CEAC reiterating its request that CEAC transfer its shares in KAP to the Government.[261] A meeting between representatives of CEAC and Montenegro was held in Podgorica on December 10, 2012.

[259] Exh. R-168. The absence of waiver was reiterated in an email dated April 2, 2012, sent by Ms. Dragicevic, an advisor to the Government – Doc. C-23.
[260] Exh. C-33.
[261] Exh. C-63.

E. CEAC's letter dated December 13, 2012

298. Three days later CEAC reacted in a letter dated December 13, 2012,[262] which is relevant because CEAC disputes for the first time that it has ever breached any of its obligations under the Settlement Agreement, and that Montenegro is entitled to request the transfer of CEAC's shares in KAP. The letter however does not aver that the Failure Event (*i.e.* the non-payment of three electricity bills) had been caused by actions taken by the Republic.

299. This statement marked the end of the exchange of letters on this subject between CEAC and Montenegro. CEAC never transferred its shares in KAP to Montenegro, and Montenegro did not start any arbitration proceeding against CEAC under the KAP Transfer Agreement (nor under the Settlement Agreement).

300. Clause 7.1 of the KAP Transfer Agreement does provide for an abbreviated arbitral procedure, but that procedure is conditional on CEAC first having transferred its shares to Montenegro. Since CEAC never performed the transfer of the KAP shares, it is unclear whether the special arbitration procedure provided for in Clause 7.1 of the KAP Transfer Agreement was available to Montenegro.

301. In any case Montenegro chose to follow a different approach to take control of KAP.

F. Montenegro follows an alternative procedure

302. In April 2013 the Parliament of Montenegro approved a Resolution with regard to KAP. The relevant part of the resolution reads as follows:

> "Noting that the foreign partner breached key contractual obligations, the transfer of CEAC's shares to the state of 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."

303. The Parliament understood that CEAC had breached the contracts entered into with Montenegro, and urged the Government to terminate the relationship without paying any compensation.

304. One month later, on June 14, 2013, Montenegro filed a petition for bankruptcy of KAP with the Commercial Court in Podgorica. The request was based on KAP's failure to reimburse Montenegro the amount of € 23 million Montenegro was forced to pay to Deutsche Bank under the State guarantee.

305. One day after the commencement of the bankruptcy proceedings, the bankruptcy judge appointed an administrator, who promptly signed, with authorization of the

[262] Exh. R-170.

judge, the so-called MB Cooperation Agreement. This Agreement gave Montenegro Bonus, a company controlled by Montenegro, "the management of KAP business during bankruptcy" and entirely deprived CEAC of the control of KAP.

306. Through this alternative procedure, Montenegro reached a similar result as by calling a Failure of Restructuring, at least with regard to excluding CEAC from the management of KAP and taking control of the company.

6. OCCURRENCE OF A FAILURE OF RESTRUCTURING

307. The existence of a Failure of Restructuring requires two elements: that a Failure Event has occurred (**A.**), and that Montenegro invokes its right to call a Failure of Restructuring (**B.**).

A. Failure Event

308. The Failure Event invoked by Montenegro was defined in Clause 28.1(f) of the Settlement Agreement: overdue liabilities of KAP to EPCG in an aggregate amount of more than three monthly electricity supply bills. Montenegro attached to its letter of March 1, 2012, a certificate from EPCG, showing that as of November 2011 electricity bills for four months in 2009 and for four months in 2011 were outstanding.[263] CEAC has never disputed these figures and the Tribunal accepts that as of November 2011 the Failure Event described in Clause 28.1(f) of the Settlement Agreement had actually occurred.

309. It is also undisputed that on November 3, 2011, Montenegro sent a letter to CEAC invoking the existence of a Failure Event and asking CEAC to propose remedial actions within 45 calendar days.[264] Claimant reacted proposing certain remedial actions,[265] which Montenegro deemed insufficient. Under Clause 28.2 of the Settlement Agreement, Montenegro and CEAC were obliged to "use reasonable endeavours to agree on the proposed plan of remedial action." CEAC has not alleged that Montenegro breached this "reasonable endeavours" obligation.

B. Failure of Restructuring

310. In its letters dated February 16[266] and March 1, 2012[267] Montenegro formally notified CEAC of a Failure of Restructuring: Montenegro averred that all preconditions for Montenegro to effect the consequences set forth in Clause 28 of the Settlement Agreement had been met.

[263] R-113 p. 7.
[264] Exh. R-99.
[265] Exh. R-100.
[266] Exh. R-166.
[267] Exh. R-113.

311. Claimant has invoked three reasons arguing that no Failure Event occurred or that Montenegro did not validly call a Failure of Restructuring:

- Montenegro agreed to the postponement of the payment to EPCG and therefore is not allowed to claim a Failure Event (**C.**);
- Montenegro did not give proper notice pursuant to Clause 28.3. (**D.**);
- There is evidence of Claimant's contemporary rejection of the Failure Event: In an email dated April 25, 2012, and in its letter dated December 13, 2012, CEAC already denied that a Failure Event occurred (**E.**).

C. First counter-argument: Montenegro agreed to postpone payment of the electricity bills

312. In its CPHB Claimant simply makes the following statement:[268]

> "Further, as demonstrated in the Hearing, the SoM agreed to the postponement of the payment to EPCG and therefore is not allowed to claim a failure event."

313. No further explanation is given, and no reference to any piece of evidence is provided. The Tribunal understands that Claimant is referring to a meeting of the Board of Directors of KAP, held on February 25, 2011, where the postponement of payments to EPCG was allegedly authorized.

314. The minutes of that meeting have been produced by Respondents.[269]

315. There are at least three problems with Claimant's position:

316. The first is that the argument was made *ex post facto*, in the course of the arbitration; in contemporaneous correspondence there is no reference whatsoever to this line of reasoning.

317. The second is that at the beginning of the meeting of KAP's board, Assistant Minister Dragan Kujovic made a specific reservation of Montenegro's rights under the Settlement Agreement.

318. And the third is that the resolution passed at the meeting of the Board does not support Claimant's allegations.

319. The resolution orders KAP

> "to give priority to the realization of payments related to maintaining the current business operations, according to which payments related to

[268] C-41, para. 212.
[269] Exh. R-69.

> maintaining the current business operations will take priority over all other payments."

320. From the context it is clear that KAP was running short of cash and that the decision was meant to postpone payment of financial debts, *i.e.*, payments due to OTP, Deutsche Bank, and VTV Bank. In an aluminum smelter, electricity is a fundamental input to "maintain the current business operations": if supply is cut off, production must cease immediately. The resolution does not refer specifically to payments for electricity supply. But if any deduction relating to this issue is to be induced from the resolution, it is that the Board decided that these payments should "take priority over all other payments," not that it authorized KAP to withhold payments of electricity, as Claimant now avers.

D. Second counter-argument: Montenegro failed to give proper notice

321. CEAC says that Montenegro never gave proper notice under Clause 28.3 of the Settlement Agreement, and consequently Montenegro never "effected the consequences set forth" in that clause, and a Failure of Restructuring never occurred.[270]

322. Claimant's allegation is factually wrong.

323. In its letter dated February 16, 2012,[271] Montenegro granted an additional period of grace of seven days for Claimant to remedy the situation, adding the following:

> "In case CEAC fails within 7 days of receipt of this letter fails to do as proposed in the foregoing paragraph [i.e. remedying the Failure Event], then this letter may be considered as SoM's notification on the exercise of the consequences set forth in Clause 28.4. This will, *inter alia*, include CEAC's obligation to transfer immediately all its shares in KAP to the SoM."

324. And subsequently, in its letter of March 1, 2012,[272] Montenegro states unambiguously:

> "Further we also wish to confirm the fact that all preconditions for the SoM to effect consequences set forth in Clause 28 of the Settlement Agreement have been met."

325. Finally, the Republic in the same letter "effects the first consequence" of the Failure Event: it requests CEAC "to transfer its shares in KAP . . . to the SoM without further delay."

[270] C-41, para. 65.
[271] Exh. R-166.
[272] Exh. R-113.

E. Third counter-argument: CEAC denied the existence of a Failure of Restructuring

326. CEAC says that there is evidence of Claimant's contemporary rejection of the Failure Event.[273]

327. The proven facts show otherwise.

328. It was almost one year after the Failure Event, when in its letter dated December 13, 2012,[274] Claimant rejected for the first time the occurrence of a Failure Event and the subsequent Failure of Restructuring.

329. During that year, Claimant's position was markedly different:

- CEAC's letter dated February 23, 2012[275] does not dispute Montenegro's right to call a Failure of Restructuring and to take control of the Company, and does not impute the cause of the Failure Event to Montenegro.
- The letter dated April 2, 2012[276] does not dispute Montenegro's right to have the shares in KAP transferred, declares that CEAC is ready to do so, and only requires "adequate compensation."
- Furthermore, the email dated April 25, 2012[277] simply reiterates the position held in the previous letter.

330. Summing up, the Tribunal rejects Claimant's arguments and finds that as of March 1, 2012 all preconditions for Montenegro to effect the consequences set forth in Clause 28 of the Settlement Agreement had been met and that Montenegro had formally notified CEAC that a Failure of Restructuring occurred.

7. LEGAL CONSEQUENCES OF THE FAILURE OF RESTRUCTURING

331. In accordance with the Settlement Agreement, Montenegro's decision to call a Failure of Restructuring brought about three consequences which are relevant for this case:

- The first is that Montenegro became entitled to take full control of KAP, CEAC being obliged to transfer all of its shares without any compensation[278] (**7.1**);

[273] C-41, para. 59.
[274] Exh. C-63.
[275] Exh. R-167.
[276] Exh. R-116.
[277] Exh. C-33.
[278] Clauses 28.3 and 28.4.8.

- The second is that the Party that "caused the Failure of Restructuring" must be identified, and that such "Responsible Party" is liable for any damage ["**Indemnifiable Damage**"] caused by the Failure of Restructuring to the "Innocent Party"[279] (**7.2**);
- The third is that, further to such Indemnifiable Damage, which can be demanded only from the Responsible Party, "any other legal consequences of the Failure of this Agreement is expressly excluded," and no Party shall have any "claim of whatsoever kind" against any other Party resulting from the Failure of Restructuring or in general arising "out of this Agreement"[280] (**7.3**).

7.1 FIRST CONSEQUENCE: CEAC'S OBLIGATION TO TRANSFER ITS SHARES IN KAP

332. The first and foremost consequence of a Failure Event is that Montenegro is entitled to require that CEAC promptly transfer all its shares in KAP to Montenegro, resulting in the State taking full control of the company. Montenegro, as a general rule, is entitled to acquire these shares for free; the only exception is that if Montenegro has a claim for damages or otherwise against CEAC, the lower of nominal and fair value of the shares "is deducted from [such] claim."[281]

333. Beginning in March 2012 Montenegro requested CEAC to comply with this obligation. CEAC agreed to the transfer, but requested that the State pay compensation.[282] Towards the end of 2012, CEAC's position changed, and Claimant wrote to Montenegro, denying the existence of a Failure Event, and of any obligation to transfer its shareholding in KAP.[283]

334. Faced with this situation, Montenegro chose not to enforce its contractual rights, either under the KAP Transfer Agreement or under the Settlement Agreement, possibly because the special arbitration procedure provided for in Clause 7.1 of the KAP Transfer Agreement was not available to Montenegro (such procedure requiring that CEAC comply first with its share transfer obligation).

335. Instead, Montenegro decided to follow an indirect route to take control of KAP: on June 14, 2013 it filed a petition for bankruptcy, based on KAP's failure to reimburse the amounts disbursed by Montenegro to Deutsche Bank under the State guarantee. Immediately thereafter the administrator of the bankrupt estate, with the consent of the judge, entrusted the management of KAP to Montenegro Bonus, a company owned by Montenegro.

[279] Clause 28.4.7.
[280] Clauses 28.5 and 28.6.
[281] Clauses 28.3 and 28.4.8.
[282] Exh. R-116.
[283] Exh. C-63.

336. Montenegro thus finally secured the control of KAP, to which it had been entitled under the Settlement Agreement.

337. Summing up, the Tribunal finds that since March 1, 2012 CEAC was under a contractual obligation to deliver its shares in KAP to Montenegro, without receiving any payment in exchange, except if Montenegro had a claim against CEAC, when the lower of nominal and fair value of the shares "is deducted from [such] claim."[284] CEAC breached its obligation and, notwithstanding Montenegro's repeated requests, failed to transfer the KAP shares. In these circumstances, Montenegro filed a petition of bankruptcy, and the bankruptcy judge and the administrator entrusted the management and control of KAP to Montenegro Bonus, a State owned company. Thus, Montenegro took indirectly control of KAP.

7.2 SECOND CONSEQUENCE: IDENTIFICATION OF THE RESPONSIBLE PARTY

338. Clause 28.4.7 requires that in any Failure of Restructuring the Party that "caused" such Failure must be identified.

339. In the present case the Failure Event giving rise to a Failure of Restructuring consists in the non-payment by KAP of certain monthly electricity bills. Montenegro does not argue that CEAC or En+ should be made responsible for KAP's default; the Party which caused the Failure of Restructuring was KAP: it was KAP who was obliged to pay, and it was KAP who defaulted.

340. CEAC, however, disagrees; it avers that the non-payment of KAP's electricity bills was caused by Montenegro, in particular through its failure to approve fresh loans offered by CEAC (**A**.) and by its refusal to support the restructuring (**B**.).[285]

A. CEAC's first counter-argument: Montenegro failed to approve fresh loans

341. The DB Facility, a loan agreement between KAP and Deutsche Bank, guaranteed by Montenegro, included the (unusual) provision that new loans from CEAC to KAP had to be authorized by Montenegro; in accordance with Clause 19.18 *in fine* KAP was prohibited to

> "request the extension of loans . . . (including CEAC and any company affiliated to CEAC and En+ Group) without the prior written consent of the Government of Montenegro."[286]

342. (*Pro memoria*: under Clause 5.1.h) of the Shareholders' Agreement

[284] Clauses 28.3 and 28.4.8.
[285] C-41, para. 212.
[286] Exh. C-41.

> "borrowing or raising money (except loans set out in the Settlement Agreement) . . . (including CEAC and any company affiliated to CEAC or En +)"

was subject to a veto right of the Republic: officers and organs of KAP could not adopt any decision to borrow or raise money if Montenegro "was not properly informed about such resolution or it has vetoed such resolution."[287] The DB Facility expanded the rights of Montenegro: under the Shareholders' Agreement any CEAC loan to KAP was subject to a veto right; under the DB Facility, the veto right was converted into a requirement of "prior written consent".)

343. Claimant says that between the signing and the closing of the Settlement Agreement CEAC granted loans to KAP in an amount of € 12 million, without having an obligation to do so, that Montenegro rejected to approve such advances, and that Montenegro also rejected further proposed loans from CEAC to KAP.[288]

344. Respondent denies the allegation. It says that there were no objections from Montenegro to loans or investments by CEAC in KAP, and that Claimant failed to provide any evidence to the contrary.[289] Montenegro only asked that Claimant makes their intentions clear; once Montenegro received the requested clarification, it readily gave its consent.[290]

345. The issue at hand requires that as a first step the Tribunal establishes the proven facts, based on the evidence marshalled by the Parties.

a. Proven facts

346. In 2008 (i.e. before signing the Settlement Agreement) CEAC had arranged a long-term loan to KAP in a maximum amount of € 390 million, for financing of its ordinary business operations (with an interest of 7% and repayment in 2015).

347. The Settlement Agreement required that on the Closing Date (i.e. October 26, 2010) CEAC waive a portion of the outstanding loan, and CEAC actually released an amount of € 38 million.[291] But at the end of 2010 a significant amount of that loan was still outstanding: € 34.5 million.[292]

348. Between the signature of the Settlement Agreement in late 2009 and the closing of the transaction in late 2010, KAP suffered acute funding shortages. This deficit was covered by successive loans from CEAC, which started on July 20, 2010, and

[287] Clause 5.1.
[288] C-41, para. 36.
[289] R-43, para. 46.
[290] R-43, para. 49.
[291] The amount of the waiver is not totally clear; Claimant says that the amount is € 40 M; the 2010 accounts of KAP put the figure at € 38 M (the difference probably is due to the inclusion or exclusion of outstanding interest).
[292] R-27 p. 36.

continued with six additional drawdowns through January 11, 2011. The total amount lent by CEAC to KAP amounted to € 12 million.[293]

The Request for authorization

349. Barely two months after the closing of the Settlement Agreement, on December 22, 2010, KAP approached Montenegro in writing, requesting authorization for CEAC to increase the inter-company loan granted to KAP up to a principal amount of € 75.6 million – the sum of outstanding principal, before the waiver made by CEAC on Closing Date in compliance with the Settlement Agreement [the "**Request**"].[294] In practical terms KAP's Request implied the possibility that CEAC provide close to € 40 million of additional funding (including the € 12 million which had already been drawn down during 2010).

350. The Government of Montenegro reacted on January 18, 2011, requiring additional information,[295] which KAP provided in a letter sent on January 27, 2011.[296] In that letter KAP explained

- that CEAC had continued to finance KAP during the year 2010, up to the Closing Date and even thereafter, in a total amount of close to € 12 million; KAP clarified that it was also requesting authorization for this additional lending;
- that the ceiling requested (up to € 75.6 million) corresponded to the principal and interest outstanding as of the Closing Date, before the waiver of the amount agreed upon in the Settlement Agreement;
- and that the purpose of the financing was "to cover the planned deficit (cash gap)" of KAP.

Alleged rejection by the Ministry

351. Claimant alleges that, after a further reminder,[297] the Ministry of Economy eventually rejected the Request in a letter dated May 11, 2011.[298]

352. The statement is actually not true.

353. The May 11, 2011 letter[299] explicitly rejects another application, made as of May 10, 2011,[300] which concerned deferral of obligations towards VTB, Deutsche Bank and ECPG.

[293] Exh. C-216 B has a complete schedule with details.
[294] Exh. C-215A; the letter was ratified on January 13, 2011 – C-215 B.
[295] Exh. C-216A.
[296] Exh. C-216B.
[297] Exh. C-217.
[298] C-41, para. 48.
[299] Exh. C-218.

354. The May 11, 2011 letter has no reference whatsoever to KAP's Request for additional funding by CEAC.

Did Montenegro reject KAP's request?

355. The Parties have not drawn the Tribunal's attention to any document in the file, in which the Government of Montenegro either accepts or rejects the Request. In accordance with the DB Facility, any loan from CEAC to KAP required "prior written consent" from Montenegro. Neither Party has marshalled any documentary evidence showing that such consent was either granted or denied.

356. This is especially surprising, because both Parties accept that an 800,000 € loan from CEAC to KAP was actually approved (in writing) by Montenegro,[301] yet no documentary evidence has been marshalled.[302]

357. The only available evidence is the witness evidence provided by Mr. Potrubach, the CFO of CEAC and of KAP, by Mr. Kavaric, Minister of Economy, and by Mr. Buskovic, Deputy Minister of Finance of Montenegro.

358. Mr. Potrubach declared as a witness during the hearing that he repeatedly approached the Government, and that authorization of the Request was rejected:

> "MR WOLFF: . . . I'm sorry, one last question. What was the reaction of the Government to this quite clear letter from end of December 2010?
>
> MR POTRUBACH: They refused us to provide such acceptance and we tried to explain what is the reason because I many times even discussed this issue with Mr Buskovic and I tried to explain that in this situation if the Government didn't give us confirmation, acceptance to receive loan, in this case KAP is in the very difficult situation because we don't have enough money to cover cash gap, to cover operational expenses.[303]
>
> . . . State of Montenegro repeatedly made situation of KAP very difficult refused to provide possibility to receive money . . . ."[304]

359. Minister Kavaric was not directly involved in the matter, because the necessary authorization had to be provided by the Ministry of Finance, and not by the Ministry of Economy, which he headed. Still, he was copied on some of the letters, and extensively questioned at the hearing regarding this matter. He was asked whether Montenegro ever denied CEAC's request to provide loans, and his answer was non-committal:

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[300] Exh. R-159, as Respondent has correctly shown – R II n 187.
[301] *See* Potrubach, HT II, p. 246:16 and Buskovic HT IV, 194:16.
[302] C-41, para. 50.
[303] HT, day 2, p. 238:23–239:12.
[304] Hearing transcript, day 2, p. 240:11-13.

> "THE CHAIRMAN: You or someone you control or the Government of Montenegro, did you at any stage deny Claimants the possibility of making loans to the company?
>
> MR KAVARIC: (By himself) Injection never. I am not sure about credits on smaller scale. I cannot remember but I believe that never it was rejected -- I believe. Probably something more smaller scale which I cannot recall."[305]

360. Mr. Buskovic, Deputy Minister of Finance of Montenegro, who signed the Government's letter dated January 18, 2011, also gave his testimony as a witness.

361. He acknowledged that CEAC provided KAP an additional loan of € 12 million in the course of 2010, stated that this lending constituted a breach of the DB Agreement,[306] but that eventually, after an auditor's report, the Government had authorized this financing.[307] There is no documentary evidence in the file proving this statement.

362. When questioned regarding KAP's Request that the CEAC debt ceiling be increased to € 75 million, the Deputy Minister's answer was the following:[308]

> "MR WOLFF: Why did you not provide a consent for CEAC as its shareholder, as then co-shareholder of the Government, to provide additional funds in form of loans to KAP?
>
> MR BUSKOVIC: We clearly presented our point of view to the aluminium plant. We told them we are ready to support all of your requests to get additional loans but the amount of funds had to be clear. The limits do not mean much in business. It can happen but it doesn't have to happen that way.
>
> So the moment aluminium plant addressed us with a clear request related to a borrowing in the amount of EUR 800 million from CEAC, we gave them – yes, yes, sorry 800,000 is the correct figure – so we gave them that consent and there's a document to prove it."

363. Mr. Buskovic's initial answer seems to be that the Government was prepared to approve CEAC's loans for specific amounts of principal, but not a general debt ceiling. His position was clarified in a further question by Claimant's counsel:

> "MR WOLFF: So to sum it up you did not give the consent for the debt ceiling to be raised to EUR 75 million from CEAC to KAP?
>
> MR BUSKOVIC: It's a difficult question to answer. The ceiling for taking out loans does not mean anything. There is an obligation regarding this. They can get the funds – they could get the funds that they needed. We are

[305] Hearing transcript, day 4, p. 170:2-10.
[306] Hearing transcript, day 4, p. 186:1–186:13.
[307] Hearing transcript, day 4, p. 192:19–192:24.
[308] Hearing transcript, day 4, p. 194:7–195:13.

> speaking about clear transactions that have to be clearly quantified and there has to be a clear deadline up to which the transactions will be effectuated.
>
> So it was in our interest for the plant to continue working and whenever KAP addressed us with a clear financial transaction in mind, the transaction was approved by us.
>
> Unfortunately, that happened only once and that was materially insignificant amount of only EUR 800,000. When I say materially [in]significant it's because of the size of the company not because of the amount itself."

364. Summing up, from the evidence marshalled by the Parties, the following conclusions can be safely drawn:

- The DB Facility, a loan agreement between KAP and Deutsche Bank, guaranteed by Montenegro, included the unusual feature that any new loans from CEAC to KAP would require authorization by Montenegro;
- From July 20, 2010, through January 11, 2011 (between signature and closing of the Settlement Agreement), CEAC advanced € 12 million to KAP without obtaining the authorization from Montenegro;
- On December 22, 2010 KAP submitted a Request to Montenegro, informing that € 12 million of funding had been advanced and asking for authorization to increase the maximum outstanding amount of the CEAC/KAP intercompany loan to € 75.6 million (including the € 12 million which had already been drawn down during 2010);
- Montenegro did not start any remedial action against CEAC/KAP, based on the fact that the DB Facility had been breached;
- There is no evidence that Montenegro either explicitly authorized or explicitly denied the increase of the Request; the available evidence indicates that Montenegro simply procrastinated on the decision and never granted the requisite authorization;
- In his testimony Assistant Minister Buskovic explained the position adopted by Montenegro, saying that the Republic was unwilling to authorize a generic ceiling, which left the decision at the discretion of CEAC, but that it was prepared to authorize specific loans;
- It is undisputed that KAP asked for additional authorization for an € 800,000 loan, and that this authorization was duly granted; there is no evidence that KAP submitted additional requests for authorization of other loans.

b. Existence of causality

365. Clause 28.4.7 requires that the Failure of Restructuring "be caused" by a Party. Claimant alleges that in the present case the Failure of Restructuring was caused

by Respondent's rejection of KAP's Request. If such Request had been granted, so the argument runs, CEAC would have provided sufficient funds to KAP, and KAP would have been able to pay its electricity supply bills, and the Failure Event would never have occurred.

366. The Tribunal is unconvinced.

367. First, Claimant's present line of reasoning was introduced for the first time in Claimant's Statement of Reply.[309] There is

- no contemporary evidence that CEAC requested authorization for loans to KAP for the settlement of electricity bills nor
- any contemporary statement by KAP or CEAC averring that KAP's default was caused by Montenegro's denial of the Request.

368. Second, Montenegro provides a reasonable explanation for its behaviour: the State was not prepared to grant CEAC a blanket authorization to finance KAP at its discretion, but was ready to approve individual transactions; in one instance, CEAC was actually authorized to provide an € 800,000 loan to KAP.

369. Third, CEAC never asked for an authorization permitting it to advance a defined amount of funds to KAP, so that KAP could settle its outstanding invoices from ECPG; had this happened, it seems unlikely that the State would have refused such authorization, the utility being a State-owned enterprise; it seems more plausible that CEAC, which was in the middle of a negotiation with Montenegro, was not prepared to provide funds to KAP, which would immediately flow to the State, from whom CEAC was demanding financial support for KAP's restructuring (it would be financing Montenegro's support to KAP with its own money!).

B. CEAC's second counter-argument: Montenegro refused to support the restructuring

370. Claimant also alleges that the Failure of Restructuring was caused by Montenegro's refusal to support the restructuring.[310]

371. Montenegro denies the entire allegation.

a. CEAC's position

372. CEAC claims that Montenegro's rejection of several restructuring plans proposed by CEAC was not only the cause of the Failure of Restructuring, but also a breach

[309] C-23, para. 296.
[310] C-41, para. 212.

of the Settlement Agreement, of the Shareholders' Agreement and of its duty of loyalty under Montenegrin contract law.[311]

373. Claimant submits that the Settlement Agreement and the KAP's Shareholders' Agreement must be construed as to impose a duty of loyalty on each shareholder, not only toward the company but also toward its co-shareholder.[312] The co-shareholders undertook to achieve a full recovery of KAP and were under an obligation to take part in restructuring measures.[313] The duty entails the obligation for each shareholder to support a restructuring plan designed to safeguard the company's long-term sustainability in the face of insolvency. It also includes the obligation to take part in debt-to-equity swaps, especially in the absence of restructuring measures.[314] Montenegro chose not to honor this obligation.[315]

(i) Construction of the Agreements

374. First, the Settlement Agreement and the KAP's Shareholders' Agreement must be construed taking into account the principles of contract interpretation set forth in Arts. 4, 5, 6, 9, and 95–98 of Montenegro's Law on Contracts and Torts ["**LCT**"].[316]

375. The Supreme Court of Montenegro confirmed the application of these principles in its decision dated May 29, 2013, holding that the Court

> "had to . . . interpret the provisions in concordance with the principles of contract law."[317]

Similarly, in its decision of October 11, 2012, the Court observed that,

> "when construing the provisions of the Agreement, one should . . . understand the provisions in accordance with the principles of the Law on Contract and Torts."[318]

376. Applied to the Settlement Agreement and KAP's Shareholders' Agreement, these principles show that:

- The co-shareholders undertook to achieve a full recovery of KAP and were under an obligation to take part in any measures in this regard;[319]

[311] C-16, para. 236–248.
[312] C-16, para. 243.
[313] C-16, para. 237.
[314] C-16, para. 244.
[315] C-16, para. 245.
[316] C-16, paras. 237–242.
[317] Exh. RLA 9.
[318] Exh. RLA 10, *See* also Exh. RLA 12: Decision of Supreme Court of Montenegro Rev.br. 60-13, dated 26 February 2013.
[319] C-16, para. 237.

- Both agreements must be construed so as to impose a duty of loyalty on each co-shareholder, not only toward the company but also toward each other;[320]
- The duty entails positive obligations for each co-shareholder, such as to support a restructuring plan designed to safeguard the company's long-term sustainability in the face of insolvency.

377. CEAC says that, if the Agreements do not specify all these obligations, it is because the Parties left them open to be decided later as necessary.[321]

(ii) Recitals

378. Second, a duty of loyalty also arises from the recitals in the Settlement Agreement and the KAP's Shareholders' Agreement. Specifically, Montenegro undertook "to support the financial recovery of the companies" (Recital D of the Settlement Agreement), and became a major shareholder of KAP "in order to ensure the harmonious and successful management" of KAP (Preamble of the KAP's Shareholders' Agreement, *in fine*).[322] Recital D should be interpreted to the effect that the "goal to support" was meant as a "mandatory goal" for Montenegro, i.e. in other words as an "obligation to support."[323]

(iii) Filling of gaps

379. Third, even if one does not accept that Recital D contains an obligation to support KAP's recovery, this obligation is to be implied by filling a gap in the Settlement Agreement, the Settlement Agreement being silent on the question of whether the parties are under an obligation to take part in further steps to save the company. The following provisions must be taken into account:

- Montenegrin contract law requires that gaps be filled by determining the hypothetical will of the parties, based on objective and subjective criteria, for the filling of such gaps, the same principles of interpretation apply as in the case of the interpretation of express contractual provisions, namely Art. 95 through 97 LCT;[324]
- Also, Clause 34.9 of the Settlement Agreement and Article 18.2 of KAP's Shareholders' Agreement contain a specific provision on how to deal with gaps; its language support this conclusion;

[320] C-16, para. 243.
[321] C-31, para. 113.
[322] C-16, para. 246.
[323] C-23, para. 104.
[324] C-23, paras. 31, 33, and 106.

– Under Article 25(2) LCT, the same approach is to be applied if the parties had not agreed on how to deal with gaps.[325]

(iv) Good faith

380. Fourth, CEAC states that the principle of good faith encompasses the duties of loyalty and care and that Art. 11.3 LCT prohibits parties to perform acts which might be detrimental to the performance of the other party's obligations. As soon as parties enter into a contractual relationship, a bond of trust is established. Since every case is specific, the content and extent of the good faith principle is determined by the Court for every individual situation – there are no ready-made rules.[326]

381. Additional ancillary obligations, required for the adequate performance of obligations, arise *ipso iure* from the good faith principle. This "regulatory function" of good faith gives rise to a duty of notifying, a duty of reporting, a duty of cooperation etc., which must be complied with by every faithful and fair business partner. Failure to do so gives the counterparty the right to seek damages.[327]

382. The highest level of good faith and trust is required in cooperation agreements and agreements with long-lasting obligations. If the purpose of the contract is to establish a business, the joint interest of the parties supersedes all other interests. If one party puts its own interests before the joint interests, the mutual trust created is grossly violated and the good faith principle is breached.[328]

(v) Joint venture agreements

383. Fifth, Montenegrin law does not contain provisions that specifically regulate the rights and obligations of the parties under joint venture agreements. But since these agreements imply the existence of a joint interest of the parties and a long-term relationship, a high degree of good faith must be expected.[329]

384. Under German law, there is a long-standing case law regarding the duty of loyalty (*Treuepflichten*) between shareholders of a company, not stipulated by statutory law, but recognized by the courts based on the general principle of good faith pursuant to Section 242 of the German Civil Code. This duty of loyalty requires each shareholder to actively promote the purpose of the company and to refrain from actions that could compromise such purpose. Rights and powers must be exercised in a reasonable manner, taking into consideration the legitimate interests

[325] Exh. CLA-22.
[326] C-41, paras. 165-166.
[327] C-41, para. 170-171.
[328] C-41, para. 167-168.
[329] C-41, para. 169.

of the company and its shareholders[330]. The intensity of the duty of loyalty depends on the type of company and on the shareholder structure.

385. Based on the duty of loyalty, a shareholder also owes a duty to cooperate and support a restructuring if the company is in a financial crisis. In a number of landmark decisions, the German Federal High Court ["**BGH**"] has set out in detail in which cases a shareholder is required to provide further financial means to the company. In summary, the following requirements must be met:

- The company must be in need of a restructuring;
- The restructuring of the company must be possible;
- An appropriate restructuring plan must exist;
- The cooperation of the respective shareholders must be absolutely essential for the restructuring of the company; and
- The support of the restructuring can be reasonably expected from the shareholder and is not opposed to the shareholder's legitimate interests[331].

386. Besides the specific obligation to support a restructuring of the company, the duty of loyalty demands, in broader terms, that a shareholder must take into account the financial situation of the company and accept financial restraints. For example, a shareholder must not drive the company into insolvency by enforcing a claim as creditor against the company.[332]

387. Summing up, CEAC says that Montenegro prevented the implementation of all the restructuring measures proposed by CEAC and, thereby, thwarted CEAC's efforts to resolve the financial crisis of KAP.[333]

b. Montenegro's position

388. Montenegro says that neither the Settlement Agreement nor the KAP's Shareholders' Agreement contain a single provision forcing Montenegro to accept any demand presented by the Claimant aimed to save the company.[334] Rather, "the [Settlement Agreement] was concluded for a clearly defined and limited set of restructuring measures."[335] The parties never envisaged to implement further measures if the agreed measures proved insufficient or inadequate. In fact, it was

[330] C-41, para. 174.
[331] C-41, paras. 177-178.
[332] C-41, para. 179
[333] C-16, para. 247.
[334] R-22, para. 127.
[335] R-22, para. 19.

expressly provided for that a failure of the measures as set forth in the Settlement Agreement would lead to its termination.[336]

389. Montenegro argues that the allegations should be dismissed in their entirety for the following reasons:[337]

(i) Construction of the Agreements

390. First, CEAC's understanding of the Montenegrin law on the construction of contracts is incorrect:[338]

391. The general principles of the LCT list specific circumstances to be taken into account when interpreting contractual obligations, such as the circumstances of the contract's conclusion, prior negotiations, the conduct of the parties following the conclusion of the contract, the nature and purpose of the latter, and so on. Yet the general principles of the LCT cannot:

- regulate any issues deliberately left out of the agreement, or issues which arise between the parties after signing their agreement;
- oblige a party to act contrary to its own interest, only to meet the expectations of the other party;
- entitle one party to expect the counterparty to use its special capacity or status, not connected with the contract itself, in order to grant certain benefits to the first party.[339]

(ii) Recitals

392. Second, neither the Settlement Agreement nor the KAP's Shareholders' Agreement contain a single provision forcing Montenegro to accept any new restructuring plan presented by the Claimant.[340] The parties never envisaged the implementation of further restructuring measures if the agreed measures proved insufficient or inadequate.[341]

393. The Claimant's reliance on Recital D of the Preamble of the Settlement Agreement is pointless for the following reasons:[342]

394. As a matter of principle, preambles do not impose any obligations on the parties. Rather, preambles typically express the intent of the parties or their motives for committing themselves to the obligations contained in the dispositive part of the

[336] R-22, paras. 21 and 22.
[337] R-22, para. 142.
[338] R-22, paras. 116–126.
[339] R-43, paras. 215 and 216.
[340] R-22, para. 127.
[341] R-22, paras. 21 and 22.
[342] R-22, paras. 107–115.

contract. Accordingly, Recital D of the Settlement Agreement does not impose on the parties any specific obligations. It merely expresses the reasons why Montenegro entered into the Settlement Agreement and undertook certain duties. It cannot be reasonably construed as a full-fledged obligation.

395. In order to be valid, a contractual obligation must be determined or determinable (Arts. 41 and 42 LCT).[343] Recital D cannot be stretched so far as to create a determined or determinable obligation, that Respondents must support further restructuring steps. Recital D is a mere statement of the parties' general motivation when entering into the Settlement Agreement. It sets out no obligations.

396. Recital J acknowledges that Recital D merely sets out Montenegro's reasons for entering into the Settlement Agreement. Moreover, Recital J shows that the preamble only illustrates the Parties' intents. The actual obligations can be found in the dispositive part of the Settlement Agreement.

(iii) Filling of gaps

397. Third, Article 25 LCT establishes that a gap can never relate to a primary obligation under a contract. The restructuring and financial measures were a primary and essential part of the Settlement Agreement. Therefore they cannot be implied.

(iv) Good faith

398. Fourth, the duty of good faith and fair dealing, provided for in the LCT, defines the general framework for the conduct of parties when performing their contractual rights or obligations. The aim of such framework is to prevent parties from abusing their rights and legal positions, and to protect the proper performance of the parties' specifically agreed obligations. While this duty may imply certain secondary obligations, such secondary obligations must always be connected to the parties' primary obligations, and cannot stand alone. Put simply: secondary obligations prescribe in more detail "how" an obligation should be performed, but not "what" that obligation is.[344]

399. Even if such duty of loyalty existed, its scope is not as far-reaching as the Claimant purports:

– the extent of a duty of loyalty would essentially depend on the "degree of personalization" of the company; KAP, at the time of the

[343] RLA 25.
[344] R-43, paras. 206–211.

conclusion of the Settlement Agreement, was quoted on the stock exchange;[345]

– any duty of loyalty would never go as far as to require a shareholder to assent to any proposed measures which is contrary to its interests or which require considerable financial contributions.

(v) Joint venture agreements

400. Fifth, shareholders do not owe any duty of loyalty to each other. The law on point here is the Montenegrin Law on Companies ["**MLC**"], which does not even stipulate that a shareholder owes its company a duty of loyalty. The MLC expressly provides that a shareholder has no other obligations than to pay in the contribution when subscribing to the shares.[346]

401. The KAP's Shareholders' Agreement, individually or seen in concert with the Settlement Agreement, does not create a partnership. A partnership under the MLC is a type of company that assumes the parties' joint engagement in a specific profit-making business, and the contribution of specific assets to that business. The KAP's Shareholders' Agreement is not aimed at establishing any new business operations, and by definition it cannot result in a MLC partnership between Claimant and Montenegro.

402. But even assuming that there was an MLC partnership between Claimant and Montenegro, the MLC would still not impose any specific duties of care or good faith on the partners in their mutual dealings, except for the obligation to provide full information on matters affecting the partnership.[347]

c. The Tribunal's decision

403. CEAC asserts that Montenegro, in breach of its obligations toward CEAC under the Settlement Agreement and the KAP's Shareholders' Agreement, repeatedly obstructed the restructuring plans proposed by CEAC to ensure KAP's viability. Had Montenegro cooperated in these efforts and accepted one of the restructuring plans proposed, KAP would not have defaulted on its obligations with ECPG, no Failure Event and Failure of Restructuring would have occurred, and KAP would by now be a profitable company. Consequently, in Claimant's line of reasoning, the Failure of Restructuring "was caused" by Montenegro.

404. Montenegro denies any obligation to participate in KAP's restructuring.

405. The Tribunal sides with Montenegro.

[345] Exh. R-30 (Excerpt from Montenegrin Stock Exchange).
[346] RLA-14 (Montenegrin Law on Companies), Arts. 30(3) and 44 MLC.
[347] R-43, paras. 198–202.

(i) Facts

406. At the time of the First Arbitration, KAP was already struggling with serious liquidity and structural problems. The signing and execution of the Settlement Agreement did not solve KAP's financial problems. The company continued to face serious economic difficulties. For about three years after the Settlement Agreement became operative (from October 2010 to July 2013) CEAC, En+, and Montenegro repeatedly sat at the negotiation table and tried to come up with a restructuring plan. CEAC presented various alternative solutions, which Montenegro rejected for a variety of reasons.

407. At the beginning of 2011 the management of KAP commissioned Houlihan Lokey, an international investment bank, to design a restructuring plan to save the company.[348] Montenegro's government showed willingness to help CEAC in its efforts to restructure and save KAP. At the invitation of the company, in April 2011 the Montenegrin Minister of Economy attended one of KAP's shareholders' meetings,[349] where officers of Houlihan Lokey and KAP delivered a presentation on the potential scenarios for restructuring KAP.[350]

408. On June 10, 2011 Montenegro and the En+ Group signed the 2011 MoU,[351] in which both Parties agreed to use "their best efforts to ensure KAP's long-term operational viability and financial solvency" and to reach an agreement (by October 31, 2011) on how to restructure KAP's debts and reduce its electricity costs.

409. A few weeks later, however, the talks came to a dead end. Montenegro was not willing to consent to CEAC's proposal because it entailed huge amounts of public funds. Besides, Montenegro was not persuaded that the proposal would put an end to KAP's financial trouble.[352] In contrast, CEAC avers that its restructuring plan would have reduced KAP's high debt and operations costs, and turned the company into a valuable and successful enterprise.[353]

410. The negotiations continued, and in March 2012 CEAC sent Montenegro a term sheet with new restructuring proposals.[354] CEAC suggested to resolve KAP's financial crisis through a debt-to-equity swap in the amount of € 200 million and $ 80 million.[355] The plan included the following steps:[356]

[348] C-16, para. 65.
[349] C-16, para. 66. Exh. C-18 (KAP's letter of April 14, 2011, inviting the government officials to KAP stakeholders' meeting).
[350] C-16, para. 67. Exh. C-19 (Presentation April 2011).
[351] C-16, para. 78. Exh. C-21 (Memorandum of Understanding of June 10, 2011).
[352] R-22, para. 133–136.
[353] C-16, paras. 79 and 83.
[354] C-16, paras. 84 to 95. Exh. C-22 (Term Sheet 2-12).
[355] Exh. C-22 (Term Sheet 2-12), Clauses 1 and 4 and Schedule 1.
[356] Exh. C-22 (Term Sheet 2-12), Clauses 2.1, 3.3, and 7 and Schedule 2.

- KAP's significant debts with its three major lenders (Deutsche Bank, OTP Bank, and VTB Bank) were to be assumed by Montenegro and converted into shares in KAP, to be held by Montenegro;
- Further, CEAC would assume the claims of En+ against KAP and, thereafter, all of CEAC's claims against KAP would be capitalized; in turn, EPCG's claims against KAP would also be converted into new shares;
- Additionally, CEAC proposed an extension of the existing electricity supply agreement between EPCG and KAP in order to secure cheap electricity in the long term.

411. In the weeks after CEAC sent its proposal, the parties exchanged a sizeable amount of correspondence,[357] including a mark-up version of the term sheet.[358] The parties met once to shape the contours of a potential agreement.[359]

412. The negotiations reached again an impasse at the end of May 2012, when Montenegro informed CEAC that the Government refused the terms and condition set out in the latest version of the term sheet.[360] While for CEAC the restructuring contemplated in its draft term sheet had the potential to turn the company into a "highly valuable" business, Montenegro considered that the proposed term sheet did not provide "a plausible solution" for the issues with KAP's other major creditors.[361]

413. Without the implementation of any restructuring measures, KAP's situation worsened dramatically throughout 2012. Suffocated by debt, towards the end of the year the board of directors began to consider a total shutdown of the production. In a final attempt to save the company from collapse, talks between CEAC and KAP rekindled.

414. Around December 2012 CEAC sent to the Government of Montenegro a presentation on a new financial model for KAP.[362] Two months later, in February 2013, a meeting took place between representatives of KAP, Montenegro, and CEAC, to discuss a new financial model for KAP prepared by CEAC in December 2012.[363]

[357] Exhs. C-23 to C-35. C-16, paras. 95–110.
[358] Exh. C-24 (Mark-up Term Sheet).
[359] C-16, para. 101.
[360] Exh. C-34 (Email of Schoenherr of June 1, 2012) and Exh. C-35 (Email of Alexey Kuznetsov of June 1, 2012).
[361] R-22, paras. 138 and 140. C-16, paras. 107 and 110.
[362] C-16, para. 111. Exh. C-36 (CEAC's letter of December 21, 2012) and Exh. C-37 (Presentation Further Scenarios November 2012).
[363] C-16, para. 118. Exh. C-38 (Presentation 5-2-13).

415. However, the following months showed no progress toward an agreement, and in June 2013, Montenegro requested KAP's bankruptcy declaration.

(ii) Contractual obligations

416. The starting point for the Tribunal's decision is the language of the Agreements signed by the Parties. When these documents were negotiated, drafted, and executed, both Parties were perfectly aware that KAP was in a difficult financial situation, that its long term future was not assured and that the business plan that served as the basis for the Settlement Agreement could well become impossible to achieve.

417. There is clear evidence that from the beginning of the negotiation Montenegro was not prepared to provide open ended support to KAP, that its commitments were restricted to those established in the relevant contractual documents, and that the State would not assume any further liabilities for losses; a conclusion reinforced by the fact that KAP was being managed by CEAC.

418. The very first contractual document signed by the Parties, the MoU, was a short, three-page document underlining the most basic traits of the deal. It already foresaw that if after the restructuring KAP would still show an operating loss

> "part of that loss shall be covered by En+ with the implementation of other measures. [Montenegro] would have no obligation to cover the remainder of the loss."[364]

419. The same principle was then taken up with added detail in the Shareholders' Agreement. Clause 8 provided two specific rules for this situation:

- First, it was agreed that KAP's loss "shall be covered in the manner prescribed by Montenegrin law" (Clause 8.1);
- Second, the Shareholders added the (unnecessary) *caveat* that Montenegro will "not have an obligation to cover any losses of the Company" (Clause 8.2); notably, this exemption is only granted to Montenegro; the same principle is not extended to CEAC.

Montenegro's liability

420. KAP is a limited liability company. Under Montenegro's MLC, shareholders of limited liability companies are shielded from losses. Clause 8.1 reflects this principle. But Clause 8.2 goes a step further: it says that Montenegro will not have any obligation to cover losses.

421. Under the MLC, shareholders are never called to cover losses. Consequently, Clause 8.2 must be referring to other situations, e.g., to the possibility that

[364] Clause 6 c).

Montenegro incur liability vis-à-vis CEAC and En+ by application of general principles of law, like good faith or duty of loyalty.

422. By insisting that Clause 8.2 be inserted in the Shareholders' Agreement, Montenegro was signaling to CEAC, that Montenegro, which as a shareholder in a limited liability company already enjoyed an exclusion of liability under Montenegrin company law, was also declining any commitment to provide further support to KAP, under any other rule or principle of law. And when Claimant agreed to the Shareholders' Agreement, with this unilateral benefit in favor of the counterparty, they assumed the risk that, if KAP required further restructuring and further support from shareholders, Montenegro could not be called upon to proffer any additional commitments.

423. Alas, this is what actually happened.

424. During the years 2010 and 2011 KAP suffered substantial losses. According to the financial statements, in 2010 the results from operating activities were negative (€ 31 million) and the Company presented a net loss in the amount of € 57 million, save for the profit generated through the income arising on write-off of liabilities. KAP had negative equity in the amount € 70 million.[365] In 2011, the Company had a negative working capital of € 276 million, and ended the year with a negative equity in the amount of € 157 million.[366]

425. These losses could not be covered with the company's own means, and required a second restructuring with additional resources to be provided by the two shareholders. During three years, CEAC and Montenegro held repeated rounds of discussions, trying to find a financial solution for KAP's woes. All plans required significant new contributions by Montenegro (and also by CEAC). At various points in time, the Parties were close to reaching an agreement. They even went so far as signing the 2011 MoU. But eventually, Montenegro did not agree to the term sheet proposed by CEAC, the talks collapsed, and KAP ended in bankruptcy.

(iii) Claimant's position

426. Claimant says that Montenegro was under an obligation to support the restructuring of KAP as outlined in the restructuring plans developed by KAP's management with the support of CEAC. In particular, Montenegro was obliged to participate in a debt-to-equity swap in order to relieve KAP of its historic debt levels. By not agreeing to CEAC's proposals, Montenegro breached the Settlement Agreement, the KAP's Shareholders' Agreement, and its duty of loyalty under Montenegrin contracts law.

[365] R-27 (KPMG Independent Auditors' Report on 2010 Financial Statements), p. 4.
[366] R-72 (KPMG Independent Auditors' Report on 2011 Financial Statements), p. 3.

427. In view of Clauses 8.1 and 8.2 of the Shareholders' Agreement, Claimant's position is untenable.

428. The Parties anticipated and agreed that if KAP incurred additional losses (as in fact happened) Montenegro would be exempted from any obligation to cover such losses. CEAC repeatedly proposed restructuring plans, whose guiding principle was always that both shareholders assume the losses incurred by KAP. In accordance with Clause 8.2 of the Shareholders' Agreement, Montenegro explicitly rejected any duty to participate in any scheme for covering KAP's losses. When Montenegro eventually rejected CEAC's proposals, it was entitled to do so. *Qui iure suo utitur, neminem laedit*.

(iv) CEAC's counter-arguments

429. Claimant has submitted five lines of argument to support their position that Montenegro was under an obligation to participate in the restructuring of KAP.

Construction of the Agreements

430. First, CEAC argues that the Settlement Agreement and KAP's Shareholders' Agreement must be construed according to the principles of contract interpretation set forth in LCT,[367] so as to conclude that the co-shareholder was under an obligation to participate in the restructuring plans and to make contributions towards KAP's full recovery.[368]

431. This argument cannot be accepted.

432. As Montenegro rightly points out, the general principles of the LCT cannot regulate any issues left out of the agreement deliberately.[369] As already discussed, Clause 8.2 of Shareholders' Agreement and the MoU make clear that Montenegro was assuming in the Settlement Agreement certain obligations to support KAP but that, further to those obligations, the State would not cover any additional loss incurred by KAP.[370]

433. In addition, there is clear evidence that, from the beginning of the negotiation, Montenegro was not prepared to provide unlimited support to KAP and that its commitments were restricted to those established in the relevant contractual documents.

434. In light of these facts, the principles of contract interpretation set forth in the LCT cannot come into play with the result claimed by CEAC.

[367] C-16, paras. 237–242.
[368] C-16, para. 237.
[369] R-43, paras. 215 and 216.
[370] *See* Clause 6.c) MoU.

Recitals

435. Second, CEAC says a duty of loyalty also arises from Recital D of the Settlement Agreement and the Preamble of KAP's Shareholders' Agreement,[371] which must be interpreted to the effect that the "goal to support" was meant to include an affirmative "obligation to support" any restructuring measures of KAP.[372]

436. The Tribunal sides with Montenegro's arguments. Generally, preambles do not impose any obligations on the parties. Rather, they are meant to express the intent of the parties or their motives for committing themselves to the obligations contained in the dispositive part of the contract.

437. The same happens here. Both the proven facts and the general context of the agreements show that the parties to the Settlement Agreement and the Shareholders' Agreement used that language in the preambles as a mere statement of their general motivation in entering into these contracts. The recitals cannot be read as to create any specific obligations.

Filling of gaps

438. Third, CEAC claims that the obligation to support KAP's recovery is to be implied by filling a gap in the Settlement Agreement, which is silent on the question of whether the parties are under an obligation to take part in further steps to save the company. Articles 95 through 97 LCT,[373] Clause 34.9 of the Settlement Agreement, Art. 18.2 of KAP's Shareholders' Agreement, and Art. 25(2) LCT[374] must be construed in the sense that the will of the parties was to impose on each other a duty to support any and all measures aimed to KAP's recovery.

439. The Tribunal disagrees.

440. As explained before, the Settlement Agreement shows no gap with regard to further steps or additional duties on the Parties to support KAP's restructuring. Montenegro's obligations in this regard were addressed and purposefully limited by the parties in Clause 8 of the Shareholders' Agreement. That was also the compromise reached in the MoU.

Good faith

441. Fourth, CEAC states that the principle of good faith encompasses the duties of loyalty and care and that Art. 11.3 LCT prohibits parties to perform acts which

[371] C-16, para. 246.
[372] C-23, para. 104.
[373] C-23, paras. 31, 33, and 106.
[374] Exh. CLA-22

might be detrimental to the performance of the other party's obligations.[375] The highest level of good faith and trust is required in a contract to establish a business, in which the joint interest of the parties supersedes all other particular interests of any party.[376]

442. This argument fails because it misinterprets the duty of good faith and fair dealing as provided for in the LCT. The duty defines a general framework for the conduct of parties when performing their contractual rights or obligations, preventing parties from abusing their rights and protecting the proper performance of the agreed primary obligations. Although some secondary obligations may be drawn from the duty of good faith, such secondary obligations must always stem from primary obligations specifically agreed upon by the parties.[377]

443. The duty to support the restructuring of KAP would be a primary obligation: the parties chose not to create such duty. On the contrary, they explicitly excluded it by adding a contractual clause which limits Montenegro's duty regarding financial support of the company. Therefore such a duty cannot be implied.

444. This conclusion is reinforced by the argument that no duty of loyalty could ever require a shareholder to assent to any proposed measure that is contrary to its interests, or that requires considerable financial contributions. This is particularly true in the case of KAP, which at the time of the conclusion of the Settlement Agreement was quoted on the stock exchange.[378]

Joint venture agreements

445. Fifth, CEAC admits that Montenegrin law does not contain provisions that specifically regulate the rights and obligations of the parties under joint venture agreements. But since these agreements imply the existence of a joint interest of the parties and a long-term relationship, a high degree of good faith must be expected.[379] CEAC also cites to German case law regarding the duty of loyalty (*Treuepflichten*) between shareholders of a company.[380]

446. The Tribunal must reject this argument too.

447. First, there is no legal or factual grounds to hold that the Shareholders' Agreement or the Settlement Agreements are actually a joint venture.

448. On the contrary, the Shareholders' Agreement's purpose was to govern the relationship between the major shareholders of KAP, a limited liability company.

[375] C-41, paras. 165-166.
[376] C-41, para. 167-168.
[377] R-43, paras. 206–211.
[378] Exh. R-30 (Excerpt from Montenegrin Stock Exchange).
[379] C-41 para 169.
[380] C-41 para 174 and 177-178.

Under the MLC, shareholders do not owe any duty of loyalty to each other. The MLC expressly provides that a shareholder has no other obligation than to pay in the contribution when subscribing the shares.[381]

449. Second, Montenegro is right that the KAP's Shareholders' Agreement, individually or seen in concert with the Settlement Agreement, does not create a partnership under the MLC. The KAP's Shareholders' Agreement is not aimed at establishing any new business operations, and by definition it cannot result in a MLC partnership between Claimant and Montenegro.

450. Third, insofar as CEAC is referring to German case law regarding the duty of loyalty between shareholders of a company, German law is not applicable, and there are no indications that the legal situation under the applicable Montenegrin law might be similar.

451. But even if German law were considered a persuasive authority, German law does not support an obligation of Montenegro to participate in the restructuring of KAP proposed by CEAC by way of, *e.g.*, partaking in a debt-to-equity swap or by providing additional financial contributions to KAP.

452. If German law was applicable, the Shareholders' Agreement could be considered to be a civil law partnership (*BGB-Gesellschaft*), giving rise to certain duties of loyalty between the partners also with regard to their shareholdings in KAP. However, pursuant to § 707 German Civil Code (*Bürgerliches Gesetzbuch*) a partner in such civil law partnership is not required to make further financial contributions, unless otherwise agreed.

453. Beyond this, the German Federal Court of Justice (*Bundesgerichtshof, BGH*) has held that a partner of a civil law partnership may be required by the duty of loyalty to not arbitrarily damage the joint company, and to exercise its shareholder´s rights having regard to the interests of its co-shareholders. However, the duty of loyalty does not require a partner to make additional financial contributions to the company, or to not exercise its rights as a shareholder pursuing its own legitimate interests, even if the company is in a crisis.[382]

454. Therefore, even if German law were applicable, there is no basis in German case or statutory law for the conclusion that the Shareholders' Agreement required Montenegro to participate in KAP's restructuring according to CEAC's restructuring plans.

C. Intermediate conclusion

455. Summing up: Clause 28.4.7 requires that in any Failure of Restructuring the Party that "caused" such Failure must be identified.

[381] RLA-14 (Montenegrin Law on Companies), Arts. 30(3) and 44 MLC.
[382] *Cf.* BGH, *Neue Juristische Wochenschrift* 2010, p. 65 *et seq.*

456. In the present case, the Failure Event which provoked the Failure of Restructuring was KAP's failure to pay its monthly electricity bills. CEAC submits that the Failure Event was caused by Montenegro, because the Republic

- failed to approve fresh loans from CEAC and
- refused to participate in CEAC's restructuring.

457. The Tribunal has analyzed both reasons, and found that Montenegro's failure to approve a global debt ceiling for CEAC's intercompany loan to KAP was not the cause that provoked the Failure Event, and that Montenegro did not breach any contractual or legal obligation when it refused to participate in a restructuring of KAP, which required that Montenegro assume the losses suffered by KAP.

458. This leads to the conclusion that the only Party which "caused the Failure of Restructuring" (for purposes of Clause 28.4.7 of the Settlement Agreement) was KAP: it was KAP who was obliged to pay the outstanding invoices to ECPG, and it was KAP who defaulted. KAP is consequently the only Responsible Party, and as such it is liable for any Indemnifiable Damage caused by the Failure of Restructuring to the Innocent Party: Montenegro and its agencies.

7.3 THIRD CONSEQUENCE: LIMITATION OF CLAIMS AND RESPONSIBILITY

459. The third consequence of a Failure of Restructuring derives from Clauses 28.5 and 28.6 of the Settlement Agreement:

> "28.5. Safe for the provisions of the clause 24.7, herein any other legal consequence of the Failure of this Agreement is expressly excluded. CEAC, En+, KAP and RBN shall have no claim of whatsoever kind against the SoM or the Parties 1-3 as a result of such Failure or out of this Agreement.
>
> 28.6 Safe for the provisions of the clause 28.4.7 herein, any other legal consequence of the Failure of this Agreement is expressly excluded. SoM and the Parties 1-3 shall have no claim of whatsoever kind against the KAP or RBN, CEAC and En+ as a result of such Failure or out of this Agreement."

A. <u>Construction of Clauses 28.5 and 28.6</u>

460. Clauses 28.5 and 28.6 start with an exception:

> "safe for the provisions of the clause 28.4.7 herein."

461. Clause 28.4.7, which has been analyzed in the previous section, provides that the Party which caused the Failure of Restructuring is responsible for any Indemnifiable Damage caused to the Innocent Parties.

462. The Tribunal has already found that in the present case the principle implies that KAP, as the party which caused the Failure of Restructuring, is responsible for any Indemnifiable Damage caused to Montenegro and its agencies (and pleaded in this procedure).

463. Clause 28.5 then defines the general rule affecting Montenegro:

> "CEAC, En+ and KAP […] shall have no claim of whatsoever kind against [Montenegro and its agencies] as a result of such Failure or out of this Agreement."

464. Clause 28.6 provides the reciprocal arrangement:

> "[Montenegro and its agencies] shall have no claim of whatsoever kind against the KAP […], CEAC and En+ as a result of such Failure or out of this Agreement."

465. These clauses create a reciprocal exclusion of claims and consequently of liability (if there is no possibility to file a claim, there is no possibility that responsibility arises). The scope of the exclusion is drafted in very wide terms: all other legal consequences of the Failure of Restructuring are "expressly excluded" with the result that

- Montenegro and its agencies lose all possibility to assert claims "of whatsoever kind" against KAP, CEAC, and En+, and
- *vice versa*, KAP, CEAC and En+ lose all possibility to assert claims "of whatsoever kind" against Montenegro and its agencies.

466. Both Clauses then add that the claims that are being waived may derive

- not only from the Failure of Restructuring itself,
- but also from any other provision of the Settlement Agreement.

467. Clause 28.5 and 28.6 describe an important feature of the Settlement Agreement, which is fundamental for the balancing of the duties and benefits of all Parties: if a Failure Event happens, Montenegro has the right to call a Failure of Restructuring, and to take full control of KAP, without paying any compensation; but the Failure of Restructuring also provokes a general limitation of claims and responsibilities, which benefits all Parties:

- KAP: The Settlement Agreement provides KAP with the benefit of a double limitation of liability; under Clause 28.4.7 KAP's liability arising from the Failure Event only encompasses damage ("Indemnifiable Damage") caused to Montenegro as a consequence of such Failure Event; and under Clause 28.6 KAP's liability arising from any other provision of the Settlement Agreement is totally excluded;

- CEAC and En+: under Clause 28.4.7 CEAC and En+ do not incur any liability for the Failure of Restructuring, the liability being restricted to the Party which caused such Failure (in this case KAP); and under Clause 28.6, CEAC's and En+'s liability arising from any other provision of the Settlement Agreement is likewise excluded.
- Montenegro and its agencies: under Clause 28.4.7 Montenegro and its agencies have avoided any liability for the Failure of Restructuring, because Claimant has not succeeded with their argument that the Failure of Restructuring was caused by Montenegro; and under Clause 28.5 the liability of Montenegro and its agencies arising from any provision of the Settlement Agreement is likewise excluded.

Cut-off date

468. There is an additional issue which must be addressed. Clauses 28.5 and 28.6 prohibit the Parties from submitting claims "of whatsoever kind" against each other, "as a result of such Failure [of Restructuring] or out of this Agreement": Does this agreed exclusion of claims affect all claims, including those which had arisen before the Failure of Restructuring and were still outstanding as of that date, or only those which arise as a consequence of or after such Failure?

469. The question is not clearly addressed in Clause 28.5. In such cases, Art. 95, paragraph 2, of the LCT provides as follows:

> "In interpreting controversial provisions the literal meaning of the terms employed should not be adhered to, but rather the common intent of the contracting parties examined, and the provision understood in accordance with the principles of contracts and tort law, as set out in the present Act."

470. The joint intention of the contracting parties can in this case be inferred from examining Clauses 28.5 and 28.6 in their entirety.

471. Both Clauses start with the statement that, except for the responsibility of the Party which caused the failure of Restructuring, "any other consequence of the Failure of this Agreement is expressly excluded." This is a forward-looking statement ("consequence"), which indicates that the intent of the Parties was to exclude all legal consequences arising from or after the Failure of Restructuring, not to extinguish claims which had already arisen and were still due and payable as of the date of the Failure of Restructuring.

472. The Tribunal's finding is further supported by Art. 99 LCT, which provides that

> "unclear provisions should be interpreted . . . in case of an onerous contract in the way which establishes an equitable relation between mutual considerations."

473. Consequently, the Tribunal finds that the exclusion of liability agreed upon in Clauses 28.5 and 28.6 only affects claims that arise as a consequence of the

Failure of Restructuring or after such Failure (i.e. after March 1, 2012). Claims that arose before that cut-off date and were still outstanding as of that date remain unaffected by the subsequent exclusion of liability.

Purpose of Clauses 28.5 and 28.6

474. Clauses 28.5 and 28.6, with their widely drafted exclusions of liability, reinforce the conclusion that the Parties, when they entered into the Agreements, were conscious of the economic risks involved and of the likelihood that KAP's critical situation could derive into a Failure of Restructuring. Anticipating this risk, both Parties inserted clauses intended to protect their interests:

475. (i) En+, CEAC and KAP, as operators of the business, were concerned with the occurrence and the consequences of a Failure Event. Foreseeing that this could happen, and that Montenegro would call a Failure of Restructuring, Claimant protected themselves by limiting its liability:

- CEAC's obligation, if a Failure of Restructuring occurred, was limited to transferring the shares held in KAP to Montenegro, without receiving any compensation;
- The responsibility for any damage caused as a consequence of the Failure of Restructuring was limited to the Party which caused the Failure;
- With that single exception, En+, CEAC, and KAP would enjoy a full exclusion of liability for any claim submitted by Montenegro and its agencies deriving from the Settlement Agreement.

476. (ii) Montenegro was concerned that in a new crisis it could be required to provide further assistance to KAP; Montenegro managed to secure Clause 8.2 of the Shareholders' Agreement, which guarantees that the State can under no circumstances be called to cover future losses; additionally, under Clause 28.5 Montenegro and its agencies were able to obtain a full exclusion of liability for any claim submitted by Claimant and deriving from the Settlement Agreement.

B. Exclusions of liability under the LCT

477. The LCT generally accepts exclusions from liability, with the limitations provided for in Art. 272:

> "Limitation and Exclusion from Liability.
>
> 1) Liability of the debtor for acting intentionally or with gross negligence may not be excluded in advance by contract.
>
> 2) At the request by an interested contracting party, the court may, however, also avoid the contractual provision on the exemption of liability for simple negligence, should such agreement be the result of the monopoly position of

> the debtor or, otherwise, of unequal mutual positions of the contracting parties."

478. The first paragraph of Art. 272 clarifies (*a contrario sensu*) that general exclusions of liability are permissible, with the exception that liability for intentional or grossly negligent acts cannot be excluded in advance.

479. The second paragraph permits a court to avoid an agreed exclusion of liability for simple negligence, if the agreement resulted from a monopoly position of the debtor or from unequal bargaining positions of the Parties. This second paragraph finds no application in the present case, since none of the Parties alleges, and there is no indication in the evidence marshalled, that any of the Parties abused a monopoly position or enjoyed a superior bargaining power.

C. Respondent's counter-argument

480. Montenegro and its agencies make a counter-argument that in their opinion would exclude Claimant from the benefits of Clause 28.6 of the Settlement Agreement. Respondents say that CEAC, displaying bad faith, breached its duty to transfer the shares. As a result, the transfer could not be effected. Montenegro summarizes the situation with these words[383]:

> "Thus Claimant *cannot* rely on the damages and exclusion provisions of the Settlement Agreement – clauses 28.4.7 and 28.5/28.6- not becoming effective" (emphasis in the original).

481. The Tribunal agrees that in accordance with Art. 272, paragraph 1, of the LCT, debtors who act intentionally (including with bad faith) or with gross negligence do not enjoy the benefit of agreed exclusion of liability clauses.

482. The problem in this case is the evidence. Respondent simply makes an allegation of bad faith, in a single paragraph of its RPHB, but then fails to marshal any evidence supporting the reproach.

483. In fact, the available evidence does not prove that CEAC and/or KAP acted intentionally or with gross negligence. The only contentious issue could be CEAC's failure to deliver its KAP shares to Montenegro in compliance with its obligation under the Settlement Agreement.

CEAC's behaviour

484. CEAC was prepared to deliver the shares, and the point of contention was whether it was entitled to compensation. The general rule provided for in the Settlement Agreement is that CEAC would not receive any payment in exchange, except if

[383] R-42, para. 98.

Montenegro had a claim against CEAC, when the lower of nominal and fair value of the shares "is deducted from [such] claim."[384]

485. During the negotiations following the Failure Event, Montenegro encouraged CEAC to sell its shares in KAP to a third party for a certain price – Montenegro even identified two possible candidates and introduced them to CEAC.[385] Claimant started negotiations, although they eventually were not successful.

486. CEAC may have construed Respondent's proposal to sell to a third party as an indication that Montenegro was agreeing that, in this case, and despite the general principle established in the Settlement Agreement, the transfer of shares would result in compensation to the seller, and this understanding may have justified CEAC's position: it agreed to transfer the shares, but requested compensation for the sale.

487. Be that as it may, the Tribunal finds that CEAC's position as regards the transfer of its KAP shares (agreeing to the transfer, but requesting compensation) does not meet the threshold required for an action to be labelled as performed intentionally or with gross negligence. In the Tribunal's opinion, CEAC's behavior cannot and should not result in CEAC being deprived of the benefit of exclusion of liability agreed upon in Clause 28.6 of the Settlement Agreement; especially, because Montenegro, which refused to pay any compensation, was shortly thereafter able to secure full control of KAP by indirect means.

488. Apart from that, it is doubtful that CEAC's failure to transfer the shares caused any damage to Montenegro. Given the general situation of KAP, the shares did not have any economic value at the time. Therefore, even if there was a claim by Montenegro against CEAC for damages based on CEAC not transferring the shares in KAP to Montenegro, it remains unclear which damages, if any, were caused.

8. CONCLUSIONS

489. Summing up, the Tribunal finds that Montenegro's decision to call a Failure of Restructuring provoked significant contractual and legal consequences:

490. First, CEAC was under a contractual obligation to deliver to Montenegro its shares in KAP, without receiving any payment in exchange. CEAC breached its obligation and failed to transfer the KAP shares, and Montenegro filed a petition for bankruptcy, which resulted in a State-owned company being entrusted with the management of KAP, and Montenegro *de facto* obtaining control of the company.

[384] Clauses 28.4.8 and 28.4.2.
[385] Exh. C-63.

491. Second, the only Party which "caused the Failure of Restructuring" (for purposes of Clause 28.4.7 of the Settlement Agreement) was KAP: it was KAP who was obliged to pay the outstanding invoices to ECPG, and it was KAP who defaulted. KAP is consequently the only Responsible Party, and as such it is liable for any Indemnifiable Damage caused by the Failure of Restructuring to Montenegro and its agencies.

492. It is true that under Clause 21.1(l) CEAC had undertaken not to permit KAP to incur any delay in excess of three months in the payment of electricity bills and that this undertaking was supported by the daily penalty payments provided for in Clause 22.2(e) (€ 1000 per day). Montenegro could have requested CEAC to comply with its obligation and to pay up under this penalty clause. But Montenegro – for good reason – preferred the alternative route of the Failure of Restructuring. And by triggering a Failure of Restructuring, Montenegro obtained significant legal advantages, but had to accept that its right to seek any penalties under Clause 21.1(l) CEAC and Clause 22.2(e) of the Settlement Agreement became barred, by application of Clause 28.6.[386]

493. Third, under Clause 28.6 of the Settlement Agreement, KAP, En+, and CEAC benefit from an exclusion of liability:

- KAP's liability is limited to the Indemnifiable Damage caused to Montenegro and its agencies as a consequence of the Failure of Restructuring; any other liability arising from the Settlement Agreement is excluded;
- En+ and CEAC enjoy an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

494. Fourth, under Clause 28.5 of the Settlement Agreement Montenegro and its agencies also enjoy an equivalent and reciprocal exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by KAP, CEAC and En+ "of whatsoever kind" arising from the Settlement Agreement.

495. Fifth, the exclusion of liability provided for in Clauses 28.5 and 28.6 only affects claims that arise as a consequence of or after the date of the Failure of Restructuring (*i.e.* after March 1, 2012). Claims that arose before that cut-off date and were still outstanding as of that date, remain unaffected by the subsequent exclusion of liability.

496. Sixth, under Art. 272, paragraph 1, of the LCT these exclusions do not cover acts performed intentionally or with gross negligence.

[386] *See* also Section VI.4 below.

497. Montenegro has failed to marshal evidence proving that CEAC's or KAP's actions, and specially CEAC's failure to transfer its KAP shares to Montenegro, meet the threshold demanded for actions to be considered as performed intentionally or with gross negligence.

9. EFFECT ON THE RELIEF SOUGHT BY THE PARTIES

498. The foregoing analysis and the conclusions reached have a direct impact on the Parties' prayers for relief.[387]

499. First, CEAC is submitting a "**Primary Damage Claim**," based on claims arising from the First Arbitration.[388] Under this Claim CEAC is asking the Tribunal to order Respondents to pay the same compensation which would have accrued if the claims brought in the First Arbitration had been admitted.

500. This Primary Damage Claim cannot succeed and is dismissed.

501. The parties agreed under Clause 27 of the Settlement Agreement to waive "any rights or claims they may have against each other and asserted" in the First Arbitration.[389] The waiver expressly concerned "any claim regardless of whether such claim is accepted or disputed, known or unknown, due or not due yet."[390]

502. This waiver remains unaffected by Montenegro's decision to call a Failure of Restructuring. In addition to settling the First Arbitration and waiving all the parties' claims, the Settlement Agreement created a new catalogue of rights and duties, mostly of financial nature. It provided that if a Failure Event occurred, Montenegro was entitled to declare a Failure of Restructuring; and the Failure of Restructuring would provoke a double consequence:

- All obligations assumed by the Parties under the Settlement Agreement would be terminated,
- While the agreed settlement and termination of the First Arbitration and of all disputes arising from the SPAs would remain unaffected.[391]

Consequently, Montenegro's decision to call a Failure of Restructuring did not affect the principle that all claims deriving from the First Arbitration had been waived for good.

503. Second, CEAC is subsidiarily submitting a "**Secondary Damage Claim**," based on the hypothetical value of KAP. Under this Claim CEAC is asking the Tribunal

[387] *See* C-47 and R-49, reproduced *verbatim* in Part III of this Award.
[388] *See* Section III.1 *supra.*
[389] Exh. C-9, Clause 27.1 Settlement Agreement.
[390] Exh. C-9, Clause 27.1 Settlement Agreement.
[391] Clause 28.4.5.

to order Montenegro and its agencies, jointly and severally, pay compensation equal to the entire "hypothetical value of KAP," set at € 104 million (plus interest).

504. Third, in turn, Montenegro and its agencies ask the Tribunal to order CEAC and En+ jointly to pay compensation equal to

- The "**Subsidies and Guarantees Claim**," which represents the electricity subsidy paid out to KAP and the amount of State guarantees provided to KAP and called by the respective lenders and
- The "**Contractual Penalties Claim**," which represents the contractual penalties owed by CEAC and En+ under the Settlement Agreement.

505. In accordance with the correct methodology of calculation,[392] Montenegro and its agencies request the following payments[393]:

- The Subsidies and Guarantees Claim: € 191,205,011 (with interest until September 30, 2015, € 231,728,900) plus
- The Contractual Penalties Claim: € 10,035,000 (with interest until September 30, 2015, € 12,367,993).

Exclusion of liability

506. CEAC's Secondary Damage Claim, and Montenegro's two Claims are affected by Clause 28 of the Settlement Agreement, which provide for a reciprocal exclusion of liability and claims:

- Under Clause 28.5, Montenegro and its agencies enjoy an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by KAP, CEAC and En+ "of whatsoever kind" arising from the Settlement Agreement; and *vice-versa*:
- Under Clause 28.6, En+ and CEAC enjoy an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

Barred claims and surviving claims

507. This agreed contractual exclusion of liability does not affect all Claims, but only those that meet a double requirement:

[392] Montenegro offers two alternative methodologies for the calculation of damages; see REX-4 p. 16 (Expert Report on quantification of contractual penalties and damages). For more details see Section VI.6 below.

[393] For the breakdown see REX-4, page 15 (Expert Report on quantification of contractual penalties and damages).

- that they arose as a consequence of the Failure of Restructuring and/or after the date of such Failure (*i.e.* after March 1, 2012), and
- that the Party in breach did not act intentionally or with gross negligence.

508. CEAC's claim based on Montenegro's failure to pay the electricity subsidies including VAT (a claim that arose between 2009 and 2012, before the Failure of Restructuring[394]) and two of the four Contractual Penalties Claims brought by Montenegro (two Claims which arose after the cut-off date) are not affected by the exclusion of liability and are still standing. All other claims, however, (including CEAC's Secondary Damage Claim and Montenegro's Subsidies and Guarantees Claim) were caused by the Failure of Restructuring and/or arose after March 1, 2012 and have become barred due to the exclusion of liability agreed upon in Clauses 28.5, 28.6, and 28.4.7 of the Settlement Agreement.

509. This conclusion will be further developed in Parts V and VI below (especially in Sections V.7 and VI.6).

[394] *See* Section V.3.

V. MERITS (II): CEAC'S CLAIMS

510. CEAC raises six claims against Montenegro and its agencies (Respondents 1 to 4):

- that Montenegro obstructed KAP's restructuring plans (**1.**),
- it unlawfully caused the acceleration of KAP's loan with Deutsche Bank (**2.**),
- failed to fully pay the electricity subsidies provided for in the Settlement Agreement (**3.**),
- failed to provide a long-term, affordable electricity supply for KAP (**4.**),
- breached its contractual and statutory duties by filing a bankruptcy petition against KAP (**5.**),
- and repeatedly violated the law during KAP's bankruptcy (**6.**).

The Tribunal will devote a separate section to each claim, and will finalize with a section devoted to CEAC's prayer for relief (**7.**)

1. MONTENEGRO OBSTRUCTED KAP'S RESTRUCTURING PLANS

511. CEAC asserts that Montenegro, in breach of its obligations toward CEAC under the Settlement Agreement and the KAP's Shareholders' Agreement, repeatedly obstructed the restructuring plans proposed by CEAC to ensure KAP's viability. Had Montenegro cooperated in these efforts and accepted one of the restructuring plans proposed, KAP would be a profitable company by now.[395]

512. Montenegro denies the entire allegation.

513. In support of their position the Claimant submits the same arguments presented in order to prove that the Failure of Restructuring was caused by Montenegro. The Tribunal has already analyzed these arguments, and come to the conclusion that the claim must be dismissed.

2. MONTENEGRO UNLAWFULLY CAUSED THE ACCELERATION OF KAP'S LOAN WITH DEUTSCHE BANK.

514. The second claim brought by CEAC relates to the acceleration of the DB Facility, the loan that KAP obtained from Deutsche Bank.

[395] C-16, para. 63.

515. KAP incurred in certain actions, which constituted events of default under the DB Facility. KAP, Montenegro, and En+ engaged in negotiations with Deutsche Bank from December 2011 through March 2012, in order to avoid that Deutsche Bank accelerate the loan. The negotiations did not succeed, and on March 23, 2012 Deutsche Bank eventually declared the acceleration.[396] Since KAP proved unable to satisfy its debt to Deutsche Bank, Deutsche Bank enforced the State guarantee[397] and Montenegro was forced to pay over € 23 million to the bank. It thus became KAP's creditor.[398]

516. CEAC now claims that Montenegro, by its actions and omissions, caused KAP to default under the DB Facility, and therefore, that Montenegro is legally responsible for the damages flowing from the acceleration of the loan.

A. CEAC's position

517. Pursuant to the terms of the DB Facility, KAP had to comply with a plethora of strict requirements. Among them was the duty to periodically supply Deutsche Bank Luxembourg S.A., as agent, with its financial statements, plus annual and semi-annual certificates of compliance.[399] In addition, each year KAP had to deliver a business plan for the following year (within 90 days of January 15).[400] The breach of such requirements authorized the bank to accelerate the loan.

518. CEAC says that Montenegro, by its actions and omissions, prevented KAP from complying with some of these requirements. This made KAP default under the DB Facility, causing the eventual acceleration of the loan. Consequently, Montenegro is legally responsible for the damages flowing from the acceleration of the loan.

519. CEAC argues that Montenegro had a specific legal duty to avoid the acceleration of KAP's loan with Deutsche Bank, and to refrain from any action that could lead to such result. This obligation arises from the duty of loyalty between the parties, as contained in Recital D of the Settlement Agreement, the last phrase of the Preamble of the KAP's Shareholders' Agreement,[401] and the principles of good faith, honesty, and prohibition of causing damage established in the LCT.[402]

520. Montenegro breached this obligation because its representatives in shareholders' meetings and at the board of directors intentionally blocked, for no good reason, the adoption of the 2009 financial statements and the 2011 business plan of KAP, respectively. Both vetoes prevented KAP from delivering a compliance certificate

[396] C-16, para. 152.
[397] C-16, para. 156.
[398] C-16, para. 157.
[399] Exh. C-41, Section 18.2.
[400] C-16, paras. 132 to 134. Section 18.4 of Exh. C-41.
[401] C-16, para. 249.
[402] C-23, para. 223.

to Deutsche Bank on June 30, 2011, as the DB Facility agreement requested. This subsequently caused the acceleration of the entire loan.[403]

521. First, KAP's financial statements for the previous business year were usually adopted at the shareholders' meeting in the fall of the following year. Montenegro representative vetoed the adoption of the 2009 financial statements at the shareholders' meeting held on November 30, 2010.[404] The Claimant argues that Montenegro exercised its veto for "no understandable reason."[405]

522. [(i) Montenegro denies this allegation, and refers to the minutes of the assembly. Montenegro's representative refused to approve the financial statement because he believed that

> *"the potential liabilities of the Government of Montenegro should not be included in the line Provisions"*

and expected that

> *"after further revision, this item in the balance sheet will be adjusted in accordance with the zero balance sheet, which was an integral part of . . . the [Settlement Agreement]."[406]]*

523. Second, as to the business plan for 2011, it was not approved because in the meetings of the Board of Directors that took place on December 23, 2010, and on February 25, 2011, the Montenegro-appointed director vetoed its adoption.[407] CEAC says that Montenegro's representative vetoed the decision "without any plausible reasons."[408]

524. [Montenegro replies that its representative's veto of the business plan was fully reasoned, and KAP's management even expressly agreed that the business plan was defective.*[409]* Montenegro's representative even assisted CEAC and En+ in improving the business plan. Yet the Claimant never put a new business plan to vote after the first veto although it was free to do so.*[410]*]

525. Third, besides these allegations, Claimant accuses Deutsche Bank and Montenegro of colluding against KAP to accelerate the loan, trying to restructure

[403] C-16, para. 161, and C-23, paras. 185, 207, and 224; C-33, paras. 71 and 72.
[404] Exh. C-46 (Minutes of the shareholders' meeting of KAP of November 30, 2010).
[405] C-16, para. 137.
[406] Exh. R-67 (Minutes of the shareholders' meeting dated November 30, 2010), page 4.
[407] Exh. C-43 (Minutes of the board of directors of KAP of December 23, 2010) and Exh. C-44 (Minutes of the board of directors of KAP of February 25, 2011).
[408] C-16, para. 136; Exh. C-45 (KAP's letter to Deutsche Bank of 12 May 2011).
[409] C-43 (Minutes of the board of directors of KAP of December 23, 2010) and Exh. C-44 (Minutes of the board of directors of KAP of February 25, 2011). R-43, para. 129.
[410] R-43, para. 131. Minutes of Meeting dated 23 December 2010 (Doc. R-68).

without the borrower's knowledge, and eventually creating the conditions for KAP's bankruptcy. CEAC specifically alleges the following:[411]

- Deutsche Bank negotiated with Montenegro, without KAP's or CEAC's knowledge, the terms of a restructuring of the Facility Agreement in summer of 2011.
- This "restructuring" was induced by a significant payment of € 1 million from Montenegro to Deutsche Bank on December 23, 2011, such payment having been referred to as the "restructuring fee." The only plausible explanation for the payment of this "restructuring fee" must have been to convince Deutsche Bank to accelerate the Facility Agreement despite major concerns of whether an event of default did in fact still subsist.
- Deutsche Bank, instead of sending the conditional waiver letters and all other communications to its contractual partner and borrower KAP, sent such communications directly to the State of Montenegro.[412]
- Deutsche Bank eventually accelerated the facility with KAP on "legally shaky" grounds.[413]

526. CEAC concludes that, because Montenegro managed to block the adoption of the financial statements for 2009 and the business plan for 2011, KAP could not deliver the compliance certificate to Deutsche Bank on June 30, 2011, which the bank used as a justification to accelerate the loan in March 2012.[414]

B. Montenegro's position

527. Montenegro and its agencies ask the Tribunal to reject this claim for the following reasons.[415]

528. First, none of the provisions invoked by CEAC gives rise to an obligation on Montenegro's side to support KAP in order to avoid any termination or acceleration of a loan.[416]

529. Second, under Montenegrin law there is no duty of loyalty between shareholders, as discussed earlier.[417] Neither the Recitals of the Settlement Agreement nor the Preamble to the KAP's Shareholders' Agreement can be construed as to create an obligation on Montenegro to support KAP in order to avoid the acceleration of the

[411] C-41, paras. 118–136.
[412] C-41, para. 128.
[413] C-51, para. 131.
[414] C-16, para. 138.
[415] R-22, para. 175; R-25, para. 134; and R-32, para. 160.
[416] R-22, para. 174, R-32, para. 160, and R-43, para. 250.
[417] R-22, paras. 170 and 173, and R-25, paras. 117–119.

loan or to refrain from any action that could lead to such termination or acceleration.[418]

530. (i) None of the general principles of the LCT can impose an independent obligation in addition to those specifically agreed in the Settlement Agreement or the KAP's Shareholders' Agreement, or prevent the performance of a party's legitimate rights, such as voting against financial statements which contain inaccurate data.[419]

531. (ii) Montenegro's veto of the 2009 financial statements is entirely irrelevant, because: [420]

- in the Notice of Acceleration Deutsche Bank made no mention to the failure to submit these statements;[421]
- in fact, under the Facility Agreement KAP was not obliged to provide Deutsche Bank with its financial statements for 2009;
- the 2009 Financial Statements were readily available, even audited; they were just not formally adopted by the shareholders' assembly. Deutsche Bank never requested that the financial statements submitted had to be adopted formally. Accordingly, KAP was perfectly able to provide Deutsche Bank with its compliance certificate for 2010.[422]

532. (iii) Most importantly, Deutsche Bank was entitled to accelerate its loan on other grounds such as the failure of KAP's management to approve the loan restructuring demanded by Deutsche Bank.[423]

533. Third, Montenegro denies all the factual allegations of collusion with Deutsche Bank to accelerate the loan.[424] Respondents say that they made all conceivable efforts to prevent the acceleration of Deutsche Bank's loan, and never excluded KAP, Claimant, or En+ from its dealings with the bank.[425] In addition, the following facts must be considered:

- The declaration of a cross-default from KAP to Deutsche Bank had a single purpose: to force Montenegro to yield to Claimant's and En+'s

[418] R-22, para. 169 and 172.
[419] R-43, para. 252.
[420] R-22, para. 143 and R-32, para. 160. Exh. C-41 (Facility Agreement dated June 25, 2010).
[421] Notice of Acceleration dated 23 March 2012 (Doc. R 61) speaks of 30 June 2011 financial statements. *See* also, Waiver letter dated 31 October 2011 (Doc. R 41); Waiver letter dated 22 November 2011 (Doc. R 42); Waiver letter dated 25 November 2011 (Doc. R 44) and Waiver letter dated 22 December 2011 (Doc. R 50).
[422] R-43, para. 165.
[423] R-32, para. 163.
[424] R-43, paras. 114–152.
[425] R-43, paras. 114–115.

new demands regarding the ongoing negotiations on the restructuring of KAP.[426]

- Additional defaults, not mentioned in Deutsche Bank's notices and waivers, included KAP apparently failing to obtain consent in respect of some of the loans taken from Claimant and En+; in addition, there were legal proceedings pending against KAP which could have a materially adverse effect on its operations.[427] However, KAP decided not to notify Deutsche Bank of these defaults, which, in itself, constituted another default.[428]
- The negotiations with Deutsche Bank lasted for almost a year. KAP and its management (i.e. Claimant and En+) were included in each and every negotiation. In the summer of 2011, Claimant and En+ provoked and piloted the negotiations, whereupon Deutsche Bank complained about their uncooperativeness. Then, in the autumn of 2011, Claimant and En+ were involved when Montenegro kept pleading with Deutsche Bank not to accelerate KAP's loan, after KAP failed to meet Deutsche Bank's expectations.[429] Finally, in the winter of 2011 and the spring of 2012, Claimant and En+ were, for all practical purposes, steering the negotiations of a new transaction structure. Claimant's witness, Mr Priymakov, then head of KAP's legal department, conceded that KAP, Claimant and En+ were included in the negotiations that Claimant and En+ allege they were supposedly excluded from.[430]

534. Summing up, it was Claimant's and En+'s own conduct that ultimately led to Deutsche Bank accelerating its loan.

C. The Tribunal's decision

535. CEAC contends that Montenegro had a duty to avoid the acceleration of KAP's loan with Deutsche Bank and to refrain from any action that could lead to such result. This obligation, CEAC says, arises from the duty of loyalty, which Montenegro breached by making KAP fail on its obligations under the Facility Agreement with Deutsche Bank and causing the acceleration of the entire loan.[431]

536. Montenegro and its agencies reject this allegation.

[426] R-43, paras. 121–127.
[427] Written notes of Yury Moi*See*v and Pavel Priymakov dated 09 November 2011 (Doc. R-164).
[428] R-43, para. 137.
[429] Hearing transcript, Day 4, 199:13–200:6 (Bušković).
[430] R-42, paras. 144–146.
[431] C-16, para. 161, and C-23, paras. 185, 207, and 224; C-33, paras. 71 and 72.

a. Proven facts

537. Pursuant to the terms of the DB Facility, KAP had to comply with numerous strict requirements, and the breach of such requirements authorized the bank to accelerate the loan. KAP had to periodically supply Deutsche Bank Luxembourg S.A., as agent, with its financial statements, plus annual and semi-annual certificates of compliance.[432] In addition, each year KAP had to deliver a business plan for the following year (within 90 days of January 15).[433]

538. Any failure to comply with these undertakings was to be deemed as an "event of default,"[434] entitling the agent to accelerate the loan and demand immediate repayment of the amounts accrued or outstanding.[435]

539. These were not the only events of default. Failure to pay any debt to another financial institution when due constituted a cross default,[436] while commencement of negotiations with one or more of KAP's creditors with a view to readjusting or rescheduling any of KAP's indebtedness was also considered as an event of default.[437]

Events of default

540. On March 1, 2011, KAP had to ask Deutsche Bank for a first waiver, because a few days earlier KAP was late in paying one of the instalments of its loan with OTP Bank.[438]

541. In May 2011 KAP asked Deutsche Bank for a second waiver, this time due to KAP's inability to submit the business plan on time. In its letter, KAP explains the situation in the following terms: [439]

> "As the Lender was aware, the Borrower is experiencing temporary difficulties regarding to the securing or sufficient revenue enabling to properly comply with all the payment obligations of the Borrower without supplementary financing from two main shareholders: State of Montenegro and CEAC Holdings Ltd. As result **the member of KAP's Board of Directors from** the side of State of **Montenegro expressed the veto right on KAP business plan for 2011 which assumes supplementary financing from** Sate (*sic*) **Montenegro and CEAC** Holdings limited." (emphasis added)

[432] Section 18.2 of Exh. C-41.
[433] C-16, paras. 132 to 134. Section 18.4 of Exh. C-41.
[434] Section 21.
[435] Section 21.20.
[436] Section 21.5.
[437] Section 21.5(a) and Section 21.6(a).
[438] Exh. C-47 (KAP letter to Deutsche Bank of March 1, 2011).
[439] Exh. C-45 (KAP's letter to Deutsche Bank of May 12, 2011).

The Letter Agreement signed by KAP

542. Negotiations ensued, and eventually on December 22, 2011, a letter agreement [the "**Letter Agreement**"] between Deutsche Bank, KAP, and Montenegro was signed.[440]

543. The Letter Agreement provides a detailed list of the breaches incurred by the company so far:

- KAP was in breach of its obligations in Clause 18.2 of the Facility Agreement: as of the date of the Letter Agreement it had failed to deliver to the bank a compliance certificate in respect of the June 30, 2011 financial statements.
- KAP was in breach of its obligations in Clause 18.4 of the Facility Agreement, since as of the date of the Letter Agreement it had failed to deliver to the bank a business plan for the current calendar year, 2011.
- KAP was in breach of its obligations in Clause 21.5(a) of the Facility Agreement, because it had failed to pay when due three repayment instalments to OTP Bank PLC for over € 1 million.
- Finally, KAP was in breach of its obligations in Clause 21.6(a) of the Facility Agreement, since as of the date of the Letter Agreement it had commenced negotiations with its creditors, including the Government of Montenegro, OTP Bank, CEAC, VTB Bank, and the EPCG.

544. The Letter Agreement acknowledged that all these circumstances were, in accordance with the provisions of Clause 21 of the Facility Agreement, events of default entitling the bank to accelerate the loan. The Bank offered, and KAP and Montenegro agreed to, waive all these breaches, provided that the following two conditions were fulfilled by February 20, 2012:

- execution of an amendment agreement providing for the accession of Montenegro to the Facility Agreement as a primary obligor; and
- payment by Montenegro to Deutsche Bank of all fees incurred in connection with the negotiation, preparation, and execution of the amendment agreement.

545. The Letter Agreement specifically provided that failure to comply with these conditions would constitute a separate event of default.

546. In an attempt to fulfil the conditions, CEAC, Montenegro, the Bank and KAP initiated negotiations. In January 2012 KAP received a first draft of the proposed arrangement. As requested by the bank, Montenegro would become the new

[440] Exh C 49; KAP and Montenegro signed on December 28, 2011.

borrower of Deutsche Bank under the Facility Agreement. Montenegro would next lend the principal amount to KAP.

547. A few weeks later KAP submitted its mark-ups to the draft agreement.[441]

KAP decides to backtrack

548. But then, ten days later, KAP informed Deutsche Bank and Montenegro that for a number of reasons the overall restructuring concept was unacceptable to KAP's management.[442] KAP withdrew from the negotiations.

549. As these negotiations unfolded, Montenegro requested that KAP reimburse the € 1 million "restructuring fee" that, as early as December 2011, Montenegro had already paid to the bank for the preparation of the draft.[443] KAP refused to pay on two grounds:

- there was no contractual or other basis for KAP to make or commit to such payment to Deutsche Bank, and
- KAP had serious doubts that the "restructuring fee" was compatible with best practices in banking.[444]

550. On March 7, 2012 Montenegro warned KAP's management of the urgent need to agree to the proposed transaction to prevent the acceleration of the loan and an imminent insolvency of the company.[445]

Montenegro pays under the guarantee

551. Negotiations led to no success. On March 23, 2012 Deutsche Bank served on KAP a notice of acceleration, demanding immediate repayment of the entire loan.[446]

552. KAP was not able to pay the amount requested.[447] On April 2, 2012[448] Deutsche Bank enforced the State guarantee and Montenegro paid the amount requested in a single instalment three days later.[449] The payments made by Montenegro amounted to € 22 million plus € 1.4 million for associated fees and costs. The loan receivable against KAP was transferred to Montenegro and eventually permitted Montenegro to request KAP's bankruptcy.

[441] C-16, para. 143. Exh. C-50 (Email communication SoM/KAP end of January 2012) and Exh. C-51 (Mark up of KAP of draft loan facility SoM/KAP).
[442] C-16, para. 144.
[443] C-16, para. 148. Exh. R-49 (Swift regarding payment to Deutsche Bank dated December 23, 2011).
[444] C-16, para. 148–150, and R-22, para. 166–168.
[445] Exh. R-57 (Letter from Ministry of Finance to CEAC dated March 7, 2012).
[446] C-16, para. 153– 155. Notice of Acceleration dated 23 March 2012 (Doc. R 61).
[447] C-16, para. 156.
[448] Notice of demand under guarantee dated 2 April 2012 (Doc. R 62).
[449] Swifts regarding payment to Deutsche Bank dated 5 April 2012 (Doc. R 63).

b. Application of Clause 28.5 of the Settlement Agreement

553. The exclusion of liability provided for in Clauses 28.5 (and 28.6) only affects claims that arise as a consequence of the Failure of Restructuring or after such Failure (*i.e.* after March 1, 2012). Claims that arose before that cut-off date and that were still outstanding as of that date remain unaffected by the subsequent exclusion of liability.

554. This leads to the question whether the present claim arose before or after the March 1, 2012 cut-off date. Deutsche Bank accelerated the DB Facility on March 23, 2012, *i.e.*, after the Failure of Restructuring. Claimant's claim is based on the allegation that Montenegro unlawfully caused the acceleration of KAP's loan with Deutsche Bank. The claim could not mature until the Bank decided to accelerate the loan, and this did not happen until after the cut-off date.

555. Despite Claimant's allegations of collusion, no evidence has been introduced proving that Montenegro acted intentionally or with gross negligence when they allegedly caused the acceleration of KAP's loan with Deutsche Bank.

556. Consequently, the claim has become unenforceable as a consequence of the exclusion of liability agreed upon in Clause 28.5 of the Settlement Agreement (and Art. 272, paragraph 1, of the LCT is inapposite).

557. There is however a *caveat*: Montenegro's alleged breaches (the blocking of the 2009 financial statements and of the 2011 business plan) occurred before the cut-off date (June 30, 2011), but only resulted in the acceleration of the DB facility after the cut-off date. For this reason, the Tribunal has concluded that the Claimant's claim is barred by Clause 28.5. Since the Tribunal's findings might be questioned, the Tribunal will analyze *ad cautelam* (and eventually dismiss) the merits of the claim.

c. Discussion *ad cautelam* of the merits

558. Claimant's argument is that Montenegro breached its good faith obligation vis-à-vis Montenegro by blocking, for no good reason, the adoption of the 2009 financial statements and of KAP's 2011 business plan. Both vetoes prevented KAP from delivering the compliance certificate and business plan to Deutsche Bank on June 30, 2011, as the DB Facility agreement requested. According to CEAC, this subsequently caused the acceleration of the entire loan[450].

559. The basic problem with Claimant's line of reasoning is that it is factually not accurate. Events did not develop in the way described by Claimant and the acceleration of the loan was not caused by KAP's failure to deliver the 2011 compliance certificate and the 2011 business plan.

[450] C-16, para. 161, and C-23, paras. 185, 207, and 224; C-33, paras. 71 and 72.

560. The true facts show that KAP incurred (and acknowledged as such in the Letter Agreement) three additional, much more significant, events of default, which each authorized Deutsche Bank to accelerate the loan:

- KAP was in breach of its obligations under Clause 21.5(a) of the Facility Agreement, having failed to pay when due three repayment instalments to OTP Bank PLC for over € 1 million;
- KAP was also in breach of its obligations under Clause 21.6(a), having commenced negotiations with its creditors, including the Government of Montenegro, OTP Bank, CEAC, VTB Bank, and EPCG; and finally
- KAP also accepted that the failure to comply with the two conditions imposed by Deutsche Bank in the Letter Agreement (Montenegro to become primary obligor and payment of a fee) would by itself constitute an event of default.

561. After having signed the Letter Agreement, and having negotiated the first draft of an amendment agreement, KAP decided to backtrack, informing Deutsche Bank that it was not prepared to accept the two conditions agreed upon in the Letter Agreement. Unsurprisingly, Deutsche Bank decided to accelerate the DB Facility in March 2012. There is no cause-effect relationship between KAP's failure to deliver the 2011 accounts and business plan and Deutsche Bank's decision to call an event of default: the Bank was entitled to do so, because KAP, by signing the Letter Agreement, accepted that the failure to comply with the two conditions imposed by the Bank would constitute in itself an event of default.

Deutsche Bank's fee

562. Claimant has also referred to the fee charged by Deutsche Bank (€ 1.4 million) and has implied that such a high amount might signal the existence of impropriety. It is true that the fee charged by the bank to restructure the facility may seem strikingly high for a € 22 million loan. Alas, the arrangement fee for the Facility was also high, at almost € 1.3 million.[451] It is undisputed that KAP was in a difficult financial situation, that the loan involved high risk, and it is certain that Deutsche Bank took advantage of the situation to extract a fee as high as possible. The amount of the fee in itself is not an indicator of collusion between Deutsche Bank and Montenegro.

3. MONTENEGRO DID NOT PAY OFF THE ELECTRICITY SUBSIDIES AGREED IN THE SETTLEMENT AGREEMENT

563. All aluminum smelters, including KAP, consume significant amounts of electric energy, and the price of electricity is one of the main cost drivers in the aluminum

[451] Exhs. R-149 and R-150.

industry. Under the Settlement Agreement, Montenegro undertook to grant KAP up to € 60 million in subsidies, to be used from 2009 to 2012 to reduce KAP's electricity costs.

564. By January 2012 KAP had almost used up the available funds. At that point KAP objected for the first time to the way Montenegro had been calculating the subsidies. From January to May 2012 KAP tried to convince EPCG (its electricity provider) and Montenegro that under a correct interpretation of the Settlement Agreement, Montenegro had undertaken to disburse € 60 million net of VAT, i.e. that the 17% Montenegrin VAT should be added to the subsidy.[452] Thus, according to KAP's calculations, € 8.72 million of subsidy remained outstanding.[453]

565. The payment of this amount constitutes the third claim brought by CEAC.

A. CEAC's position

566. CEAC claims that Montenegro has not paid in full the electricity subsidies agreed in Clause 11 of the Settlement Agreement.

567. CEAC reads the provision to the effect that Montenegro must disburse:

- € 60 million exclusively on net amounts of electricity (i.e. prices excluding VAT),
- plus an additional amount for the 17% Montenegrin VAT, that EPCG added to every electricity bill issued to Montenegro.[454]

568. According to CEAC, Montenegro has paid € 51.28 million for net amounts of electricity and € 8.72 million for the attached VAT. CEAC says these VAT amounts cannot be detracted from the € 60 million subsidy,[455] and that € 8.72 million remain outstanding.[456] CEAC supports its position on the following arguments.

569. First, VAT cannot be paid out of the € 60 million subsidy. Clause 11.3 of the Settlement Agreement does not mention VAT. Therefore, the clause must be construed to the effect that the € 60 million can only be spent on net amounts of electricity consumption, but not on VAT, since VAT is a different category of expenditure.[457]

[452] C-16, paras. 164 and 167, and C-33, para. 63.
[453] C-23, para. 235 and C-33, para. 58. Exh. C-57. Exh. C-58. Exh. C-60.
[454] C-16, paras. 164 and 167, and C-33, para. 63.
[455] C-16, para. 172 and C-23, para. 226.
[456] C-23, para. 235 and C-33, para. 58.
[457] C-33, para. 59.

570. Second, it makes no sense, looking at the economic balance of the contract, to interpret Clause 11.3 of the Settlement Agreement to the effect that Montenegro may detract amounts paid on VAT from the € 60 million subsidy. Montenegro is the entity that passes and levies the VAT, and therefore, the € 8.72 million Montenegro paid for VAT were payments Montenegro made to itself.[458] Otherwise, Montenegro could have reduced the economic burden of Clause 11.3 by simply increasing the applicable VAT.[459]

571. Third, Montenegro could have paid VAT out of the € 60 million only if the Settlement Agreement specified so. However the agreement does not spell out such obligation. On the contrary, the Parties decided to calculate a € 60 million lump sum to cover the gap between the price set out in the Settlement and the public, general price. Each price was expressed on net amounts (i.e. excluding VAT). Of course it was clear to the Parties that EPCG would need to add VAT to each invoice issued; such is the law under Art. 20 of the Montenegrin VAT Act. Since the Parties did not include payment of VAT within the € 60 million subsidy, VAT cannot be paid out of such subsidy, and Montenegro must pay € 60 million plus the applicable VAT.[460]

572. Fourth, detracting VAT from the € 60 million subsidy contradicts its purpose, which was to bridge KAP's liquidity problems and to permit that the company settle its electricity invoices.[461] This purpose is stated in Recitals D and J of the Settlement Agreement. In fact, once Montenegro refused to pay the remaining amount of subsidy, KAP was unable to pay € 5.1 million for the electricity supplied in March 2012. The subsidy was meant to prevent exactly this situation.[462]

573. Fifth, detracting VAT payments from the € 60 million electricity subsidy works against one of financial goals pursued by the Settlement Agreement. According to the Restructuring Concept 2009, on which the Settlement was based, the cash deficit in the operations of KAP amounted to € 88 million. This cash gap was to be covered in the following way:

- € 28 million from the sale of non-core assets of KAP, and
- € 60 million from Montenegro's electricity subsidy.[463]

The cash gap can be fully covered only if the amount of € 60 million subsidy does not include VAT payments; VAT is but a transitory item in the company's ledger that cannot fill KAP's cash gap.[464]

[458] C-33, para. 59.
[459] C-23, para. 233.
[460] C-23, para. 232.
[461] C-33, para. 59.
[462] C-23, para. 229.
[463] R-22, para. 81.

574. Sixth, Art. 4(5) of the EPCG Framework Agreement provides that Montenegro's subsidies "shall be used for payment of electricity supply only". Payments of VAT fall outside the concept of "payment of electricity supply". The VAT is an expenditure conceptually different from electricity consumption. In fact, the VAT generally does not constitute an eligible expenditure in operations financed with public subsidies.[465]

575. Seventh, Montenegro was obliged not only to pay € 60 million on net amounts of electricity consumption, but also to pay, in addition, the VAT amounts attached to the invoices it received from EPCG. A different understanding would contradict the purpose of the subsidies to bridge KAP's liquidity needs.[466] CEAC bases this argument on Recital D.

B. Montenegro's position

576. Montenegro and its agencies reply that Montenegro paid off the entire amount of electricity subsidies (€ 60 million) and, therefore, fully complied with its obligation under Clause 11.3 of the Settlement Agreement. Montenegro requests the Tribunal to dismiss this claim for the following reasons:[467]

577. First, Clause 11.3 of the Settlement Agreement limits Montenegro's financial commitment to € 60 million. The amount of subsidies available to KAP was capped at a maximum of € 60 million.[468] CEAC could not reasonably expect to receive any additional amount.[469] Whether net or gross, Montenegro is not obliged to pay any further subsidies.[470]

578. Second, the Parties were always aware that electricity invoices included VAT. CEAC knew that the invoices paid by Montenegro included VAT, and never complained about it until the subsidy was about to be exhausted.[471]

579. Third, the additional € 8.72 million sought by CEAC would amount to unlawful state aid under Montenegrin law.[472] CEAC could not have expected Montenegro to pay more than € 60 million on electricity subsidies, because subsidies can only be paid up to the exact amount approved by the competent authority.[473] When the Montenegrin Commission for State Aid and Support Control approved the € 60

[464] C-33, paras. 61 and 62.
[465] The Claimant cites to Commission Regulation (EC) No 1685/2000 of 28 July 2000, Rule No 7 of the Annex.
[466] C-23, para. 229.
[467] R-22, para. 187 and 192, and R-32, para. 164. Exh. R-24 (Letter from EPCG to Ministry of Economy dated January 20, 2015).
[468] R-22, para. 181.
[469] R-22, para. 186.
[470] R-22, para. 179, 180, and 182 and R-25, para. 143.
[471] R-43, paras. 44 and 264.
[472] R-25, paras. 145 y 146, and R-32, para. 164.
[473] RLA-16 (Montenegrin Law on State Aid Control, Articles 2 and 4).

million subsidy, it did not provide that the amount was a "net" amount and that VAT should – or could – be added to it.[474] The Commission approved the electricity subsidy at a maximum of € 60 million,[475] and acknowledged that no further subsidizing may be authorized.[476] Rather, the State Aid Commission expressly stated that no state aid beyond the approved sum could be granted to KAP.[477] Any additional financial support to KAP would have been distortive for both the electricity and aluminum production markets: it would have afforded KAP a favorable position compared to other large electricity consumers, and prevented possible entries of other aluminum producers.[478]

C. The Tribunal's decision

580. The exclusion of liability provided for in Clauses 28.5 (and 28.6) only affects claims which arise as a consequence of the Failure of Restructuring or after such Failure (i.e. after March 1, 2012) – not those existing before that cut-off date.

581. In this claim CEAC argues that Montenegro did not pay the VAT corresponding to the electricity subsidies agreed upon in Clause 11.3 of the Settlement Agreement. These subsidies were to be disbursed in the years 2009, 2010, 2011, and early 2012 – i.e. before the cut-off date. The claim is unaffected by the limitation of liability established in Clause 28.5 of the Settlement Agreement.

a. Discussion of the merits

582. CEAC contends that € 60 million subsidy agreed in Clause 11.3 can be used to pay for net amounts of electricity only. Montenegro replies that the 60 million subsidy can also be used to pay for the VAT amounts attached to each electricity bill sent to Montenegro. CEAC claims that € 8.72 million of electricity subsidy remain outstanding to this day, because Montenegro already disbursed € 51.28 million on net amounts of electricity and € 8.72 million on VAT. Montenegro and its agencies say that the government paid off the entire amount of subsidy agreed in the Settlement.

583. The Tribunal finds for CEAC.

584. The proper interpretation of the Settlement Agreement supports the conclusion that VAT amounts should not have been detracted from the € 60 million subsidy

[474] R-22, paras. 183 and 184, and R-32, para. 164. Exh. C-11 (Decision of the Commission for State Aid and Support Control dated November 24, 2009).
[475] Exh. C-11 (Decision of the Montenegrin Commission for the Control of State Support and Assistance of November 24, 2009).
[476] R-22, para. 185. Exh. C-11 (Decision of the Montenegrin Commission for the Control of State Support and Assistance of November 24, 2009).
[477] R-25, para. 144–146; and R-32, para. 164
[478] R-43, para. 42.

granted by Montenegro. VAT and electricity consumption, while closely related, are conceptually different expenditures.

Contractual provisions

585. The contractual provisions do not specify whether the amounts granted as subsidies can be used to pay for VAT.

586. Art. 95 paragraph 2 of the LCT provides that

> "[i]n interpreting controversial provisions one should not follow the literal meaning of the terms employed, but inquire instead into the joint intention of the contracting parties . . . ."

587. A careful construction of the Settlement Agreement leads to the conclusion that the true intention of the Parties was to exclude VAT payments from the € 60 million subsidy.

588. The main provision, Clause 11.3 of Settlement Agreement, establishes that, from 2009 to 2012, Montenegro shall pay EPCG for the difference between the general and public electricity tariff and KAP's electricity special tariff, which is to be calculated according to a formula. The clause fixes the maximum Euro amount that Montenegro shall disburse each year. The provision reads as follows:

> "The SoM shall pay to EPCG the **difference between** the **electricity price calculated in accordance with the formula given in clause 11.2 of this Agreement** and **the electricity price as regulated by the Energy Regulatory Agency of Montenegro** (*Regulatoma agencija za energetiku*) […], **for the energy consumed by KAP** up to EUR 15,000,000 (in words: fifteen million Euro) for 2009, EUR 20,000,000 (in words: twenty million Euro) for 2010, EUR 18,000,000 (in words: eighteen million Euro) for 2011 and EUR 7,000,000 (in words: seven million Euro) for 2012." (emphasis added)

589. The November 24, 2009 Resolution of the Montenegro's Commission for the Control of State Support and Assistance mentions the electricity subsidies agreed in the Settlement Agreement in similar terms as Clause 11.2. A section titled *Justified Expenses* describes the subsidies as follows:

> "**State of Montenegro will pay** to Electric Power Industry of Montenegro **difference between price received by formula prescribed in MFR and price of electric power established by Regulatory agency for energy** for the period 2009–2012 based on the following dynamics: up to 15 mil. Euros

> in 2009, up to 20 mil. Euros in 2010, up to 18 mil. Euros in 2011 and up to 7 mil. Euros in 2012."[479] (emphasis added)

590. Clause 11.3 of the Settlement Agreement provides (and the November 24, 2009 Resolution confirms) that Montenegro undertook to pay the difference between two prices:

- "the electricity price calculated in accordance with the formula given in clause 11.2 of this Agreement"

minus

- "the electricity price as regulated by the Energy Regulatory Agency of Montenegro."

591. Sales of energy are subject to VAT in Montenegro; consequently, when KAP purchases electricity, it must not only pay the price foreseen in Clause 11.2 of the Settlement Agreement (which goes to the seller of the electricity), but also the corresponding VAT (which goes to the State). The same applies to the public tariffs established by the Regulatory Agency of Montenegro; the sale prices established in such tariffs must be increased by the corresponding VAT.

592. Neither of the two prices referred to in Clause 11.3 of the Settlement Agreement include VAT:

- "the electricity price calculated in accordance with the formula given in clause 11.2 of this Agreement" does not include VAT;
- "the electricity price as regulated by the Energy Regulatory Agency of Montenegro" is set out in the regular decisions made by the Energy Regulatory Agency of Montenegro, which do not include VAT.[480]

593. Montenegro argues that this difference between two ex-VAT amounts should be deemed to include VAT, although the Settlement Agreement is totally silent on this issue.

594. The Tribunal is unconvinced.

595. Absent any contractual provision, it seems unreasonable to understand that the cap for a contractual obligation, defined as the difference between two amounts ex-VAT, should be construed as including VAT. It seems more reasonable to

[479] Exh. C-11 (Decision of the Montenegrin Commission for the Control of State Support and Assistance of November 24, 2009). On another page, a section titled *Reintroducing Long-Term Profitability* mentions the periods and the amount of the subsidies in the following terms: "We should point out that agreement was achieved under which Government of Montenegro will allocate subsidies for electric power for the period 01/01/2010 to 31/01/2012 in the amount of 60 million EUR." Exh. C-11 (Decision of the Montenegrin Commission for the Control of State Support and Assistance of November 24, 2009).
[480] *See* Exhs. C-56A, C-56B, and C-56C.

interpret that the Parties' intention was that the cap on subsidies be also calculated ex-VAT.

Further argument

596. Economic arguments also support this interpretation. At the end of the day, all VAT amounts return to the public purse. If VAT was to be included in the € 60 million subsidy, Montenegro's real financial efforts would have been reduced by the amount of VAT due, since the subsidy would have flown from the State to KAP and from there back to the State via VAT payment.

597. For all these reasons, the Tribunal concludes that € 8.72 million of electricity subsidy remain outstanding to this day, Montenegro having disbursed only € 51.28 million on net amounts of electricity ex-VAT.

598. An additional *caveat* is appropriate.

599. The fact that Montenegro failed to pay KAP the full amount of subsidy does not affect the Tribunal's conclusion that the Failure of Restructuring was caused by KAP and not by Montenegro. Claimant has not argued otherwise: in their submission, Claimant only refers to Montenegro's failure to approve fresh loans and to Montenegro's refusal to support the restructuring.[481] There is no mention of Montenegro's failure to pay the electricity subsidy in full. The amounts involved justify Claimant's position: the Failure of Restructuring was based on KAP having failed to pay over € 22 million in electricity supply bills; the amount of electricity subsidy withheld amounts to a fraction - € 8.72 million. Full payment of the subsidy would not have cured the Failure Event.[482]

b. Decision

600. The Tribunal has concluded that Montenegro did not comply with its obligations regarding payment of VAT, that Montenegro failed to pay KAP the full amount of electricity subsidies promised in Clause 11.3 of the Settlement Agreement, and that Montenegro should have disbursed an additional amount of € 8.72 million to KAP.

601. The exclusive creditor of the subsidy is KAP, Respondent 5 in this arbitration, not CEAC, Claimant in these proceedings. The Tribunal is confronted with the

[481] C-41, paras. 163–203.

[482] Exh. R-99 (letter from Montenegro to CEAC): "In relation to the foregoing, it is to be noted that, as of 2 November 2011, KAP owes to Elektroprivreda Crne Gore A.D. ("EPCG") the principal amount of EUR 19,035,347.13 for unpaid due electricity supply bills for February, March, May, June, July, August and September of this year, which have either not been settled at all or only partially settled by KAP. In addition to the foregoing amount owed and due to EPCG, KAP's unpaid electricity bill for October 2011 is EUR 3,662,316.16.
Moreover, as of 2 November 2011, KAP owes EUR 655,774.13 in interest to EPCG (which is not rescheduled) for late payment to EPCG."

question how this finding can be included in the prayers for relief submitted either by KAP or by CEAC.

KAP's prayer for relief

602. KAP has initially participated in this procedure, but has not sought payment of the outstanding subsidy nor has it submitted any other prayer for relief.[483]

CEAC's prayer for relief

603. In its prayer for relief CEAC is submitting a Primary and a Secondary Damage Claim.[484]

604. The Primary Damage Claim refers to claims arising from the First Arbitration. Among these is Claim 1.2., in which CEAC asks the Tribunal to

> "order the Respondents 1-4, jointly and severally to pay to KAP
>
> a) The amounts of EUR 101,200,000.00 and USD 2,057,987.44
>
> b) [Interest]" (Emphasis added)

605. The Tribunal has already dismissed CEAC's Primary Damage Claim, because such prayer reintroduces the claims submitted in the First Arbitration, and such claims have been finally and conclusively been settled under the Settlement Agreement – and such settlement has not been affected by the Failure of Restructuring.[485] Furthermore, the obligation which Montenegro has breached (the failure to pay VAT on the electricity subsidy) was created in the Settlement Agreement, and thus could not form part of CEAC's historic claims in the First Arbitration.

606. The unavoidable conclusion is that Claim 1.2 of CEAC's Primary Damage Claim does not permit the Tribunal to order Montenegro to pay KAP an amount of € 8.72 million for insufficient payments under the agreed electricity subsidy.

607. This leads to CEAC's Secondary Damage Claim, which refers to the hypothetical loss of value suffered by KAP. Under this heading CEAC is asking for a compensation of € 104 million.

608. The problem with this prayer is that CEAC has not suffered any direct damage from the fact that Montenegro failed to pay off the entire amount of electricity subsidy to KAP. In December 2012 CEAC was only a shareholder of KAP (with a

[483] *See* para. 8 *supra*.
[484] *See* Part III *supra.* R-32, para. 202. This prayer for relief was expressly confirmed by communication R-49.
[485] *See* Section IV.9 *supra.*

29.4% stake), while Montenegro owned another 29.4% of KAP's equity. The remaining shares were publicly traded in the Montenegro Stock Exchange.[486]

609. It stands to reason that CEAC cannot seek to recover now, as a mere shareholder, the € 8.72 million subsidy whose exclusive creditor and beneficiary is KAP. There is no causal link between the prayer for relief and the identified breach: CEAC has not proved that it suffered any direct damage or loss of value caused by Montenegro's breach, and the outstanding € 8.72 million subsidy owed to KAP cannot be recovered by one of its shareholders (to the detriment of the other shareholders and stakeholders in KAP).

610. Summing up, the Tribunal must limit itself to finding that Montenegro did not comply with its obligations regarding payment of VAT under the Settlement Agreement, and that Montenegro should have paid an additional amount of € 8.72 million on electricity subsidies to KAP. It is for KAP to recover from Montenegro the outstanding amount of electricity subsidies, or for CEAC to prove that it suffered a direct damage or loss of value caused by Montenegro's breach – something which Montenegro has failed to do in this procedure.

4. MONTENEGRO FAILED TO SECURE AN AFFORDABLE, LONG-TERM ELECTRICITY SUPPLY FOR KAP

611. Once the electricity subsidies were depleted at the beginning of 2012, another point of friction emerged between the Parties. From March 2012 to June 2013, CEAC repeatedly requested Montenegro to provide KAP with an affordable, long-term electricity supply agreement. On different occasions KAP, Montenegro, and CEAC engaged, without success, in negotiations to find a long-term electricity supply agreement for KAP.

612. CEAC claims that Montenegro breached its legal duties under the Settlement Agreement by not securing such agreement.

A. CEAC's position

613. CEAC contends that Montenegro had a positive duty to safeguard an affordable, long-term electricity supply agreement with KAP at a fair market price. CEAC says that Montenegro breached this duty in two ways:

- First, Montenegro did not prevent EPCG from reducing, and eventually terminating, its electricity supply to KAP;
- Second, Montenegro did not even try to influence EPCG to sign an affordable, long-term electricity supply agreement between EPCG and KAP, despite CEAC's and KAP's requests.[487]

[486] CEX-5, p. 7.

614. The Claimant asserts the following legal contentions.

615. First, Montenegro's conduct is a major breach of its duty of loyalty toward CEAC.

616. Second, Montenegro's behavior was in breach of its duty under Clause 11.5 of the Settlement Agreement whereby, "for the purpose of achieving the maximum production quantities and optimal price," Montenegro promised to use its "best endeavours to enable supplying of the electricity to KAP."[488]

617. The term "best endeavours" must be given the meaning that the expression has under Anglo-American law for the following reasons:

618. (i) Pursuant to Art. 96.2 LCT, for the interpretation of contractual provisions

> "one should inquire into intention which reasonable persons of same kind would regularly have in the same situation."[489]

The Parties did want to attribute English law meaning to the term because:

- they were engaging in a transnational contract in the English language (while both parties' native language is not English);
- they used a specific English law term;
- the two parties come from different legal backgrounds; and
- they used international lawyers in negotiating the contract.[490]

619. (ii) Clause 34.10 of the Settlement Agreement provides that the specific legal terms which were inserted in the agreement in Montenegrin or German language shall be authoritative. Thus, "best endeavours" as a specific legal term in English language that is not accompanied by a Montenegrin or German language term, must have the English law meaning.[491]

620. (iii) Montenegro had to use its "best endeavours" to secure the electricity supply because electricity costs are crucial to keep a smelter running and profitable.[492]

621. Under English contract law the term "best endeavours" requires an obligor to take whatever steps are necessary to produce the desired results.[493] Best-endeavours obligations may sometimes require expenditure by the obligor.[494] Here,

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[487] C-41, paras. 153–155. C-16, paras. 178 and 179; C-23, para. 160; and C-33, paras. 64 and 65.
[488] C-33, para. 69.
[489] Exh. CEX-1. Exh. CLA 22. C-23, para. 152. C-33, para. 66. *See* para. 4.35.
[490] C-23, para. 152.
[491] C-23, para. 152.
[492] C-23, para. 155
[493] Exh. CLA 23 and Exh.CLA 24.
[494] C-23, para. 153. Para 70, Jet2.com v Blackpool Airport Ltd [2012] EWCA Civ 417.

Montenegro was also required to make expenditures, if necessary, in order to achieve a deal on electricity supply for KAP.[495]

622. Third, even if the expression "best endeavours" means that Montenegro had an obligation to use only "appropriate means," Montenegro's conduct still fell short of this standard.[496]

623. Finally, CEAC says that the consequences of this breach were the following:

- KAP paid electricity prices substantially above average for the aluminum market, and
- the supply of electrical energy was eventually cut in half, causing havoc to KAP's industrial production.[497]

B. Montenegro's position

624. Montenegro and its agencies deny Claimant's allegations.[498] Montenegro says that it was not obliged under the Settlement Agreement or Montenegrin law to secure a new, affordable long-term electricity supply agreement for KAP.[499]

625. First, there is no "duty of loyalty" between CEAC and Montenegro obliging Montenegro to safeguard such agreement.[500]

626. Second, the expression "best endeavours" in Clause 11.5 of the Settlement Agreement must be construed under Montenegrin law as an "obligation to appropriate means," i.e., an obligation to *try to achieve* a certain result. This standard means that Montenegro had to act as any reasonable person under the same circumstances.[501] An "obligation to appropriate means" is complied with once the effort has been made, regardless of whether a result is achieved or not.[502]

627. Third, Clause 11.5 of the Settlement Agreement only expressed the Parties' common general intent of a possible future cooperation, as the following reasons show:

- Clause 11.5 has a declaratory nature; it does not force the parties to perform their intentions;[503]

[495] C-23, para. 159.
[496] C-43, para. 158.
[497] C-16, para. 257 and C-23, para. 157.
[498] R-22, para. 219.
[499] R-32, paras. 165 and 166; and R-25, para. 148.
[500] R-22, para. 200.
[501] R-22, paras. 212 and 213.
[502] R-43, paras. 170–172. REX1, paras. 102–103.
[503] R-43, paras. 163 and 164.

- There is a substantial difference between "intend to use," used in the text, and "shall use," which is the kind of language that could have created an obligation to perform a specific conduct;[504]
- Clause 11.5 does not provide for any determined or determinable conduct to create an obligation.[505]

628. CEAC has not proved that Montenegro's conduct breached an "obligation to appropriate means" or that Montenegro has caused any damage.[506] Quite the opposite. Montenegro did in fact make every effort to help KAP conclude a new electricity agreement, namely:

- It mediated with Montenegro Bonus to supply KAP with electricity from October to December 2012;
- It proposed concluding another electricity agreement with this company after December 2012; CEAC refused because, in its view, the solution failed to "address the issue of electricity supply in the long term";[507] this was an irresponsible decision because at the time KAP had no electricity supply agreement in force, had piled up a € 40 million debt on electricity bills, and EPCG had refused—with good reason—to supply any longer.[508]

629. Fourth, Montenegro had neither the legal duty nor the power to exert control over EPCG and force the company to conclude another long-term supply agreement with KAP for the following reasons:[509]

- Clause 11.5 does not create such obligation; in fact, Clause 11.5 Settlement Agreement provides

> "for possible cooperation in connection with the supply of electricity to KAP . . . without being limited only to a contract with EPCG";[510]

- Montenegro does not manage EPCG, which is under the control of an Italian energy company called A2A;
- Montenegro does not have unfettered decision-making powers at EPCG; A2A is also a major shareholder in the company; according to

[504] R-43, para. 164.
[505] R-43, para. 166. *See* REX1, paras. 105–107.
[506] R-22, paras. 217 and 218.
[507] R-43, para. 184–188, Exh. R-9. Exh. R-79 (Letter from KAP to Montenegro Bonus dated April 8, 2013).
[508] R-25, paras. 158–160 and R-32, para. 166. Exh. R-78 (Letter from EPCG to KAP dated November 27, 2012).
[509] R-25, para. 148 and 152, and R-32, paras. 165 and 166, or R-25, paras. 148–160.
[510] R-32, para. 166.

> the "Sale and Purchase Agreement" of September 3, 2009, between Montenegro and A2A, the exclusive right to decide on agreements concerning the sale of electricity in excess of € 5 million is vested on the board of directors; at least one member appointed by A2A must vote for such decision.[511]

630. The proposal, as submitted by KAP and CEAC, was illegal:

- it was against EPCG's interest to conclude a 15-year supply agreement with KAP, because KAP was € 40 million in debt[512] and had defaulted on its obligations for over a year; if Montenegro had imposed such a commercially unacceptable arrangement with KAP, it would have abused its position as a majority shareholder in EPCG;[513]
- under Articles 226, 272, and 276 of the Montenegrin Criminal Code, a shareholder must not abuse its position in a company to either (a) disturb or prevent the work of the company's management, (b) exceed its authority to gain profit for another, or (c) breach its management rights with the aim of gaining profit for another.[514]

631. [To these allegations, CEAC replies that Montenegro cannot allege it could not impose an electricity supply agreement on EPCG because A2A manages EPCG. It is true that, under Clause 10.5.2 of the "Shares' Sale and Purchase Agreement" between A2A and Montenegro, A2A has a veto right with regard to certain issues.[515] But Montenegro owns a majority shareholding in the company.[516]]

632. Sixth, KAP never tried to buy electricity at lower prices from another supplier, though it was free to do so.[517] This shows that CEAC was not prepared to pay the real price for industrial use (about twice as high as CEAC suggests[518]) and insisted on a supply of electricity at prices subsidized by Montenegro.[519]

C. The Tribunal's decision

633. CEAC contends Montenegro broke a positive duty to safeguard an affordable, long-term electricity supply agreement between EPCG and KAP at a fair market price. Montenegro denies this claim.

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[511] R-22, para. 139, R-25, para. 153, and R-32, para. 166. Exh. R-35 (Sale and Purchase Agreement between Montenegro and A2A, dated September 3, 2009, Articles 10.3.2, 10.5.2 and Schedule 7).
[512] Letter from EPCG to KAP dated May 7, 2012 (Doc. R-110).
[513] R-32, para. 166.
[514] R-22, paras. 198 and 199. RLA18 (Montenegrin Criminal Code, Articles 226, 272 and 276).
[515] Exh. R-35.
[516] C-23, para. 237–239.
[517] Montenegrin Law on Energy, Article 158 (RLA 19).
[518] Exh. R-156 (HUPX DAM Public annual report for Trading Year 2012); Exh. R-157 (HUPX DAM Public annual report for Trading Year 2013); and Exh. R-158 (Letter from KAP to Ministry of Economy dated December 11, 2012).
[519] R-25, para. 156.

a. Proven facts

634. Electricity is typically the most important cost factor in a smelter. Without an electricity supply at competitive prices KAP would be unable to survive. The Parties were perfectly aware of this requirement and in Clause 11 of the Settlement Agreement provided for a detailed regime of "Electricity Supply of KAP". The regime was based on two consecutive phases:

635. The first phase would cover the years 2009, 2010, 2011, and the first months of 2012. During this period Montenegro undertook to pay a subsidy, up to an annual limit (which peaked in 2010 at € 20 million, and then diminished to € 18 million in 2011 and to € 7 million in 2012);

636. The second phase was to start once the subsidy regime finished, *i.e.*, sometime in 2012. The precise terms of electricity supply in this second phase had not been agreed; Clause 11.5 of the Shareholders' Agreement simply created a best endeavours obligation:

> For the purpose of achieving the maximum production quantities and optimal price, the Parties intend to use, within the terms and conditions of the Montenegrin legislation, their best endeavours to enable supplying of the electric energy, to KAP.

637. Once the subsidies committed in the Settlement Agreement were depleted, CEAC repeatedly requested Montenegro to provide KAP with an affordable, long-term electricity supply agreement with EPCG. On different occasions KAP, Montenegro, and CEAC engaged, without success, in negotiations to find a solution.

638. In April 2012 KAP informed the Ministry of Economy that, due to the "current financial situation," KAP was unable to pay € 5.1 million for the electricity supplied in March. KAP asked again to receive the amount of subsidies "withheld without merit" as soon as possible, or to adopt "a new electricity price reduction programme for KAP."[520]

639. In May 2012 KAP informed the Ministry of Economy that EPCG threatened to reduce the electricity supply if the outstanding bills were not paid. In addition, KAP alerted the Ministry that, unless a new electricity price-reduction program with EPCG was established, the smelter would be forced to adopt a shutdown plan in the near future.[521]

[520] Exh. C-59 (Letter of KAP to the Ministry of Economy of 27 April 2012).
[521] Exh. C-61 (Letter of KAP of May 8, 2012).

b. Application of Clause 28.5 of the Settlement Agreement

640. The exclusion of liability provided for in Clauses 28.5 (and 28.6) only affects claims which arise as a consequence of the Failure of Restructuring or after such Failure (i.e. after March 1, 2012) – not those existing before that cut-off date.

641. Claimant alleges that Montenegro breached its contractual duty to secure an affordable, long term electricity supply for KAP. This duty derives from Clause 11.5 of the Settlement Agreement, which regulates the second phase of the regime for supply of electricity. This second phase was only to come into operation when the first phase, based on Montenegro paying annual subsidies to KAP, finalized. This would happen in the course of 2012, once the subsidy had been depleted. And there were indeed negotiations between Montenegro and CEAC, trying to find a new electricity supply regime.

642. But as of March 1, 2012 the first phase of the electricity supply regime was still being complied with. Montenegro had still some subsidy to pay to KAP; the second phase of the electricity supply regime – which required a best endeavours commitment from the Parties – had not yet become operative. Montenegro could not, as of that date, have incurred in a breach.[522]

643. Furthermore, Claimant is not saying, nor has any evidence been marshalled in this regard, that Montenegro and its agencies acted intentionally or with gross negligence when they allegedly breached their best endeavours obligations and failed to provide a solution to KAP's electricity supply problems. In the same vein, CEAC has failed to introduce compelling evidence that Montenegro, in carrying out its "best endeavours," could have reached a better solution for KAP's electricity supply problems.

644. The Tribunal consequently finds that Claimant's claim that Montenegro failed to secure an affordable, long-term electricity supply is barred by the exclusion of claims agreed upon in Clause 28.5 of the Settlement Agreement.

[522] *See* Exhs. C-57 to C-60 and R-71.

5. MONTENEGRO BREACHED ITS CONTRACTUAL AND STATUTORY DUTIES BY FILING A BANKRUPTCY PETITION AGAINST KAP.

645. On June 14, 2013, Montenegro filed a petition for bankruptcy against KAP with the Commercial Court in Podgorica. On July 8, 2013, the court officially commenced the proceedings.[523]

A. CEAC's position

646. CEAC contends that, by the mere fact of filing a bankruptcy petition against KAP, Montenegro breached its legal duties toward CEAC.[524]

647. First, Montenegro breached its duty of loyalty toward CEAC, as set forth earlier. Neither KAP nor CEAC agreed to Montenegro's petition for insolvency or was consulted about such move.[525]

648. Second, Montenegro was under no legal duty to file the petition for bankruptcy.[526] There is no positive obligation, under Art. 56 of Montenegro's Bankruptcy Law ["**MBL**"], for a creditor to file bankruptcy proceedings against its debtor.[527]

649. Third, the filing violated Clause 4.1(c) of the KAP's Shareholders' Agreement. This clause bars shareholders from taking any action that may result in the winding up of the company.[528]

650. Fourth, Clause 28.1 of the Settlement Agreement provides a list of events ("Failure Events") that entitle Montenegro to proceed as set forth in Clauses 28.4 through 28.6 of the Settlement Agreement. One of the Failure Events is that

> "the amount paid by the SoM under any or all of the State Guarantees exceeds the amount of EUR 40,000,000." (Clause 28.1(g) of the Settlement Agreement)

651. This clause has to be construed to the effect that, as long as payments of Montenegro under the State guarantees were below € 40 million, Montenegro was under the obligation to meet its "primary goal . . . to support the financial recovery of the companies," as established in Recital D of the Settlement Agreement.[529] Deutsche Bank requested from Montenegro payment of € 23.4 million under the State guarantee. Therefore, Montenegro's disbursement under the State

[523] Exh. C-17 (The SoM's bankruptcy petition).
[524] C-16, paras. 194–202 and 261–273; C-33, paras. 93–95.
[525] C-16, para. 200 and 267.
[526] C-33, para. 97.
[527] RLA-20 (Bankruptcy Law).
[528] C-16, paras. 265–267, and C-23, paras. 241 and 242, and C-33, para. 96.
[529] C-16, paras. 269 and 270. C-23, para. 243.

Guarantees did not exceed € 40 million and the requirements of Clause 28.1(g) Settlement Agreement had not been met.[530]

652. Fifth, even if the total amount of payments under the State guarantees exceeded € 40 million, Montenegro breached the Settlement Agreement by filing the bankruptcy petition. Pursuant to Clause 28.6 of the Settlement Agreement if a Failure of Restructuring occurs, Montenegro is allowed to proceed only as set out in Clause 28.4.7 of the Settlement Agreement, which does not include the filing for bankruptcy.[531]

653. Finally, CEAC says that the bankruptcy petition was untimely because KAP's financial situation was improving at the time of the filing. The management of KAP, supported by CEAC, had already made substantial progress reducing losses and production costs.[532]

B. Montenegro's position

654. Montenegro and its agencies say that they did not violate any legal duty by asking the court to open bankruptcy proceedings against KAP.[533] Montenegro asks the Tribunal to dismiss this allegation based on the following reasons.[534]

655. First, as shown earlier, there is no duty of loyalty between Montenegro and CEAC that may prevent Montenegro from exercising its rights or pursuing its claims.[535]

656. Second, the filing was legal because under Montenegrin law a creditor may seek the bankruptcy of its debtor. In accordance with Art. 101 LCT, any contractual provision waiving this right is null and void.[536] Accordingly, no contractual clause can limit Montenegro's statutory right to request KAP's bankruptcy.

657. Third, all the requirements for opening a bankruptcy procedure were met:[537]

- Article 12.3(1) MBL provides that any inability of a debtor to meet its payment obligations for 45 days from the due date constitutes a ground for bankruptcy;[538] KAP had owed Montenegro € 23 million for over 14 months (since April 5, 2012, i.e., the day on which

[530] C-16, paras. 268–273.
[531] C-16, para. 273.
[532] C-16, paras. 195–197, and C-23, para. 244.
[533] R-32, para. 167. *See* R-22, paras 220–233, R-25, 161–173, and R-43, 280–293.
[534] R-22, para. 233.
[535] R-22, para. 222 and R-32, para. 167, and R-43, para. 285.
[536] R-25, paras. 170 and 171, and R-32, para. 167. RLA-25 (Montenegrin Law on Contracts and Torts), Article 101.
[537] R-32, para. 167.
[538] RLA-20 (Montenegrin Law on Bankruptcy, Article 12(3)(1)).

Montenegro paid KAP's loan to Deutsche Bank under the State guarantee);[539]

- Any creditor may file for bankruptcy if its claim is due and payable, but still outstanding;[540]
- Over 14 months Montenegro repeatedly invited KAP to set up a schedule for the repayment of its debt, although the debt was due in a single instalment; the fact that KAP never responded, repaid, or expressed its intention to do so prompted Montenegro to file the petition for bankruptcy.[541]

658. Fourth, whether or not a specific Failure Event existed under the Settlement Agreement is completely irrelevant to Montenegro's pursuit of its rights as KAP's creditor.[542] Reaching the € 40 million threshold activated Montenegro's right to obtain CEAC's shares in KAP[543] and the other consequences foreseen in the Settlement Agreement for a Failure of Restructuring.[544]

659. Fifth, Clause 10.1 of the Settlement Agreement establishes KAP's obligation to repay the amounts disbursed under the State guarantees. Montenegro has a right to recover the amounts paid under the State guarantee.[545]

660. Sixth, Montenegro did not breach Clause 4.1(c) of the KAP's Shareholders' Agreement because such clause does not apply to the present situation. The clause applies to cases in which shareholders at the general assembly are to vote on the initiation of bankruptcy proceedings by KAP itself:[546]

- Here, it was not KAP that filed for its own bankruptcy;
- Neither was there a meeting of KAP's shareholders' assembly;[547]
- Montenegro was not acting in its capacity as KAP's shareholder when it filed the bankruptcy petition; it simply used its general, statutory rights as a creditor under Montenegrin law, whose exercise Clause 4.1(c) of the KAP's Shareholders' Agreement cannot preempt.[548]

[539] R-32, para. 167. Exh. R-64 (Letter from Ministry of Finance to KAP dated May 18, 2012) and Exh. R-65 (Letter from Ministry of Finance to KAP dated November 13, 2012).
[540] R-22, paras. 227–230.
[541] R-25, para. 172. Letter from Ministry of Finance to KAP dated May 18, 2012 (Exh. R-64); Letter from Ministry of Finance to KAP dated November 13, 2012 (Exh. R-65); and Letter from Ministry of Finance to KAP dated June 5, 2013 (Exh. R-66).
[542] R-32, para. 167.
[543] Exh. C-9 (Settlement Agreement), Clause 10.3.
[544] Exh. C-9 (Settlement Agreement), Clause 28.1(g).
[545] R-22, para. 224.
[546] R-22, para. 225.
[547] R-22, para. 226.
[548] R-25, paras. 165–169.

C. The Tribunal's decision

661. Montenegro declared the Failure of Restructuring on March 1, 2012, provoking CEAC's obligation to transfer its shares in KAP to Montenegro.[549] CEAC never complied. More than one year later, Montenegro filed a motion for KAP's bankruptcy, based on the fact that, in the meantime, Deutsche Bank had enforced Montenegro's guarantee under the DB Facility, and Montenegro had been forced to pay all outstanding amounts owed to Deutsche Bank.

662. Claimant now says that Montenegro breached its contractual and statutory duties by filing a bankruptcy petition against KAP. The Tribunal disagrees.

a. Application of Clause 28.5 of the Settlement Agreement

663. To the extent that Claimant is claiming a breach of the Settlement Agreement, such claims are barred by application of Clause 28.5: Montenegro filed the petition for bankruptcy in June 2013, while the cut-off date for claims to be excluded under Clause 28.5 is March 1, 2012 (more than a year before). Furthermore, there is no accusation that Montenegro and its agencies, when they allegedly breached the Settlement Agreement, acted intentionally or with gross negligence.

b. Discussion of the merits

664. But Claimant is not only saying that Montenegro breached the Settlement Agreement, but also that it breached its duties under the Shareholders' Agreement and under applicable statute. The Tribunal must also dismiss the claim on these other grounds.

665. First, as to the statute-based arguments, the Tribunal cites to Clause 34.3 of the Settlement Agreement, which provides the following:

> "a) Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Rules as at present in force without recourse to the ordinary courts of law. . . ."

666. The claim brought by CEAC does not arise out of, or relate to, the Settlement Agreement. Rather, it is based on the allegation that Montenegro breached its own bankruptcy laws by filing a petition for bankruptcy against KAP, after the Settlement Agreement was not any longer in force. Accordingly, this claim falls outside the scope of the arbitration agreement: the proper venue to adjudicate this claim is not the present arbitration but *inter alia* the bankruptcy courts or the judicial system of Montenegro.

[549] Clause 28.4.2 of the Settlement Agreement.

667. Second, looking first at the Shareholders' Agreement, CEAC argues that the petition of bankruptcy violated Clause 4.1(c), which creates a pooling agreement between shareholders. The language of the clause reads as follows:

> **"4. Pooling Agreement**
>
> 4.1. **The Parties** shall at all times **exercise all their voting rights in the meetings of the general assembly of the Company and all other powers of control** so as to procure that the Company (including the BoD or any other officials of the Company) or the general assembly of the Company, as the case may be, **shall not**, unless both Parties have agreed in writing: . . .
>
> c) **do or permit or suffer to be done any act or thing whereby the Company may be wound up** (whether voluntarily or compulsory), 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."[550] (emphasis added)

668. This provision of the Shareholders' Agreement is inapposite. The fate of KAP's Shareholders' Agreement was linked to that of the Settlement Agreement. The Failure of Restructuring, once it occurred in March 2012, rendered KAP's Shareholders' Agreement ineffective.

669. Third, and in close connection with the previous argument, the Tribunal notes again that the alleged violation of the Shareholders' Agreement and the Settlement Agreement took place when Montenegro filed the petition for bankruptcy in June 2013, while the cut-off date for claims to be excluded under Clause 28.5 of the Settlement Agreement is March 1, 2012; any possible claim is barred by operation of Clause 28.5.

6. MONTENEGRO REPEATEDLY VIOLATED THE LAW DURING KAP'S BANKRUPTCY PROCEEDINGS.

670. On July 9, 2013, just one day after the commencement of the bankruptcy proceedings, KAP, now represented by a judicially-appointed administrator, entered into an agreement with a company named Montenegro Bonus [the "**MB Cooperation Agreement**"].[551] The agreement entrusted Montenegro Bonus with "the management of KAP business during bankruptcy" and entirely deprived CEAC of the control of KAP.[552] The bankruptcy judge gave his express consent to the execution of this contract.[553]

[550] Exh. C-12 (KAP's Shareholders' Agreement).
[551] Exh. C-64 (MB Cooperation Agreement).
[552] Exh. C-64 (MB Cooperation Agreement), Art. 2 of the MB Cooperation Agreement.
[553] Exh. C-64 (MB Cooperation Agreement), page 5.

671. As the bankruptcy proceedings went forward, CEAC became increasingly dissatisfied about the way Montenegro Bonus and the bankruptcy judge were managing the procedure. On March 13, 2014 CEAC reported certain actions of KAP's administrator and Montenegro Bonus to the Supreme State Prosecution Service of Podgorica, requesting a criminal investigation of the business relations between KAP's liquidator and Montenegro Bonus.[554]

A. CEAC's position

672. CEAC contends that throughout KAP's bankruptcy proceedings Montenegro has repeatedly violated the MBL.[555]

673. First, CEAC says that both Montenegro Bonus and the MB Cooperation Agreement are just vehicles for Montenegro to impede control of KAP by CEAC or other creditors. CEAC sets forth the following facts in support of this contention:[556]

- Montenegro fully owns Montenegro Bonus.
- Montenegro's former representative in KAP's board of directors became an employee of Montenegro Bonus and was appointed by Montenegro Bonus as the new manager of KAP.
- Pursuant to its Article 11, the MB Cooperation Agreement came "into force by the day it is confirmed by Government of Montenegro."

674. Second, the MB Cooperation Agreement is illegal for the following reasons:

- The MB Cooperation Agreement was concluded without conducting any procurement procedure or searching other local and international companies with experience in the management of aluminum industry;[557]
- The Administrator did not inform the other KAP creditors or asked for their opinion before concluding the agreement with Montenegro Bonus; by this omission the Administrator breached Art. 35(1) MBL, which provides that an Administrator may not undertake any measures with significant impact on the insolvency estate without prior consent of the board of creditors;
- The agreement breaches Clause 3.2 of the KAP's Shareholders' Agreement, under which CEAC should continue to manage KAP throughout the bankruptcy;[558]

[554] Exh. C-65 (Letter to State Prosecution Service), page 1.
[555] C-16, para. 274.
[556] C-16, paras. 204 and 207–211.
[557] C-16, para. 212.
[558] C-16, para. 275.

– Hiring Montenegro Bonus – a company fully owned by Montenegro – to run KAP favors Montenegro, since Montenegro is a creditor of KAP; the decision thus breaches the principle of equal treatment of creditors prescribed by Art. 4 MBL.[559]

675. Third, KAP's Administrator has never reported to the board of creditors on the status of the insolvency estate. Such omission violates Art. 36(1) MBL.[560]

676. Fourth, KAP's board of creditors was not established properly. Article 44 MBL orders that the board of creditors consist either of three or five members. The membership of the board of creditors depends on the consent of the largest creditors. If numerous creditors intend to become a board member, the board of creditors should have the maximum allowed number of members in order to achieve the maximum representation. However, in the first creditors' meeting the administrator managed to establish a board of creditors with only three members – Montenegro, EPCG and CEAC. Thus the right of En+ and VTB Bank Austria to become members of the board of creditors was ignored. Montenegro's courts have however rejected the legal actions brought by En+ and VTB against this maneuver.[561]

677. Montenegro has incurred in other irregularities in the bankruptcy proceedings, to the point that

> "[t]here are good reasons for coming to the conclusion that Montenegro, the Administrator and the Bankruptcy Judge are synchronizing their actions in order to conduct the bankruptcy proceedings in a manner suiting Montenegro's interest and to marginalize the role of the other creditors, in particular CEAC."[562]

678. Finally, CEAC also complains that the judge overseeing KAP's bankruptcy has exercised no control at all over the legality of the administrator's actions, in disregard of Montenegrin insolvency law.[563]

B. Montenegro's position

679. Montenegro and its agencies request the Tribunal to dismiss the Claimant's allegations for the following reasons:[564]

680. First, CEAC has no right to maintain its operational and management role at KAP after the commencement of the bankruptcy proceedings. Article 76(1) MBL provides that

[559] C-16, para. 213.
[560] C-16, para. 221.
[561] C-16, para. 220.
[562] C-16, para. 219.
[563] C-16, para. 222.
[564] R-22, paras. 234–240 and R-43, paras. 294–297.

> "on the date of institution of bankruptcy proceedings, representative and management rights of the Executive Director, representatives and agents, as well as those of the management bodies of the bankruptcy debtor shall cease to exist and shall be transferred to the receiver."[565]

681. Thus CEAC could not have reasonably expected to continue to manage KAP after the commencement of bankruptcy proceedings.

682. Second, even if Clause 3.2 KAP's Shareholders' Agreement was applicable, such provision would be null and void insofar as it is contrary to Art. 76(1) MBL. As provided for in Art. 101(1) LCT, any provision of a contract that is contrary to mandatory provisions of Montenegrin law is null and void.[566]

C. Tribunal's decision

683. CEAC contends that Montenegro has repeatedly violated the Montenegrin Bankruptcy Law throughout KAP's bankruptcy proceedings. Montenegro denies the allegations.

684. The Tribunal sides with Montenegro on three grounds.

685. First, Clause 34.3 of the Settlement Agreement provides the following arbitration agreement:

> "a) Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Rules as at present in force without recourse to the ordinary courts of law. . . ."

686. The claim brought by CEAC does not arise out of, or relate to, the Settlement Agreement. Rather, it is based on a number of irregularities allegedly committed by Montenegro in breach of its procedural laws and, in particular, the MBL, after the Settlement Agreement was not any longer in force. Accordingly, this claim falls outside the scope of the arbitration agreement: the proper venue to adjudicate this claim is not the present arbitration but *inter alia* the bankruptcy courts or the judicial system of Montenegro.

687. Second, to support its claim, CEAC also cites to Clause 3.2 of the KAP's Shareholders' Agreement, under which CEAC, in its view, should have continued to manage KAP throughout the bankruptcy.[567]

688. Clause 3.2 of the KAP's Shareholders' Agreement reads as follows:

[565] RLA-20 (Montenegrin Law on Bankruptcy), Article 76(1).
[566] RLA-4 (Montenegrin Law on Contracts and Torts), Article 101(1).
[567] C-16, para. 275.

> "The Parties shall use reasonable best efforts to ensure that the BoD elects persons nominated by CEAC as chairman of the BoD and as executive director of the Company." [568]

689. This provision is inapposite. The fate of KAP's Shareholders' Agreement was linked to that of the Settlement Agreement. The Failure of Restructuring, once it occurred in March 2012, rendered KAP's Shareholders' Agreement ineffective.

690. Third, and in close connection with the previous argument, the Tribunal notes again that the alleged contractual irregularities took place after Montenegro filed the petition for bankruptcy in June 2013, while the cut-off date for claims to be excluded under Clause 28.5 of the Settlement Agreement is March 1, 2012; any possible claim is barred by operation of Clause 28.5.

7. CEAC'S PRAYER FOR RELIEF

691. CEAC is submitting a Primary Damage Claim, based on claims arising from the First Arbitration. Under this Claim CEAC is asking the Tribunal to order Respondents to pay the same compensation which would have accrued if the claims brought in the First Arbitration had been admitted. This Primary Damage Claim cannot succeed and has been dismissed for the reasons set-forth in Section IV.9 above.

692. CEAC is subsidiarily submitting a Secondary Damage Claim, based on the hypothetical value of KAP. Under this Claim CEAC is asking the Tribunal to order Montenegro and its agencies to (jointly and severally) pay compensation equal to the entire "hypothetical value of KAP", set at € 104 million (plus interest).

693. This Secondary Damage Claim is also dismissed, because the Tribunal has analysed and rejected five (out of a total of six) individual claims submitted by CEAC:

- that Montenegro obstructed KAP's restructuring plans,
- that it unlawfully caused the acceleration of KAP's loan with Deutsche Bank,
- that it failed to provide a long-term, affordable electricity supply for KAP,
- that it breached its contractual and statutory duties by filing a bankruptcy petition against KAP,
- and that it repeatedly violated the law during KAP's bankruptcy.

[568] Exh. C-12.

694. As regards CEAC's third claim (that Montenegro failed to fully pay the electricity subsidies), the Tribunal has concluded that Montenegro did not comply with its obligations regarding payment of VAT, that Montenegro failed to pay KAP the full amount of electricity subsidies promised in Clause 11.3 of the Settlement Agreement, and that Montenegro should have disbursed an additional amount of € 8.72 million to KAP (see Section V.3).

695. The Tribunal analyzed whether this finding is compatible with CEAC's Secondary Damage Claim and concluded,

- that the outstanding € 8.72 million subsidy is owed to KAP and cannot be recovered by CEAC, one of its shareholders with a 24.9% participation, to the detriment of the other shareholders and stakeholders in KAP, and that
- CEAC has failed to prove that it suffered any direct damage caused by Montenegro's failure to pay off the entire amount of electricity subsidy to KAP.

696. For these reasons, the Tribunal has limited itself to finding that Montenegro did not comply with its obligations regarding payment of VAT under the Settlement Agreement, and that Montenegro should have paid to KAP an additional amount of € 8.72 million on electricity subsidies. A reference to this finding is inserted in the *dispositive* of this Award.

VI. MERITS (III): MONTENEGRO'S COUNTERCLAIMS

697. Montenegro and its agencies assert four counterclaims against En+ and CEAC. Montenegro and its agencies state that CEAC breached four covenants of the Settlement Agreement, incurring contractual penalties for over € 13.7 million.[569] The alleged breaches are the following:[570]

- Under Clause 19.1(a) of the Settlement Agreement, CEAC promised to provide every year a report defined as "Investment Report." CEAC failed to provide the report in 2011, 2012, and 2013.[571] CEAC owes Montenegro € 7.12 million in contractual penalties.[572]
- Under Clause 20.1(a) of the Settlement Agreement, CEAC had to ensure that KAP invested a minimum amount of money every year from 2010 through 2014, in accordance with a "Minimum Investment Programme."[573] CEAC did not invest the minimum amount required in any single year.[574] CEAC owes Montenegro € 1.36 million in contractual penalties.[575]
- Under Clause 20.1(g) of the Settlement Agreement, CEAC undertook to provide a € 2 million bond in favor of Montenegro by the end of 2012.[576] CEAC never provided the bond. CEAC owes Montenegro over € 4.7 million in contractual penalties.[577]
- Under Clause 21.1(l) of the Settlement Agreement, CEAC promised it would not allow KAP to fall behind in the payment of its electricity bills for longer than three months.[578] CEAC owes Montenegro € 612,000 in contractual penalties.[579]

698. Montenegro also says that CEAC and En+ are jointly and severally liable for the damages.[580]

699. CEAC and En+ reply that they did not breach any obligation and that all the counterclaims must be dismissed.[581]

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[569] R-25, para. 268.
[570] R-22, para. 261.
[571] R-22, paras. 276–283. Also, R-32, paras. 182–186, and R-43, paras. 303–328.
[572] R-25, para. 264.
[573] *See* C-9, page 6. Exh. R-93 (Minimum Investment Programme dated December 25, 2009).
[574] R-22, paras. 284–295, and R-25, paras. 229–236.
[575] R-25, para. 265.
[576] R-22, paras. 296–303, and R-25, paras. 237–239.
[577] R-25, para. 266.
[578] R-22, paras. 304–313, R-25, paras 240–252.
[579] R-25, para. 267.
[580] R-43, paras. 340–358.

700. The Tribunal will analyze (in sections **1.** through **4.**), whether any of the counterclaims is barred by application of Clause 28.6 of the Settlement Agreement; in those cases where the claim is still live, the Tribunal will enter into its merits, and will turn to calculating the agreed contractual penalties. Thereafter, the Tribunal will devote a section to the discussion whether CEAC and En+ are jointly liable (**5.**), and a final section to Montenegro's prayer for relief (**6.**)

1. CEAC BREACHED THE SETTLEMENT AGREEMENT BY FAILING TO PROVIDE "ANNUAL INVESTMENT REPORTS."

A. Montenegro's position

701. Montenegro and its agencies contend that CEAC breached Clause 19.1(a) of the Settlement Agreement. This clause required CEAC to provide every year a report defined as "Investment Report." Montenegro and its agencies say that CEAC failed to provide the report in 2011, 2012, and 2013:[582]

702. First, KAP had to furnish the first Investment Report by the end of January 2011. Yet KAP failed to do so.[583]

703. Second, CEAC did not submit the annual Investment Reports in 2012 and 2013. By letter of April 19, 2013, CEAC made clear it had no intention to comply with this obligation.[584]

704. Third, Montenegro never waived its right to receive any Investment Report.[585]

705. Fourth, in accordance with Clause 22.2(b) of the Settlement Agreement, CEAC must pay contractual penalties for the breach of this duty.[586]

B. CEAC and En+'s Position

706. CEAC and En+ move the Tribunal to dismiss these allegations because they did submit the Investment Report in 2011, 2012, and 2013, and in any case they had a legal right to withhold the reports in 2012 and 2013:[587]

707. First, CEAC did submit the Investment Report in 2011.[588] It was prepared by a company called "Racunovodstvo I. Revizija doo Tivat".[589] KAP delivered it to Montenegro on October 17, 2011.[590]

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[581] C-33, para. 116.
[582] R-22, paras. 276–283. Also, R-32, paras. 182–186, and R-43, paras. 303–328.
[583] Exh. R-93 (Minimum Investment Programme dated December 25, 2009).
[584] Exh. R-92 (Letter from Harrisons Solicitors to Schoenherr dated April 19, 2013).
[585] R-25, paras. 224–227.
[586] *See* R-43, para. 314: "Counter-Claimant is not seeking any penalties after insolvency commenced."
[587] C-23, para 275–288, and C-29, para 3–12.
[588] C-23, para. 285.

708. [Montenegro in turn replies this report did not meet the requirements set out in the Settlement Agreement because:

- *it was not delivered by January 2011, but nine months later, in October 2011;*
- *"Racunovodstvo I. Revizija doo Tivat" does not qualify as an "internationally reputable accounting firm";*
- *the report was not expressly submitted as an Investment Report on the basis of Clause 19.1(a) of the Settlement Agreement.*[591]*]*

709. Second, CEAC did *de facto* submit the Annual Investment Report in 2012 and 2013. The information that the Investment Reports had to convey was included in the notes to KAP's financial statements for the years 2010, 2011, and 2012. These financial statements were each audited by KPMG.[592]

710. Third, every month the management of KAP prepared and submitted to its board of directors a document called "management report." These "management reports" also included the same information that the Investment Reports had to convey under Clause 19.1(a) of the Settlement Agreement.[593]

711. Fourth, for the two previous reasons, the consensus among KAP's shareholders was that CEAC did not have to prepare the annual Investment Reports.[594]

712. Fifth, Montenegro caused CEAC to understand that the Investment Reports were not required, since Montenegro never requested delivery until April 2013.[595] Art. 279 LCT applies here. This article provides that an agreement on contractual penalties loses its effect where the breach or delay was not caused by the debtor.[596]

713. Sixth, starting November 1, 2011 Montenegro breached its own obligations under the Settlement Agreement. As from that date, CEAC gained a right to withhold the performance of its own obligations under the Settlement Agreement, including

[589] Exh. C-212.
[590] Exh. C-213. C-23, para. 283.
[591] R-25, paras. 221–223.
[592] C-29, para. 10. *See* Exh. R-27 (2010 Financial Statements), Exh. R-72 (2011 Financial Statements), and Exh. R-94 (2012 Financial Statements).
[593] C-29, para. 10.
[594] C-23, para. 284, and C-29, para. 11. Exh. R-92 (CEAC offers as evidence a letter sent from CEAC's lawyers to Montenegro's lawyers on April 19, 2013).
[595] C-29, para. 12. Exh. CLA-22.
[596] C-23, para. 286. Exh. CLA-22.

its duty to submit the annual Investment Reports. This right of retention is set forth in Art. 117(1) LCT.[597]

714. [Montenegro answers that CEAC and En+ cannot assert such right for two reasons:

- *This right of retention under Art. 117(1) LCT only applies to simultaneous performances. Here, the parties agreed on the specific order in which they had to perform their respective obligations; thus the requirement is not met;*[598]
- *The right of retention does not apply if the other party complied with all its obligations. Montenegro did comply with all its obligations.*[599]*]*

715. Seventh, as to the contractual penalties provided for in the Settlement Agreement, CEAC does not have to pay any of such penalties for the following reasons:

- CEAC did not breach its obligations under the Settlement Agreement;[600]
- Any penalties incurred before January 31, 2012 became statute-barred pursuant to Arts. 383(1) and 397 LCT: Art. 383(1) LCT provides that claims arising from commercial agreements expire after three years;[601] and Art. 397 LCT, that the limitation period can be interrupted only by commencement of a civil action or other motion made by the creditor against the debtor, establishing the claim. Here, Montenegro asserted this claim for the first time on January 31, 2015, when it submitted its Statement of Counterclaim; any penalties regarding the time prior to January 31, 2012, have become statute-barred.[602]

716. [Montenegro replies that the claim is not barred by the statute of limitations because:

- *Montenegro asserted this claim first with the Terms of Reference of this arbitration, which were executed on August 25, 2014.*[603]
- *Besides, this claim is not subject to the 3-year statute of limitations established by Art. 383 LCT for commercial agreements. The Settlement Agreement is not a commercial agreement but a sui generis*

[597] C-23, para. 285, and C-29, para. 7. Exh. CLA-22. C-33, para. 118. The Claimant says this is confirmed by the Serbian court practice regarding the corresponding provision in Article 122 of the Serbian LCT (*See* Commercial Court of Appeals, Pz. 10819/2010, dated 11 August 2011 (Exhibit CLA42)).
[598] RLA-23 (S. Perovic, Commentary on the Contracts and Torts Act, Volume One, 1995, p. 401).
[599] R-25, paras. 207–211. R-43, para. 316.
[600] C-23, paras. 283–304.
[601] C-23, para. 288. Exh. CLA-22.
[602] C-29, paras. 8 and 9.
[603] R-25, paras. 212–216, and R-43, paras 317–326.

contract, subject to the 10-year limitation period for general obligations fixed by Art. 380.]

C. The Tribunal's decision

717. Montenegro and its agencies contend that CEAC breached Clause 19.1(a) of the Settlement Agreement by failing to provide every year a memorandum defined as "Investment Report." CEAC denies this allegation.

718. Montenegro's counterclaim turns on whether or not Clause 19.1(a) was breached by CEAC.

719. Clause 19.1(a) of the Settlement Agreement (titled "Reporting and Inspection Obligations") imposes on CEAC a duty to submit to Montenegro every year an "Investment Report," explaining in detail the measures taken by CEAC to comply with its investment obligations under the Settlement Agreement:

> "19.1. CEAC, in particular in its capacity as shareholder of the Companies, undertakes to take all action necessary to do, or cause to be done or taken, in order to:
>
> (a) ensure that KAP submits to the SoM, within one month after the last day of each investment period of the Minimum Investment Programme a written report (the "Investment Report"). The Investment Report is to be prepared at the expense of CEAC by an internationally reputable accounting firm, approved by the SoM. The Investment Report shall state in sufficient detail the measures taken by CEAC to comply with its investment obligations under clause 18 of this Agreement; and in the case of non-compliance, clearly describe the reasons for such noncompliance."

720. The language of the clause provides that every Investment Report has to meet a list of specific requirements:

- it has to be in writing;
- it has to be prepared at the expense of CEAC;
- it has to be prepared by an "internationally reputable accounting firm, approved by" Montenegro;
- it has to be submitted within one month after the last day of each investment period;
- it has to state in sufficient detail the measures taken by CEAC to comply with its investment obligations under clause 18 of the Settlement Agreement;
- alternatively, it has to "clearly describe" the reasons why CEAC failed to comply with its investment obligations under clause 18 of the Settlement Agreement.

721. Last but not least, CEAC undertakes "to take all action necessary" to ensure that KAP submits the Investment Report to Montenegro.

722. The breach of this covenant entails the payment of certain penalties for each day CEAC remains in non-compliance. Clause 22.2(b) of the Settlement Agreement establishes CEAC's obligation to pay contractual penalties to Montenegro in the following amounts:

> "22.2. CEAC shall on written demand by the SoM pay daily penalties for breaches of its obligations to the SoM as follows: . . .
>
> (b) For each and any breach of clauses 19.1 (a) and (b) of this Agreement in the amount of EUR 1,000 (in words: one thousand Euro) per day."

723. The Tribunal will next examine separately the documents submitted by CEAC for each year.

a. The 2010 Investment Report

724. CEAC holds that the Investment Report for the year 2010 was in fact submitted, and cites to a report that, under the title of "Authorized Auditor's Report on Audit of Investments as of 31st December 2010 of a Joint-Stock Company 'Kombinat Alumnijuma Podgorica,'" was prepared by a firm named "Racunovodstvo I. Revizija doo Tivat"[604] and sent to the Ministry of Economy of Montenegro on October 17, 2011.[605]

725. Subsidiarily, CEAC contends that, even if the document does not qualify as an Investment Report, this counterclaim would be barred by operation of the statute of limitations, which provides that claims arising from commercial agreements expire after three years.[606] CEAC's position is that any penalties incurred before January 31, 2012 became statute-barred pursuant to Arts. 383(1) and 397 LCT.

726. Montenegro replies that the claim is not barred by the statute of limitations because:

- Montenegro asserted this claim first with the Terms of Reference of this arbitration, which were executed on August 25, 2014.
- Besides, this claim is not subject to the 3-year statute of limitations established by Art. 383 LCT for commercial agreements. The Settlement Agreement is not a commercial agreement but a *sui generis* contract, subject to the 10-year limitation period for general obligations fixed by Art. 380 LCT.

[604] Exh. C-212.
[605] Exh. C-212.
[606] C-23, para. 288. Exh. CLA-22.

The Tribunal's decision regarding time-bar

727. The Tribunal agrees with CEAC's subsidiary argument: the statutory period to bring the counterclaim for the 2010 Investment Report has run out.

728. Article 383 LCT reads as follows:

> "Mutual Contractual Claims from Commercial Law Contracts. Article 383.
>
> 1) Mutual claims of legal persons from contracts entered into in exercising their business activities, as well as claims relating to reimbursement of expenses made in connection to such contracts, shall expire due to the statute of limitations after a three year period.
>
> 2) The period of such unenforceability shall run separately for each supply of goods and work or service effected."[607]

729. Art. 380 LCT provides:

> "Article 380.
>
> Claims shall expire due to statute of limitations after lapse of a ten year period, unless some other expiry time limit is provided by statute."[608]

730. The Tribunal notes that limitation period applicable to the obligations arising from Clause 19.1 of the Settlement Agreement should be three years (Art. 383 LCT), not 10 years (Art. 380 LCT).The Settlement Agreement and the penalties and claims arising from it fall within language of Art. 383 LCT:

- First, we are dealing here with "mutual claims" between the Parties, which are "legal persons."
- Second, the claims arise from the Settlement Agreement, which is a contract entered into "exercising business activities".

Therefore, the applicable statutory period is the specific three-year rule under Art. 383 LCT, not the general provision set forth in Art. 380 LCT.

The duration of the statutory limit

731. The second step is to determine when the statutory period started and finished.

732. The Investment Report has to be presented "within one month after the last day of each investment period of the Minimum Investment Programme" (Clause 19.1(a) of the Settlement Agreement).

[607] Exh. LEX-LCT 0001.
[608] Exh. LEX-LCT 0001.

733. Accordingly, the deadline for submitting the 2010 Investment Report was January 31, 2011. The three year period began to run on February 1, 2011, and was meant to expire on February 1, 2014, provided the time limit was not tolled.

734. Art. 397 LCT provides that the tolling of the statute of limitations requires commencing a civil action before a jurisdictional body:

> "Article 397. Commencing of a Civil Action.
>
> The course of period for expiry shall be interrupted by commencing of a civil action and by other motion made by the creditor against a debtor before the court or other competent agency, with an aim of establishing, securing or effectuating of the claim."

735. There is no evidence that, prior to February 1, 2014, Montenegro brought a claim before a court or other competent agency, arguing that Clause 19.1(a) of the Settlement Agreement had been breached by CEAC. CEAC and En+ served their notice of arbitration on November 12, 2013.[609]

736. The earliest document that could qualify as "motion made by" Montenegro against CEAC "with an aim of establishing, securing or effectuating of the claim" (Art. 397 LCT) is the communication R-2, of May 16, 2014, where Montenegro put CEAC on notice of its upcoming counterclaims for breach of the Settlement Agreement:

> "Respondents intend to submit a counterclaim on the basis of non compliance by the Claimants with contractual obligations undertaken by them and breach of applicable laws. In this respect, Respondents will request the Tribunal to order the Claimants to pay to the Respondents an amount of at least EUR 300,000,000. Respondents reserve the right to increase the amount of counterclaims in the course of the proceedings."[610]

737. Therefore, as for the 2010 Investment Report, the three year period finalized before Montenegro raised a claim. Whatever claim Montenegro may have had in connection with this report, it was time barred when Montenegro raised it.

b. The 2011 Investment Report

738. The Tribunal is turning next to examine whether the documents that, in CEAC's view, were presented as the 2011 Investment Report comply with the requirements of Clause 19.1 of the Settlement Agreement.

739. CEAC holds that the 2011 Investment Reports was *de facto* submitted. The information that the Investment Reports had to convey was included in the notes

[609] C-1.
[610] R-2, p. 2.

to KAP's financial statement for the year 2011.[611] This financial statement was audited by KPMG.[612] Montenegro says that this document does not meet the requirements set forth in Clause 19(a) of Settlement Agreement.

740. The Tribunal has revised the contents of the 2011 financial statement and the independent auditor's report. None of them comply with all the requirements set out in Clause 19.1(a).

741. First, the 2011 Investment Report was not presented on time. The Investment Report had to be presented "within one month after the last day of each investment period of the Minimum Investment Programme." Accordingly, the deadline for submitting the 2011 Investment Report was January 31, 2012. However, the financial statement did not meet this deadline: the statement and audit report for 2011 are dated June 1, 2012.[613] Consequently, the alleged 2011 Investment Report was submitted four months late.

742. Second, the financial statement and audit report for 2011 do not fulfill the requirements as to the information that an Investment Report has to convey. Clause 19.1(a) provides that

> "[t]he Investment Report shall state in sufficient detail the measures taken by CEAC to comply with its investment obligations under clause 18 of this Agreement; and in the case of non-compliance, clearly describe the reasons for such noncompliance."

743. KAP's audited financial statements refers to the Minimum Investment Programme in its section 36 ("Commitments"). The last two paragraphs of the section merely describe the commitments arising from Clauses 18 and 19 of the Settlement Agreement in accordance with the Programme. Regarding the implementation of the investments, the section only makes the following observation:

> "The first year of the Investment programme is to start not earlier than 26 October 2010. From that date until 31 December 2011 investments in projects mentioned in the Investment programme were executed in the total amount of EUR 7,272 thousand. Additionally, in the period 31 December 2009 – 25 October 2010 investments in projects, mentioned in the Investment program, were executed in the amount of EUR 8,093 thousand."[614]

744. These two sentences fail to fulfill the conditions set out in Clause 19.1. The explanation is clearly wanting and fails to state in sufficient detail the measures taken by CEAC to comply with its investment obligations and to "clearly

[611] Exh. R-72.
[612] C-29, para. 10. *See* Exh. R-27 (2010 Financial Statements), Exh. R-72 (2011 Financial Statements), and Exh. R-94 (2012 Financial Statements).
[613] Exh. R-72.
[614] Exh. R-72 (KAP's Audited Financial Statements for 2011 dated June 1, 2012), para. 36.

describe" the reasons why CEAC failed to comply with its investment obligations under Clause 18.

745. For these reasons, the Tribunal concludes that in 2011 CEAC failed to provide the Investment Report described in Clause 19.1(a) of the Settlement Agreement.

CEAC's defenses

746. Once the Tribunal has determined that CEAC failed to comply with the obligation to submit Investment Reports under Clause 19.1, it must now discuss the defenses raised by CEAC: the right to withhold performance and the statute of limitations:

747. First, as to the right to withhold performance, CEAC contends that, starting November 1, 2011 Montenegro breached its own obligations under the Settlement Agreement. As from that date, CEAC gained a right to withhold the performance of its own obligations, including its duty to submit the annual Investment Reports. This right of retention derives from Art. 117(1) LCT.[615]

748. Montenegro answers that CEAC and En+ cannot assert such right because:

- Art. 117(1) LCT only applies to simultaneous performances; here, the parties agreed on the specific order in which they had to perform their respective obligations;[616]
- Montenegro did comply with all its obligations.[617]

749. The LCT contains the following provisions regarding the right to withhold performance:[618]

> "Article. 117. Rule of Simultaneous Performance.
>
> 1) In bilateral reciprocal contracts no party shall be bound to perform its obligation unless the other party performs or is prepared to simultaneously perform its obligation, unless otherwise is agreed or set out by the law, or unless otherwise results from the nature of the transaction.
>
> 2) However, should one party claim at court that it is not bound to perform the obligation until the other party performs its own, the court shall order such party to perform its obligation when the other party performs its own.

750. Article 117(1) LCT is inapposite.

[615] C-23, para. 285, and C-29, para. 7. Exh. CLA-22. C-33, para. 118. The Claimant says this is confirmed by the Serbian court practice regarding the corresponding provision in Article 122 of the Serbian LCT (*See* Commercial Court of Appeals, Pz. 10819/2010, dated 11 August 2011 (Exhibit CLA42)).
[616] RLA-23 (S. Perovic, Commentary on the Contracts and Torts Act, Volume One, 1995, p. 401).
[617] R-25, paras. 207–211. R-43, para. 316.
[618] CLA-22.

751. CEAC's performance contained in Clause 19.1 is not conditional on or linked to the performance by Montenegro of its duties. More importantly, the Tribunal has not found that Montenegro failed to perform any specific duties under the contract that could justify CEAC's withholding of its performance under Clause 19.1.

752. Second, as for the statute of limitations, Montenegro's claim has not expired. The time period for Montenegro to sue for this breach expired on February 1, 2015. Montenegro submitted its Statement of Defense and Counterclaim on January 30, 2015, that is, just before the expiration of the statute of limitations.

753. Consequently, Montenegro duly tolled the time limit for its claims regarding the 2011 Investment Report.

754. Summing up, the Tribunal finds CEAC liable for the breach of Clause 19.1(a) of the Settlement Agreement with regard to the submission of the 2011 Investment Report.

Penalties

755. Once the Tribunal has determined that CEAC breached Clause 19.1 of the Settlement Agreement by failing to provide the "annual investment reports" for the year 2011, it must calculate the amount of penalties accrued.

756. Clause 22.2(b) of the Settlement Agreement establishes CEAC's obligation to pay contractual penalties to Montenegro in the following amounts:

> "22.2. CEAC shall on written demand by the SoM pay daily penalties for breaches of its obligations to the SoM as follows: . . .
>
> (b) For each and any breach of clauses 19.1 (a) and (b) of this Agreement in the amount of EUR 1,000 (in words: one thousand Euro) per day."

757. Montenegro claims that these penalties must accrue at a rate of € 1,000 *per diem* from February 1, 2012 (the day after the first Annual Investment Report was due), until July 8, 2013 (the day on which the bankruptcy proceedings commenced).[619]

758. The Tribunal agrees with the *dies a quo*, but disagrees with the end date proposed by Montenegro. The appropriate *dies ad quem* be fixed on February 29, 2012, the day before Montenegro effected the Failure of Restructuring (i.e. March 1, 2012).

759. The reason is that (as the Tribunal has already found) under Clause 28.6 of the Settlement Agreement, KAP, En+, and CEAC benefit from an exclusion of liability:

[619] *See* R-43, para. 314: "Counter-Claimant is not *See*king any penalties after insolvency commenced."

- KAP's liability is limited to the Indemnifiable Damage caused to Montenegro and its agencies as a consequence of the Failure of Restructuring; any other liability arising from the Settlement Agreement is excluded;
- En+ and CEAC enjoy an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim filed by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

760. As explained, the exclusion of liability only affects claims that arise as a consequence of the Failure of Restructuring or after such Failure (*i.e.* after March 1, 2012). Claims that arose before that cut-off date and that were still outstanding as of that date remain unaffected by the subsequent exclusion of liability.

761. Summing up: the time period in which penalties accrued runs from February 1, 2012 (the day after the first Annual Investment Report was due) until February 29, 2012, the day before the cut-off date.

762. Considering these two dates, the total number of days in which CEAC was in breach of its duty is 29 days. At € 1,000 per day, CEAC must pay Montenegro a total amount of € 29,000 in contractual penalties.

c. The 2012 and 2013 Investment Reports

763. Finally, Montenegro and its agencies say that CEAC failed to provide the report in 2012 and 2013.[620]

764. The Tribunal dismisses the counterclaim as to these two reports.

765. Under Clause 19.1(a) of the Settlement Agreement, KAP had to submit these two reports to Montenegro by January 2013 and ny January 2014, i.e., within one month after the last day of each investment period of the Minimum Investment Programme.

766. As discussed before, the Failure of Restructuring took place on March 1, 2012, and Clause 28.6 provides for the exclusion of liability on claims that arise after such Failure (i.e. after March 1, 2012). The duty to submit the report for 2012 became due on February 1, 2013, many months after the cut-off date for bringing claims validly under the Settlement Agreement. The claim is thus barred by this exclusion of liability.

767. The logic applies to the 2013 report, which is also barred.

[620] R-22, paras. 276–283. Also, R-32, paras. 182–186, and R-43, paras. 303–328.

2. CEAC BREACHED THE SETTLEMENT AGREEMENT BY FAILING TO COMPLY WITH THE MINIMUM INVESTMENT PROGRAMME.

A. Montenegro's position

768. Montenegro and its agencies assert that CEAC breached Clause 20.1(a) of the Settlement Agreement. Under this clause CEAC undertook to ensure that KAP invested a minimum amount of money every year from 2010 through 2014. The details of this obligation were laid out in a document annexed to the Settlement Agreement under the title of "**Minimum Investment Programme**."[621] Montenegro and its agencies say that CEAC did not invest the minimum amount required in any single year:[622]

769. First, from 2010 to 2014 KAP had to make investments for a total minimum amount of € 39.4 million,[623] distributed as follows:[624]

- Between 2010 and 2011 KAP had to invest € 21.2 million; yet it invested only € 15.365 million.[625]
- In 2012 KAP had to invest € 11.7 million; CEAC invested only € 2.346 million.[626]
- In 2013 KAP had to invest € 4.2 million; and in 2014, € 2.3 million. KAP failed to do so.

770. Second, Montenegro notified CEAC of these breaches in a letter of April 19, 2013,[627] but CEAC took no action.[628]

771. In accordance with Clause 22.2(a) Settlement Agreement, CEAC must pay contractual penalties for these violations.[629]

B. CEAC and En+'s Position

772. CEAC and En+ ask the Tribunal to dismiss this counterclaim on the following grounds:

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[621] *See* C-9, page 6. Exh. R-93 (Minimum Investment Programme dated December 25, 2009).
[622] R-22, paras. 284–295, and R-25, paras. 229–236.
[623] Exh. C-9 (Clause 18.1 Settlement Agreement).
[624] Exh. R-93 (Minimum Investment Programme dated December 25, 2009).
[625] Exh. R-72 (KAP's Audited Financial Statements for 2011 dated June 1, 2012), para. 36; Exh. R-92 (Letter from Harrisons Solicitors to Schoenherr dated April 19, 2013).
[626] Exh. R-94 (KAP's Audited Financial Statements for 2012 dated May 17, 2013), para. 37; Exh. R-92 (Letter from Harrisons Solicitors to Schoenherr dated April 19, 2013).
[627] Exh. R-95 (Letter from Schoenherr to CEAC dated April 16, 2013).
[628] Exh. R-92 (Letter from Harrisons Solicitors to Schoenherr dated April 19, 2013).
[629] *See* R-43, para. 314: "Counter-Claimant is not *See*king any penalties after insolvency commenced."

773. First, the investments in KAP were impossible because KAP neither had sufficient funds of its own, nor was in a position to raise funds from third parties.[630]

774. Second, CEAC did not have to invest its own funds in KAP under Clause 20.1(a) of the Settlement Agreement. Before the signing of the Settlement Agreement, on November 2, 2009, CEAC sent an email to Montenegro[631] where it made clear that "CEAC will not invest own funds in KAP and CEAC."[632]

775. Third, Montenegro failed to ask for compliance with the Minimum Investment Programme until April 2013. Up to that day, CEAC could assume that Montenegro agreed that CEAC was not ensuring that KAP made the investments required in the Minimum Investment Programme.[633]

776. Fourth, as from November 1, 2011 CEAC had a right of retention, on the grounds expressed in the defense to the previous counterclaim. [634]

777. Fifth, any contractual penalties due before January 31, 2012 became statute-barred for the reasons mentioned in the defense to the previous counterclaim.[635]

C. The Tribunal's decision

778. Montenegro and its agencies assert that CEAC breached Clause 20.1(a) of the Settlement Agreement by failing to ensure that KAP invested the annual minimum amounts specified in the "Minimum Investment Programme." CEAC rejects this counterclaim.

779. The Tribunal finds for Montenegro.

780. Clause 20.1(a) of the Settlement Agreement (titled "CEAC's Positive Undertakings") imposed on CEAC the duty to fund a Minimum Investment Programme, in the amounts and at the times set out in Appendix 7 to the Settlement Agreement. Clause 20.1(a) of the Settlement Agreement reads as follows:

> "20. CEAC's Positive Undertakings
>
> 20.1 CEAC undertakes and agrees to, for a period of five (5) years immediately following the Closing Date, take all action necessary to do, or cause to be done or taken, in order to:

[630] C-29, para. 15.
[631] C-23, para. 290. Exh. C-214.
[632] C-23, para. 289, and C-29, para. 17.
[633] C-23, para. 301.
[634] C-23, para. 301.
[635] C-23, para. 301.

> (a) Ensures that not less than the amounts as set out in more detail in the Minimum Investment Programme and within the timeframe contemplated therein are invested in KAP. Any investment shall not be made by way of a capital contribution."

781. The basics of the Minimum Investment Programme are set out in Clause 18.1 of the Settlement Agreement:

> "18. Investment and Environmental Programme KAP
>
> 18.1 The Parties hereby agree that CEAC shall, as a Closing Activity, provide for KAP a 5 years minimum investment programme in written form which gives details on the minimum amounts CEAC ensures to be invested in KAP during the first five years from the Closing Date and which shall also include the environmental investments (the "Minimum Investment Programme"). The Minimum Investment Programme shall provide for the amount timing and type of the investment in KAP. The amount to be provided in the Investment Programme shall not be below EUR 39,000,000 (in words: thirty nine million Euro) out of which the amount of EUR 21,000,000 (in words: twenty one million Euro) shall be invested within the first 2 years from the Closing. The Minimum Investment Programme shall be attached to this Agreement as Appendix 7."

782. CEAC expressly acknowledged in Clause 22.1 of the Settlement Agreement the importance that Montenegro attached to this covenant:

> "22. Breach of Undertakings
>
> 22.1 CEAC acknowledges and confirms that the SoM acting in the general interest, has attached significant importance to CEAC's commitments made under this Agreement in relation to the Minimum Investment Programme with a view to, inter alia, advancing the overall economic and social development of the SoM in the five (5) year period immediately following the Closing Date. The SoM is entitled to claim damages for any breach of this Agreement including any loss or damage to the environment and economy of Montenegro."

783. The Minimum Investment Programme was attached to the Settlement Agreement as Appendix 7.[636] It provided that CEAC had to invest a minimum amount of € 39.4 million in KAP from 2010 to 2014,[637] distributed as follows: 11.8 million euro in 2010, € 9.4 million in 2011, € 11.7 million in 2012, € 4.2 million in 2013, and € 2.3 million in 2014:[638]

[636] *See* C-9, page 6.
[637] Exh. C-9 (Clause 18.1 Settlement Agreement).
[638] Exh. R-93 (Minimum Investment Programme dated December 25, 2009).

List of investment projects

1 X 1,000,000 €	2010	2011	2012	2013	2014
Investments aimed at increasing revenues					
Restarting cells in Electrolysis and modernising cathodes	8.9	8.9	8.9	1.5	
Upgrading anode baking furnace – support for increased production	1.0		1.0	1.0	1.0
Upgrading PCR [central distribution facility] – support for increased production	1.0	0.5	1.0	1.0	1.0
Upgrading Foundry – support for increased production	0.3				
Investments in modernisation of administrative systems					
Modernisation of administrative systems	0.6		0.7	0.6	0.2
Investments in environmental protection and workplace safety					
Solutions for red mud holding pond			0.1	0.1	0.1
Fire safety system in KAP and other costs of property protection	0.1				
Summary					
Totals	11.8	9.4	11.7	4.2	2.3
Investments in first 2 years	21.2				
Total investments over five years	39.4				

Source: Exh. R-93 (Minimum Investment Programme)

784. The audited financial statements for each year show whether these amounts were eventually spent.

785. As the table above suggests, the years 2010 and 2011 must be considered together, since Clause 18.1 specifies that "the amount of EUR 21,000,000 (in words: twenty one million Euro) shall be invested within the first 2 years from the Closing." KAP thus had to invest € 21.2 million between 2010 and 2011.

Investments in 2011

786. KAP's audited financial statements for 2011 explain in section 36 that KAP invested only € 15.365 million out of the € 21.2 million committed in such fiscal year:

> "The first year of the Investment programme is to start not earlier than 26 October 2010. From that date until 31 December 2011 investments in projects mentioned in the Investment programme were executed in the total amount of EUR 7,272 thousand. Additionally, in the period 31 December 2009 – 25 October 2010 investments in projects, mentioned in the Investment program, were executed in the amount of EUR 8,093 thousand."[639]

[639] Exh. R-72 (KAP's Audited Financial Statements for 2011 dated June 1, 2012), para. 36.

Investments in 2012–2014

787. As for the years 2012 through 2014, KAP had to invest € 11.7 million in 2012, € 4.2 million in 2013; and € 2.3 million in 2014. The obligation to invest was due on a calendar-year basis. As discussed extensively before, the Failure of Restructuring, took place in March 1, 2012, and Clause 28.6 provides for the exclusion of liability on claims that arise after such Failure (i.e. after March 1, 2012). Therefore, CEAC's and KAP's liability for investments committed for 2012 and subsequent years has been excluded by agreement between the Parties.

788. Summing up, in the years 2010 and 2011 KAP fell short of investing the amounts set out in the Minimum Investment Program.

789. The language of Clause 20.1(a) makes CEAC directly responsible for this failure: CEAC undertook to "take all action necessary to do, or cause to be done or taken" in order to

> "ensure[] that not less than the amounts as set out in more detail in the Minimum Investment Programme and within the timeframe contemplated therein are invested in KAP. Any investment shall not be made by way of a capital contribution."

Penalties

790. In accordance with Clause 22.2(a) of the Settlement Agreement, CEAC must pay contractual penalties for these violations.

791. Montenegro claims that these penalties must accrue at a rate of € 5,000 *per diem*: from January 1, 2011 (the first day of the first year in which CEAC did not comply with its investment duties), until July 8, 2013 (the day on which the bankruptcy proceedings commenced).[640]

792. The Tribunal finds that these dates are not appropriate. The years 2010 and 2011 must be considered together, since Clause 18.1 specifies that "the amount of EUR 21,000,000 (in words: twenty one million Euro) shall be invested within the first 2 years from the Closing." KAP thus had to invest € 21.2 million between 2010 and 2011, taking both years as a unit. Consequently, the first day in which the obligation became due was January 1, 2012, which is the *dies a quo*.

793. With regard to the *dies ad quem*, this should be February 29, 2012, the day before Montenegro effected the Failure of Restructuring (i.e. March 1, 2012). Clause 22.2(a) leaves no room for doubt in this regard:

> "22.2. CEAC shall on written demand by the SoM pay daily penalties for breaches of its obligations to the SoM as follows:

[640] *See* R-43, para. 314: "Counter-Claimant is not *See*king any penalties after insolvency commenced."

> (a) For each and any breach of any of the investment obligations in an investment period as set out in clauses 20 (a) of this Agreement (including the respective appendices), a sum equal to EUR 5.000,00 (in words: five thousands Euro per day), starting from the first day of the month immediately following such investment period **until the earlier of**: (i) CEAC makes the investment, (ii) the not invested amount is paid to the SoM under the New Performance Bond, or (iii) **the SoM effects consequences of the Failure of this Agreement.**" (emphasis added)

794. Summing up: the time period in which penalties accrued runs from January 1, 2012, until February 29, 2012, the day before the cut-off date.

795. Considering these two dates, the total number of days in which CEAC was in breach of its duty is 59 days. At € 5,000 per day, CEAC must pay Montenegro a total amount of € 259,000 in contractual penalties.

3. CEAC BREACHED THE SETTLEMENT AGREEMENT BY FAILING TO PROVIDE A € 2 MILLION BOND.

A. Montenegro's position

796. Montenegro and its agencies allege that CEAC breached Clause 20.1(g) of the Settlement Agreement. In this clause CEAC undertook to provide a € 2 million bond in favor of Montenegro by the end of 2012.[641] Montenegro says CEAC never provided the bond.

797. On April 19, 2013, CEAC informed Montenegro that the company had "not delivered and does not intend to deliver to [Montenegro]" the bond.[642]

798. Pursuant to Clause 22.2(d) of the Settlement Agreement, CEAC must pay contractual penalties for the breach of this duty.[643]

B. CEAC and En+'s Position

799. CEAC and En+ deny all the allegations on two grounds.[644]

800. First, around the time the bond became due – December 31, 2012 – the continuous policy of obstruction of Montenegro and its intention to take over control of KAP had become so apparent that it could not be reasonably expected that CEAC would provide a € 2-million bond to Montenegro.[645]

[641] R-22, paras. 296–303, and R-25, paras. 237–239.
[642] Exh. R-92 (Letter from Harrisons Solicitors to Schoenherr dated April 19, 2013, and Exh. R-96 (Letter from Ministry of Economy to CEAC dated December 4, 2012.
[643] *See* R-43, para. 314: "Counter-Claimant is not *See*king any penalties after insolvency commenced."
[644] C-23, paras 304–309, and C-29, paras. 20–22.
[645] C-23, paras. 302 and 303, and C-29, para. 19.

801. Second, as to the contractual penalties, the defenses asserted in the previous counterclaims apply also in this instance.

C. The Tribunal's decision

802. Montenegro and its agencies allege that CEAC breached Clause 20.1(g) of the Settlement Agreement because CEAC never furnished a € 2 million bond in favor of Montenegro. CEAC and En+ ask the Tribunal to dismiss this counterclaim.

803. The Tribunal finds for CEAC and En+.

804. Under Clause 20.1(g) of the Settlement Agreement CEAC promised to provide a "new performance bond" in the following terms:

> "20. CEAC's Positive Undertakings
>
> 20.1 CEAC undertakes and agrees to, for a period of five (5) years immediately following the Closing Date, take all action necessary to do, or cause to be done or taken, in order to: . . .
>
> (g) ensure that CEAC provides for the New Performance Bond in accordance with this Agreement."

805. Clause 23.1 of the Settlement Agreement details :

> "23. Performance Bond
>
> 23.1. As a guarantee for the performance obligations under the Minimum Investment Programme and clause 22 of this Agreement (penalties), CEAC shall provide until 31 December 2012 a renewable performance bond in favour of the SoM in the amount of EUR 2,000,000 (in words: two million Euro) substantially in the form set out in Appendix 9 to this Agreement (the "New Performance Bond"). The New Performance Bond is to be issued by an A-rated bank, or by any other bank that is fully acceptable to the SoM."[646]

806. The Tribunal has already found that, under Clause 28.6 of the Settlement Agreement, KAP, En+, and CEAC benefit from an exclusion of liability:

- KAP's liability is limited to the Indemnifiable Damage caused to Montenegro and its agencies as a consequence of the Failure of Restructuring; any other liability arising from the Settlement Agreement is excluded;
- En+ and CEAC enjoy an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim filed by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

[646] Exh. C-9, Clause 23.1 Settlement Agreement.

807. As explained, the exclusion of liability provided for in Clause 28.6 affects claims that arise as a consequence of the Failure of Restructuring or after such Failure (*i.e.* after March 1, 2012). Claims that arose before that cut-off date and that were still outstanding as of that date remain unaffected by the subsequent exclusion of liability.

808. This counterclaim arises from a breach that allegedly took place on January 1, 2013, about nine months after the Failure of Restructuring occurred. Therefore the exclusion of liability provided for in Clause 28.6 does apply.

809. The counterclaim is dismissed.

4. CEAC BREACHED THE SETTLEMENT AGREEMENT BY FAILING TO ENSURE PAYMENT OF KAP'S ELECTRICITY BILLS.

A. Montenegro's position

810. Montenegro and its agencies state that CEAC breached Clause 21.1(l) of the Settlement Agreement. In this clause CEAC promised it would not allow KAP to fall behind in the payment of its electricity bills for longer than three months.[647] Montenegro says that CEAC broke this promise:

811. First, on March 2, 2011 EPCG – the electricity provider – warned KAP's management that its unpaid electricity debt for January 2011 amounted to € 3 million.[648]

812. Eight months later, KAP had failed to pay its electricity bills for February, March, May, June, July, August, and September 2011. KAP's unsettled electricity bills were over € 19 million.

813. On November 3, 2011 Montenegro notified CEAC of the breach,[649] asked the company to remedy such situation and requested payment of the contractual penalties stipulated in the Settlement Agreement.[650]

814. A few weeks later, in a letter dated December 31, 2011, CEAC acknowledged "the fact that KAP did not pay all due invoices of EPCG."[651]

815. Second, CEAC must pay contractual penalties for the breach of this duty pursuant to Clause 22.2(e) of the Settlement Agreement.[652]

[647] R-22, paras. 304–313, R-25, paras 240–252.
[648] Exh. R-97 (Letter from EPCG to KAP no. 10-00-3483 dated March 2, 2011).
[649] Exh. R-99 (Letter from Schoenherr to CEAC dated November 3, 2011).
[650] Exh. R-99 (Letter from Schoenherr to CEAC dated November 3, 2011).
[651] R-32, para. 190. Exh. R-101 (Letter from Harrisons Solicitors to State of Montenegro dated December 31, 2012). Exh. R-100 (Letter from CEAC to Government of Montenegro dated December 1, 2011).

B. CEAC and En+'s Position

816. CEAC and En+ deny the allegations:[653]

817. First, the Respondents argue that Montenegro waived CEAC's duty under discussion. Clause 21.1 of the Settlement Agreement allows Montenegro to waive this duty. Montenegro implicitly gave this waiver[654] at KAP's board meeting of February 25, 2011, where Mr. Mitrović – who was Montenegro's representative – and the other directors agreed that KAP did not have enough liquidity to settle all its outstanding liabilities. To guarantee the continuation of production, Mr. Mitrović and the other directors approved that KAP would postpone payment to EPCG (the electricity provider) and its other major creditors.[655] It was in this way that Montenegro waived CEAC's duty under Clause 21.1(l) of the Settlement Agreement.[656]

818. Second, the late payment of the electricity bills was caused by Montenegro, in particular through its failure to approve fresh loans by CEAC, and by its refusal to support the restructuring.[657]

819. Third, CEAC was under no obligation to provide KAP with funds to pay its electricity bills. Such obligation is not set out in Clause 21.1(l) of the Settlement Agreement.[658]

820. Fourth, as to the contractual penalties, the arguments set out in the defense to the previous claims also apply here.[659]

C. The Tribunal's decision

821. Montenegro and its agencies state that CEAC breached Clause 21.1(l) of the Settlement Agreement by allowing KAP to fall behind in the payment of its electricity bills for more than three months.[660] CEAC says this counterclaim has no merit.

822. The Tribunal has already determined that KAP failed to pay its electricity bills to EPCG for more than three months. In fact, this Failure Event was the one that triggered the Failure of Restructuring on March 1, 2012.

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[652] *See* R-43, para. 314: "Counter-Claimant is not seeking any penalties after insolvency commenced."
[653] C-23, paras. 304–308, and C-29, paras. 20–22.
[654] C-23, para. 304.
[655] C-23, para. 305. Exh. R-69.
[656] C-29, para. 20.
[657] C-41, para. 212.
[658] C-29, para. 22.
[659] C-23, para. 307.
[660] R-22, paras. 304–313, R-25, paras 240–252.

823. Under the Settlement Agreement, the non-payment of three months of electricity may give rise to two discrete consequences.

824. On the one hand, the non-payment may give rise to a claim for contractual penalties against CEAC, pursuant to Clause 21.1(l) CEAC and Clause 22.2(e) of the Settlement Agreement:

> "21. CEAC's Negative Undertakings
>
> 21.1. CEAC undertakes and agrees that for a period of five (5) years immediately following the Closing Date, CEAC will not carry out, nor permit or allow any of the following actions to be carried out or otherwise occur, without the prior written consent of the SoM that shall not be unreasonably withheld: . . .
>
> (l) Any delay in fulfilling obligations of KAP to EPCG exceeding three months' electricity supply bills.
>
> . . .
>
> 22.2. CEAC shall on written demand by the SoM pay daily penalties for breaches of its obligations to the SoM as follows:
>
> (e) For each and any breach of clause 21 of this Agreement (negative undertakings) and 20 (b), 20 (c), 20 (e) and 20. (f) of this Agreement in the amount of EUR 1,000 per day (in words: one thousand Euro)."

825. On the other hand, the non-payment of three monthly electricity bills is described as a "Failure Event" under Clause 28.1(f), and as such it may trigger a Failure of Restructuring under Clause 28:

> "28. FAILURE OF RESTRUCTURING
>
> 28.1 The SoM shall be entitled to effect the consequences set forth in this Clause 28.4–28.6 below by written notice to CEAC with copy to the other Parties of this Agreement if any one of the following events occurs after Closing, unless based on written consent of the SoM:
>
> . . .
>
> (f) Overdue liabilities of KAP to EPCG in an aggregate amount of more than three (3) monthly electricity supply bills"

826. On March 1, 2012 Montenegro chose to call a Failure of Restructuring, the consequences of which have been extensively described earlier and are discussed again here in light of Clauses 28.4–28.6 of the Settlement Agreement.

827. In particular, the Tribunal looks at Clause 28.6, which provides for the following arrangement:

> "[Montenegro and its agencies] shall have no claim of whatsoever kind against the KAP […], CEAC and En+ as a result of such Failure or out of this Agreement."

828. This clause, together with Clause 28.5, creates a reciprocal exclusion of claims and, consequently, of liability. The scope of the exclusion is drafted in very wide terms: all other legal consequences of the Failure of Restructuring are "expressly excluded," with the result that Montenegro and its agencies lose all possibility to assert claims "of whatsoever kind" against KAP, CEAC, and En+. The clause then adds that the claims that are being waived may derive

- not only from the Failure of Restructuring,
- but also from any other provision of the Settlement Agreement.

829. Under Clause 28.4.7 CEAC and En+ do not incur any liability for the Failure of Restructuring, the liability being restricted to the Party that caused such Failure; and under Clause 28.6, CEAC's and En+'s liability arising from any provision of the Settlement Agreement is likewise excluded.

830. Montenegro could have insisted on collecting from CEAC the penalty payments provided for in Clauses 22.1(l) and 22.2(e), but it preferred to call a Failure of Restructuring (presumably, because it offered an array of more advantageous legal consequences). Alas, the Failure of Restructuring comes with certain restrictions. By triggering a Failure of Restructuring, Montenegro chose to waive its right to seek any penalties under Clause 21.1(l) CEAC and Clause 22.2(e) of the Settlement Agreement.

831. Therefore, this counterclaim must be dismissed.

5. CEAC AND EN+ ARE JOINTLY AND SEVERALLY LIABLE.

A. Montenegro's position

832. Montenegro and its agencies hold that CEAC and En+ are jointly and severally liable for all damage and penalties arising from the counterclaims. Their contention rests on the following grounds.[661]

833. First, CEAC and En+ must be held jointly and severally responsible under Arts. 148 and 152 LCT for all the damages.

834. Second, CEAC and En+ can also be held jointly and severally liable under Clause 28.4.7 of the Settlement Agreement.[662]

[661] R-22, paras. 262–272, R-25, paras. 253–258, R-32, paras. 192–199, and R-43, paras. 335–339.
[662] R-25, para. 256.

835. Third, CEAC is a mere "shell company"[663] controlled by En+, and the requirements for a "piercing of the corporate veil" are met:[664]

- En+ is the sole shareholder of CEAC, and at all times led and directed CEAC's decisions. En+ exercised exclusive control over CEAC's actions.[665]
- En+ established CEAC exclusively to manage its interests in Central and Eastern Europe.[666] CEAC does not conduct any operative business. CEAC is "a holding company [which] does not offer any services for which VAT needs to be charged."[667] CEAC's intended purpose is to hold shares in KAP and RBN for En+, its 100% shareholder.[668]
- En+ and CEAC are both parties to the Settlement Agreement and both initiated the arbitral proceedings, acting jointly as Claimants.[669]
- Both En+ and CEAC participated in the negotiation of the overall framework for the restructuring of KAP.
- It was En+ that concluded the 2009 MoU through the CEO of En+, Mr. Soloviev, who also signed the document on behalf of both En+ and CEAC.[670]
- Officers from En+ constituted the majority on KAP's board of directors.[671] The persons who talked to the Government of Montenegro on behalf of KAP were working for En+. This is illustrated, for instance, by their e-mail addresses and their CVs.
- Even in the public sphere, En+ and CEAC present themselves as one and the same company.[672] On its website, En+ presents KAP as its

[663] R-22, para. 268.
[664] R-25, para. 258 and R-22, para. 272.
[665] R-22, para. 263.
[666] Exh. R-82 (CEAC's public LinkedIn profile).
[667] C-12 (Claimants' communication to the Tribunal).
[668] R-22, para. 264.
[669] R-22, para. 262.
[670] R-22, para. 265. Exh. R-11 (Memorandum of Understanding on Mutual Cooperation and General Settlement dated June 2, 2009, introductory part and the signature page).
[671] R-22, para. 266.
[672] *See* e.g. En+ website, En+ Group and Government of Montenegro go on with KAP Turnaround dated 27 October 2010 (Exh. R-86); En+ website, En+ Group and Government of Montenegro adopt joint bailout plan for KAP dated 4 June 2009 (Exh. R-87); En+ website, En+ Group debt restructuring completed dated 28 January 2010 (Exh. R-88); En+ website, En+ Group announces the appointment of Viacheslav Krylov as KAP CEO dated 17 November 2008 (Exh. R-89); En+ website, En+ Group and Government of Montenegro agree on future for KAP dated 17 November 2009 (Exh. R-90).

asset. The International Monetary Fund considers CEAC a "Russian company."[673]

B. CEAC and En+'s Position

836. CEAC and En+ say that En+ is not co-liable for CEAC's duties or actions.[674]

837. First, Arts. 148 and 152 LCT do not provide any basis at all for a co-liability of En+.[675]

838. Second, Clause 28.4.7 of the Settlement Agreement cannot be construed as to impose any co-liability on En+.[676] Clause 22.2 of the Settlement Agreement explicitly provides only for the liability of CEAC in respect of any claims for penalties. In fact, under the Settlement Agreement, En+ has only very limited and specific obligations, like for example, to waive certain claims (e.g., Clauses 13.3 and 13.6 of the Settlement Agreement).[677]

839. Third, Montenegro does not explain exactly how En+ could have caused any damage.[678]

840. Fourth, the history of the negotiations of the Settlement Agreement shows that the parties did not intend to impose any liability on En+. Under Art. 97 LCT, the negotiations of a contract are relevant for its interpretation.[679] Here, the Parties agreed separately every instance in the Settlement Agreement where En+ would have obligations. In fact, during the negotiations Montenegro sought to add certain provisions making En+ co-liable, but the parties ultimately agreed not to adopt most of these proposals.[680]

841. Fifth, En+ cannot be held co-liable by "piercing the corporate veil" or under any other legal theory:[681]

- Cypriot law must control the issue.[682] Clause 34.1 of the Settlement Agreement (on choice of law) only applies to matters related to the agreement itself. For a general corporate law question, like the piercing of the corporate veil, the law of the State in which the

[673] R-22, paras. 266–267. Exh. R-91 (IMF Staff Report for 2012 Article IV Consultation dated 27 April 2012, para. 13).
[674] C-23, para. 312.
[675] C-29, para. 26.
[676] C-29, para. 27.
[677] C-23, para. 313.
[678] C-29, para. 26.
[679] C-23, para. 315.
[680] *See* Exh. C-196 (SoM's draft of July 24, 2009) and compare with the Settlement Agreement's final version.
[681] C-29, para. 28, and C-33, para. 120.
[682] C-23, para. 317.

company was incorporated applies.[683] CEAC was incorporated in Cyprus, hence Cypriot law must govern this issue.

- Under Cypriot law, there is no legal basis to hold En+ jointly and severally liable for any claims. Montenegro has not provided substantive evidence in this regard.[684]
- Cypriot courts lift the corporate veil only in the most exceptional cases, usually involving breaches of criminal law or grave *ordre public* considerations. The relationship between En+ and CEAC does not satisfy these requirements.[685]
- Cypriot courts also draw authoritative guidance from English common law, on which the Cypriot legal system is based. English courts apply the "piercing of the veil" only where a company is used primarily as a vehicle of fraud or as a means of evading its legal obligations. This is not the case here.[686]
- Under Cypriot and English law, mere ownership and control of a company are not sufficient in themselves to allow a piercing of the veil.[687] The fact that a person is the representative of both the parent company and the subsidiary and that such person uses the email account of one company or the other is nothing special and does not warrant a piercing of the corporate veil.[688]
- CEAC is not a "shell company" because it holds its own assets in addition to KAP's and RBN's shares.[689]
- Finally, the "interest of justice" does not require to pierce the corporate veil in any way here: first, there is no evidence of any impropriety in this case; and second, even if there was, impropriety alone would not suffice to pierce the veil. It would be necessary to show a clear misuse of the company as a device or *façade* to conceal wrongdoing.[690]

C. The Tribunal's decision

842. Montenegro and its agencies submit that CEAC and En+ should be jointly and severally liable for all the damages and the penalties arising from the

[683] C-23, para. 318.
[684] C-23, para. 319.
[685] C-23, para. 321.
[686] C-23, para. 321.
[687] Exh. CLA-40 (para. 1.5.9, Ben Hashem *v* Al Shayif [2009] 1 FLR 115).
[688] C-23, para. 322.
[689] C-23, para. 322.
[690] C-23, para. 323. *See* Exh. CLA-41 (para. 78-80, VTB Capital plc v Nutritek International Corp and others [2012] EWCA Civ 808).

counterclaims under Montenegrin law, the Settlement Agreement, and the general principles that permit "piercing the corporate veil." CEAC and En+ disagree.

843. The Tribunal sides with CEAC and En+.

844. It is true that the evidence on the record leaves no room for doubt as to the very close links between the two companies, and the fact that En+ and CEAC, its subsidiary, worked together in the purchase and management of KAP and all the events that followed. However, the fact that a parent company and its subsidiary acted jointly is not enough for a tribunal to pierce the corporate veil, as Montenegro and its agencies request. This would upset the most basic notions regarding the limitation of responsibility of corporations, a basic principle of all legal systems, fundamental for the development of enterprises and the furtherance of commerce.

845. This being said, the Tribunal will look first at the covenants between the parties and the applicable law, to examine later whether there are any circumstances that could justify the recourse to an extraordinary remedy.

Contractual provisions

846. As for the covenants, according to the language of Clauses 20.1(a), 22.2(a), and 22.2(b) of the Settlement Agreement, CEAC is the only party responsible for the breaches and for the payment of the contractual penalties. The provisions do not mention En+. In fact, as CEAC and En+ point out, under the Settlement Agreement En+ has only very limited and specific obligations, like for example, to waive certain claims (e.g., Clauses 13.3 and 13.6 of the Settlement Agreement).[691]

847. Pursuant to these covenants, agreed upon by the Parties to the Settlement Agreement, it is only CEAC that is responsible for the "undertakings" and the payment of the penalties incurred by any breach.

848. En+ was intentionally left out of these provisions. As the CEAC and En+ argue, the history of the negotiations of the Settlement Agreement shows that the parties did not intend to impose any liability on En+ in this regard.[692] The evidence introduced shows that the Parties agreed separately the instances in the Settlement Agreement where En+ would have obligations. It is also clear that the parties agreed not to adopt a number of draft provisions making En+ co-liable.[693]

[691] C-23, para. 313.
[692] Under Art. 97 LCT, the negotiations of a contract are relevant for its interpretation: . . .
[693] *See* Exh. C-196 (SoM's draft of July 24, 2009) and compare with the Settlement Agreement's final version.

Statutory provisions

849. Save for some specific provisions, Montenegrin law governs the Settlement Agreement pursuant to Clause 34.1:

> "34.1 Governing Law
>
> (a) This Agreement including the arbitration clause, is governed by the laws of Montenegro, excluding international private law and the CISG except as provided in the next provision of this clause.
>
> (b) The provisions of this Agreement on the termination of the SPAs (clause 17), on the termination of the Arbitration Proceedings (clause 26) and on the waiver of claims in the Arbitration Proceedings (clause 27) shall be governed by the law of the Federal Republic of Germany, excluding international private law and the CISG."[694]

850. Turning to the Montenegrin applicable law, the Republic and its agencies have not pointed out to the specific statutory provisions under which En+ could be held liable under the penalty clauses.

851. The general rules on liability, set out in Articles 148 and 152 LCT, place liability directly on the wrongdoer who caused the damage. The LCT provides as follows:

> "Article 148.
>
> Whoever causes injury or loss to another shall be liable to compensate such, unless he can prove that the damage was caused through no fault of his.
>
> Liability shall arise regardless of fault where injury or loss is caused by property or activities giving rise to an increased level of danger to the environment.
>
> Liability for injury or loss regardless of fault shall also arise in other cases laid down by law.
>
> . . .
>
> Article 152.
>
> Fault shall be present if the wrongdoer has caused injury or loss intentionally or through negligence.
>
> In assessing whether a person causing injury or loss is at fault, the court shall take account of the regular course of events, and of the manner in which a

[694] Exh. C-9.

> reasonable and careful person would be expected to act in the given circumstances."[695]

852. These provisions cannot serve as legal basis to hold En+ liable pursuant to the Clauses 20.1(a), 22.2(a), and 22.2(b) of the Settlement Agreement, which only mention CEAC.

853. Montenegro has drawn the Tribunal's attention to the following facts:

- En+ is the sole shareholder of CEAC, and at all times led and directed CEAC's decisions;[696]
- En+ established CEAC exclusively to manage its interests in Central and Eastern Europe;[697] CEAC is "a holding company [which] does not offer any services for which VAT needs to be charged."[698]
- En+ and CEAC are both parties to the Settlement Agreement and both initiated the arbitral proceedings, acting jointly as Claimants.[699]
- Both En+ and CEAC participated in the negotiation of the overall framework for the restructuring of KAP.
- It was En+ that concluded the 2009 MoU through its CEO, Mr. Soloviev, who signed the document on behalf of both En+ and CEAC.[700]
- Officers from En+ constituted the majority on KAP's board of directors;[701] the persons who talked to the Government of Montenegro on behalf of KAP were working for En+; this is illustrated, for instance, by their e-mail addresses and their CVs.
- Even in the public sphere, En+ and CEAC present themselves as one and the same company.[702]

854. In the Tribunal's opinion these facts, even if accurate, would only prove the close connection between the parent company and its subsidiary but, by themselves, are

[695] RLA-4.
[696] R-22, para. 263.
[697] Exh. R-82 (CEAC's public LinkedIn profile).
[698] C-12 (Claimants' communication to the Tribunal).
[699] R-22, para. 262.
[700] R-22, para. 265. Exh. R-11 (Memorandum of Understanding on Mutual Cooperation and General Settlement dated June 2, 2009, introductory part and the signature page).
[701] R-22, para. 266.
[702] *See* e.g. En+ website, En+ Group and Government of Montenegro go on with KAP Turnaround dated 27 October 2010 (Exh. R-86); En+ website, En+ Group and Government of Montenegro adopt joint bailout plan for KAP dated 4 June 2009 (Exh. R-87); En+ website, En+ Group debt restructuring completed dated 28 January 2010 (Exh. R-88); En+ website, En+ Group announces the appointment of Viacheslav Krylov as KAP CEO dated 17 November 2008 (Exh. R-89); En+ website, En+ Group and Government of Montenegro agree on future for KAP dated 17 November 2009 (Exh. R-90).

not enough to justify an extraordinary measure like the piercing of the corporate veil.

855. For all the foregoing reasons, the Tribunal decides not to hold En+ jointly and severally liable with CEAC for the penalties arising from the counterclaims.

6. MONTENEGRO'S PRAYER FOR RELIEF

856. Montenegro and its agencies ask the Tribunal to order CEAC and En+ jointly to pay compensation equal to

- the Subsidies and Guarantees Claim, which represents the electricity subsidy paid out to KAP and the amount of State guarantees provided to KAP and called by the respective lenders, and
- the Contractual Penalties Claim, which represents the contractual penalties owed by CEAC and En+ under the Settlement Agreement.

857. In accordance with the correct methodology of calculation[703], Montenegro and its agencies request the following payments[704]

- the Subsidies and Guarantees Claim: € 191,205,011 (with interest until September 30, 2015, € 231,728,900) plus
- the Contractual Penalties Claim: € 10,035,000 (with interest until September 30, 2015, € 12,367,993).

858. [Montenegro also proffered an alternative methodology, based on the assumptions that CEAC provide Montenegro a new performance bond in an amount of € 2 million (as required by clause 23.2 of the Settlement Agreement)[705] and that the Tribunal dismiss Montenegro's request for contractual penalty payments. Application of this alternative leads to a different quantification of damages, in the amount of € 234,027,447[706]. The alternative methodology is inapposite, because (i) the Tribunal has found that CEAC was not under an obligation to deliver a new performance bond to Montenegro (see Section VI.3 above), and (ii) the Tribunal has (partially) accept Montenegro's claim for contractual penalties].

[703] Montenegro offers two alternative methodologies for the calculation of damages; see REX-4 p. 16 (Expert Report on quantification of contractual penalties and damages).
[704] For the breakdown see REX-4, page 15 (Expert Report on quantification of contractual penalties and damages).
[705] REX-4, page 6 (Expert Report on quantification of contractual penalties and damages)
[706] REX-4, page 16 (Expert Report on quantification of contractual penalties and damages)

The Subsidies and Guarantees Claim

859. Montenegro's Subsidies and Guarantees Claims is affected by Clause 28.6 of the Settlement Agreement, which provides that En+ and CEAC enjoy an exclusion of liability

- for any damage arising from the Failure of Restructuring and
- for any claim submitted by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

This agreed contractual exclusion of liability does not affect all claims, but only those that meet a double requirement:

- that they arose as a consequence of the Failure of Restructuring or after the date of such Failure (*i.e.* after March 1, 2012), and
- that the Party in breach did not act intentionally or with gross negligence.

860. Montenegro's Subsidies and Guarantees Claim arose after March 1, 2012 and precisely because a Failure of Restructuring: it was after the Failure of Restructuring when KAP failed to repay the subsidies received, and when the State guarantees were called. And there is a causal link between the Failure of Restructuring and the obligation to repay subsidies and the calling of State guarantees. Furthermore, Montenegro has failed to prove that CEAC and/or En+ acted intentionally or with gross negligence.

861. Consequently, the Subsidies and Guarantee Claim has become barred by application of Clause 28.6 of the Settlement Agreement.

Contractual Penalties Claims

862. The Tribunal has analyzed Montenegro's four claims for contractual penalties, and has come to the following conclusions:

- CEAC's promise to provide every year a report defined as "Investment Report.": the Tribunal has found that CEAC breached its obligation to deliver the 2011 Investment Report and has ordered CEAC to pay Montenegro € 29,000 in contractual penalties.
- CEAC's promise that KAP invest a minimum amount every year from 2010 through 2014, in accordance with a Minimum Investment Programme: The Tribunal has found CEAC liable for breach of this undertaking and has ordered CEAC to pay to Montenegro € 259,000 in contractual penalties.
- CEAC's promise to provide a € 2 million bond in favor of Montenegro by the end of 2012: The Tribunal has dismissed this claim, because it (allegedly) arose approximately nine months after the date of the

Failure of Restructuring, and consequently the exclusion of liability provided for in Clause 28.6 applies.

– CEAC's promise not to allow KAP to fall behind in the payment of its electricity bills for longer than three months: The Tribunal has dismissed this claim, because under Clause 28.4.7 of the Settlement Agreement CEAC and En+ do not incur any liability for the Failure of Restructuring, the liability being restricted to KAP, the Party that caused such Failure; and under Clause 28.6, CEAC's and En+'s liability arising from any provision of the Settlement Agreement is likewise excluded.

VII. INTEREST

1. CEAC'S POSITION

863. Claimant requests the Tribunal to award two alternative interest rates, depending on the kind of damages granted by the Tribunal:

864. (i) If the Tribunal grants damages for the value of CEAC's claims under the First Arbitration, then CEAC seeks interest "in the amount of 8 percentage points above the Base Rate ("Base Rate" in accordance with § 247 German Civil Code (*Bürgerliches Geselzbuch*)."[707]

865. (ii) In the alternative, if the Tribunal grants damages

> "based on the hypothetical value, which KAP would have had for Claimant if Respondent 1 had fulfilled its obligations and supported KAP's restructuring,"

then CEAC seeks default interest

> "at seven percentage points above the interest rate of the European Central Bank for main refinancing operations from 9 July 2013 until the date of full payment."[708]

As basis for this request, CEAC cites to Arts. 284 and 286 LCT and Art. 3 of the Montenegrin Law on the Amount of the Default Interest Rate.

2. MONTENEGRO'S POSITION

866. Montenegro and its agencies also ask for interest, to be calculated as the addition of a margin of seven percentage points above the rate applied by the European Central Bank for main refinancing operations.[709]

867. Montenegro and its agencies argue that, Montenegrin law sets default interest at seven percentage points above the base default interest rate. The base default interest rate equals the rate published by the European Central Bank for main refinancing operations, as of the first day of each calendar half year. The Montenegrin Law on the Amount of the Default Interest Rate also prescribes that default interest is calculated applying the simple decursive interest method on the principal amount due.[710]

[707] C-47, para. 7.
[708] C-47, para. 8 and 9.
[709] R-25, para. 269, and R-32, para. 202.
[710] R-22, paras. 340–342.

3. THE TRIBUNAL'S DECISION

A. Statutory provisions

868. Both Parties have cited to the provisions of the LCT and to Montenegro's Law on the Amount of Default Interest Rate.

869. Art. 284 through 286 LCT read as follows:[711]

> "When is it Owed. Article 284.
>
> 1) A debtor in delay with the performance of a pecuniary obligation shall owe, in addition to the principal, default interest, at the rate determined by special statute.
>
> 2) Creditor and debtor may, in accordance with the provision of Article 3 of present law stipulate lower or higher interest rate than the one interest rate determined by the statute.
>
> 3) Should the rate of interest stipulated by contract be higher than the rate of default interest, it shall continue to accrue even after the debtor's delay.
>
> Right to Full Redress. Article 285.
>
> 1) A creditor shall be entitled to default interest regardless of whether he sustained loss due to the debtor's delay.
>
> 2) Should the loss sustained by the creditor due to the debtor's delay be higher than the amount to be received on the ground of default interest, he shall be entitled to claim the difference up to the full redress.
>
> Compound Interest. Article 286.
>
> 1) The default interest shall not accrue on due but unpaid stipulated or default interest, or on other periodical payments falling due, unless otherwise determined by law.
>
> 2) Default interest on the amount of unpaid interest may only be claimed from the day of filing claim for such payment with the court.
>
> 3) Default interest on periodical payments falling due shall accrue from the day of filing claim for such payment with the court."

870. Montenegro's Law on the Amount of Default Interest Rate provides the following:[712]

[711] LEX-LCT 0001.
[712] RLA-22.

> "Article. 3. "The default interest rate shall be determined in the amount of the base default interest rate plus seven percentage points.
>
> The base default interest rate shall be the rate determined by the European Central Bank for main refinancing operations and valid on the first day of the calendar half year to which it relates.
>
> . . .
>
> Article 6. Default interest shall be calculated annually by applying the simple decursive interest method on the due principal amount, without accruing the default interest to the principal amount upon the expiration of the accounting period.
>
> When calculating the default interest, the calculation for the number of calendar days shall be applied and the following mathematical formula shall be used:
>
> For a non-leap year: Zk = C * p * d / 36.500
>
> For a leap year: Zk = C * p * d / 36.600
>
> Where the symbols have the following meanings:
>
> Zk = default interest
>
> C = principal amount
>
> p = default interest rate determined for a half year to which it relates
>
> d = number of days."

871. The Parties are in agreement that it would be reasonable for the Tribunal to apply as default interest rate ("**Default Interest Rate**") a variable interest rate, fixed for each calendar half year on the first day of such half year, equal to a margin of 7% above the interest rate published by the European Central Bank for main refinancing operations.[713] The Parties' agreement is in harmony with the legal provisions set out in Art. 284 through 286 LCT and Montenegro's Law on the Amount of Default Interest Rate.

B. Principal amount

872. The principal amounts on which interest shall accrue are the following:

- € 29,000 for contractual penalties that CEAC is ordered to pay to Montenegro under Clauses 19.1(a) and 22.2(b) of the Settlement Agreement (*see* Section VI.1).

[713] R-25, para. 269. C-47, para. 8 and 9.

– € 259,000 for contractual penalties that CEAC is ordered to pay to Montenegro under Clauses 20.1(a) and 22.2(a) of the Settlement Agreement (*see* Section VI.3).

C. Dies a quo

873. The Tribunal has to establish the day on which interest starts accruing with respect to the amounts of € 29,000 and € 259,000 for contractual penalties.[714]

874. Looking at the applicable statute, Art. 284(1) LCT establishes that

> "[a] debtor in delay with the performance of a pecuniary obligation shall owe, in addition to the principal, default interest, at the rate determined by special statute."

875. The starting date for accrual must therefore be the day when the debtor incurred "in delay."

876. In the final version of its prayer for relief, Montenegro and its agencies ask for interest to accrue since September 30, 2015, the day when CEAC and En+ filed their Statement of Rejoinder to Counterclaim.[715]

877. CEAC and En+ have not questioned the proposed *dies a quo*. Since on September 30, 2015 CEAC was already in delay of its payment obligations regarding the contractual penalties, the date satisfies the delay requirement discussed above. Accordingly, the Tribunal has no difficulty in accepting Montenegro's proposal and establishes September 30, 2015 as the *dies a quo* for the interest on the contractual penalties.

D. Dies ad quem

878. Interest on each amount shall continue to accrue until the date of effective payment.

E. Simple or compounded interest

879. Article 6 of Montenegro's Law on the Amount of Default Interest Rate provides that the default interest shall be simple:

> "Default interest shall be calculated annually by applying the simple decursive interest method on the due principal amount, without accruing the default interest to the principal amount upon the expiration of the accounting period."[716]

[714] Under Clauses 19(1), 20(1), and 22(2) of the Settlement Agreement.
[715] *See* R-22, para. 343, and R-25, para. 269.
[716] RLA-22

VIII. COSTS

880. In this Part VIII of the Award the Tribunal will establish and allocate the costs of this arbitration. The Tribunal will first determine the applicable rules (**1.**). Then, the Tribunal will turn to calculate and explain the amounts incurred for each category of costs: Parties' Legal Cost (**2.**) and the Arbitrators' Fees and Expenses (**3.**). Finally, the Tribunal will describe how funds have been deposited in advance by the Parties (**4.**) and allocate all the costs as appropriate (**5.**).

1. APPLICABLE RULES

881. Articles 40 through 42 UNCITRAL Rules govern the determination and allocation of costs.

882. Article 40(1) UNCITRAL Rules provides that "[t]he arbitral tribunal shall fix the costs of arbitration in the award ..."

883. Article 40(2) UNCITRAL Rules specifies that the notion of costs under the Rules exclusively covers the following expenses:

> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41 ("**Arbitrators' Fees**");
>
> (b) The reasonable travel and other expenses incurred by the arbitrators ("**Arbitrators' Expenses**");
>
> (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal ("**Other Costs**");
>
> (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Arbitral Tribunal;
>
> (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable ("**Parties' Legal Costs**");
>
> (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

2. PARTIES' LEGAL COSTS

884. On March 14, 2016 each Party submitted its statements on legal costs, (*i.e.* the Parties' "**Legal Costs**").[717]

885. Counsels for En+ and CEAC declared that the following Legal Costs have been invoiced to their clients in the present proceedings:

	(Euro)[718]
Lawyers' fees and expenses	1,501,435.37
Other expenses	668,737.37
Total	**2,170,172.74**

886. Counsels for Montenegro and its agencies have submitted the following breakdown of its Legal Costs:

	(Euro)[719]
Lawyers' fees and expenses	664,796.80
Other expenses	81,597.2
Total	**746,394**

3. ARBITRATORS' FEES AND EXPENSES

887. Article 41(1) UNCITRAL Rules provides that

> "The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."

888. Article 41(4)(a) UNCITRAL Rules provides that, when informing the parties of the Arbitrators Fees and Expenses, "the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated."

889. In accordance with the Terms of Appointment,[720] approved by all Parties, the fees of the members of the Tribunal shall be calculated by reference to work done in connection with this arbitration and will be charged at the hourly rates agreed upon in such document. In addition, the Arbitral Secretary designated by the Tribunal with the consent of the Parties shall receive an hourly fee at an agreed

[717] C-44, C-46, and R-47.
[718] Their statement informs that "[a]mounts invoiced in US Dollar were converted into Euro at a rate of 1.10."
[719] Their statement informs that "[a]mounts invoiced in US Dollar were converted into Euro at a rate of 1.10."
[720] Terms of Appointment, paras. 34–37.

rate for her participation in the Tribunal's sessions and for other work performed in connection with this arbitration.

890. The Terms of Appointment also provide that the members of the Tribunal and the Arbitral Secretary, respectively, shall be entitled to recover such expenses as are reasonably incurred in connection with this arbitration, and as are reasonable in amount, provided that claims for expenses (e.g. travel and accommodation costs) are supported by invoices or receipts.

891. The Arbitrators' Fees and Expenses are the following:

	Fees	Expenses	VAT
Dr. Jernej Sekolec	€17,010	N/A	€ 850.50
Prof. Rolf Trittmann	€ 122,724.69	€ 4,223.91	€ 21,007.99
Dr. Stefan Rützel	€ 100,968	€ 4,059.47	€ 19,955,22
Prof. Juan Fernández-Armesto	€ 152,670	€ 3,849.51	€ 9,246.29

892. Other Tribunal expenses: € 21,698.25.[721]

893. In summary, the Tribunal's fees and expenses amount to € 478,263.83 (€ 456,565.58 corresponding to Arbitrators' Fees and Expenses and € 21,698.25 corresponding to other expenses).

4. DEPOSITS FOR COSTS

894. During the course of these proceedings the Parties have made deposits as advance for the costs of this arbitration. The total amount deposited is € 520,000. This amount was paid in equal shares by the Parties, in accordance with Art. 43 UNCITRAL Rules (*i.e.* € 260,000 from Claimants and € 260,000 from Respondents).

895. As set out in the Terms of Appointment, the Permanent Court of Arbitration (PCA) has served as manager of the funds deposited by the Parties.[722] The Tribunal notes with thanks that the PCA did not charge any fee for its services.

5. ALLOCATION OF COSTS

896. Each Party seeks that the counterparty be ordered to bear all costs and expenses of the present arbitral proceedings.[723]

[721] Bank costs: € 126.53 and Currency translation variances: € 682.57; Tribunal Secretary fees: € 17,900; Tribunal Secretary expenses: € 2,986.15.
[722] Terms of Appointment, paras. 38–42.

Applicable rule

897. The allocations of costs is governed by Art. 42 UNCITRAL Rules, which provides as follows:

> "1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs."

The Tribunal's analysis

898. The provision gives the Tribunal broad discretion to allocate the costs between the Parties, the principal guideline being that the cost should be borne by the "unsuccessful parties." Otherwise, the provision directs the Tribunal to allocate the costs as it deems "reasonable . . . taking into account the circumstances of the case."

899. As for the principal guideline, the Tribunal does not identify a clear "unsuccessful party" in this arbitration. Looking at the outcome of the case, both sides have succeeded in their claims to a very limited extent. On the one hand, CEAC has not recovered any of the over € 300 million sought, but has (at least in principle) prevailed in one of its claims (the VAT claim). On the other, Montenegro has obtained about € 0.3 million out of the € 240 million sought. (*See* Prayers for Relief in Part III and Decision in Part X).

900. Turning to other guidelines to apportioning of costs, Art. 42(1) UNCITRAL Rules refers to what the Tribunal considers "reasonable, taking into account the circumstances of the case." Typically, arbitral tribunals consider under this category aspects such as the conduct of each party throughout the proceedings.

901. As for the conduct of the Parties, the Tribunal is pleased to report that neither Claimant nor Respondents have failed to comply with any procedural orders, fallen into unreasonable, obtrusive behaviour, or acted in bad faith.

902. A third frequent criterion, the difficulty of the questions raised, is not useful here, since both sides have equally brought and argued quite complex matters of fact and law.

[723] C-47 and R-49.

The Tribunal's decision

903. In light of the foregoing, the Tribunal does not identify a clear unsuccessful party that should bear all the costs of the arbitration under Art. 42 UNCITRAL Rules.

904. This being so, the Tribunal finds reasonable, considering the circumstances of the case, that the costs shall be divided in the following way:

905. First, as for Parties' Legal Costs, each Party shall bear its own Legal Costs, which it has freely assumed.

906. Second, as for the rest of costs – *i.e.* Arbitrators' Fees and Expenses –, they shall be split by half between the Parties and paid with the amounts already deposited with the PCA. Once these expenses have been disbursed, any unexpended balance shall be returned to the Parties, as provided by Art. 43(5) UNCITRAL Rules.

IX. SUMMARY

907. This dispute arises from the alleged breach of the Settlement Agreement signed by the State of Montenegro and three of its agencies, on the one hand, and En+ and its subsidiary CEAC, on the other. This settlement terminated an ongoing arbitration between the parties concerning CEAC's purchase of a majority shareholding in KAP, an aluminum smelter formerly owned by the State and its agencies. In addition to settling all claims, the Settlement Agreement created new rights and duties on the signatories, meant to achieve the financial recovery of KAP. Notwithstanding these commitments, within a few years Montenegro called a Failure of Restructuring, which eventually led to the State asking for KAP's bankruptcy.

908. CEAC brought this arbitration asserting that Montenegro had breached its main duties under the Settlement Agreement. In turn, Montenegro sought to exact contractual penalties and damages for CEAC's and En+'s alleged breaches of some provisions of the Settlement Agreement. And both Parties couched their claims within much wider prayers for relief.

1. FAILURE OF RESTRUCTURING

909. Both parties were aware that restructuring of KAP was fraught with difficulties. This is the reason why the Settlement Agreement devoted an entire section, under the title of "Failure of Restructuring," to deal with such scenario. Clause 28.1 provides that it is Montenegro, and only Montenegro, who can trigger the Failure of the Restructuring by giving written notice to CEAC.

910. The Tribunal has found that a Failure Event occurred, and that all preconditions for Montenegro to effect the consequences set forth in Clause 28 of the Settlement Agreement were met and that Montenegro properly notified CEAC that a Failure of Restructuring had occurred. In accordance with the Settlement Agreement, Montenegro's decision to call a Failure of Restructuring provoked the following contractual and legal consequences (*See* Section IV.8):

911. First, CEAC was under a contractual obligation to deliver to Montenegro its shares in KAP, without receiving any payment in exchange. CEAC breached its obligation and failed to transfer its KAP shares, while Montenegro filed a petition of bankruptcy, which resulted in a State-owned company being entrusted with the management of KAP, and Montenegro *de facto* obtaining control of the company.

912. Second, the only Party which "caused the Failure of Restructuring" (for purposes of Clause 28.4.7 of the Settlement Agreement) was KAP and as such it is the only party liable for any Indemnifiable Damage caused by the Failure of Restructuring to Montenegro and its agencies.

913. Third, under Clause 28.6 of the Settlement Agreement, KAP, En+, and CEAC benefit from an exclusion of liability:

- KAP's liability is limited to the Indemnifiable Damage caused to Montenegro and its agencies as a consequence of the Failure of Restructuring; any other liability arising from the Settlement Agreement is excluded;
- En+ and CEAC enjoy an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

914. Fourth, under Clause 28.5 of the Settlement Agreement Montenegro and its agencies also enjoy an equivalent exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim submitted by KAP, CEAC and En+ "of whatsoever kind" arising from the Settlement Agreement.

915. Fifth, the exclusion of liability provided for in Clauses 28.5 and 28.6 only affects claims that arise as a consequence of or after the Failure of Restructuring (*i.e.* after March 1, 2012). Claims that arose before that cut-off date and that were still outstanding as of that date remain unaffected by the subsequent exclusion of liability.

916. Sixth, under Art. 272, paragraph 1, of the LCT, these exclusions do not cover acts performed intentionally or with gross negligence.

917. Montenegro has failed to marshal evidence proving that CEAC's or KAP's actions, and specially CEAC's failure to transfer its KAP shares to Montenegro, meet the threshold demanded for actions to be considered as performed intentionally or with gross negligence.

2. CEAC'S CLAIMS

918. CEAC has alleged that Montenegro and its agencies incurred in six breaches of the Settlement Agreement.

First claim: Montenegro thwarted Claimant's efforts to restructure KAP.

919. CEAC has asserted that Montenegro, in breach of its obligations toward CEAC under the Settlement Agreement repeatedly obstructed the restructuring plans proposed by CEAC to ensure KAP's viability. Had Montenegro cooperated in these efforts and accepted one of the restructuring plans proposed, no Failure Event and Failure of Restructuring would have occurred, and KAP would by now be a profitable company.

920. As explained in Section V.1, the Tribunal has found that Montenegro did not breach any contractual or legal obligation when it refused to participate in a restructuring of KAP as proposed by CEAC.

Second claim: Montenegro caused KAP to default under the DB Facility.

921. CEAC has claimed that Montenegro, by its actions and omissions, caused KAP to default under the DB Facility, and therefore, that Montenegro is legally responsible for the damages flowing from the acceleration of the loan.

922. For the reasons detailed in Section V.2, the Tribunal has found that this claim has become unenforceable as a consequence of the exclusion of liability agreed upon in Clause 28.5 of the Settlement Agreement.

Third claim: Montenegro did not pay all the electricity subsidies

923. In this claim CEAC has argued that Montenegro did not pay the VAT corresponding to the electricity subsidies agreed upon in Clause 11.3 of the Settlement Agreement.

924. Under the Settlement Agreement, Montenegro undertook to grant KAP up to € 60 million in subsidies, to be used from 2009 to 2012 to reduce KAP's electricity costs. According to CEAC, Montenegro has paid € 51.28 million for net amounts of electricity and € 8.72 million for the attached VAT. CEAC says these VAT amounts cannot be detracted from the € 60 million subsidy, and that € 8.72 million remain outstanding.

925. As discussed in Section V.3, the Tribunal has concluded that Montenegro failed to pay KAP the full amount of electricity subsidies promised in Clause 11.3 of the Settlement Agreement and that Montenegro should have disbursed an additional amount of € 8.72 million to KAP.

926. However, the Tribunal has also found that the exclusive creditor of the subsidy is KAP – Respondent 5 in this arbitration – not CEAC, Claimant in these proceedings. The Tribunal is confronted with the question how this finding can be included in the prayers for relief submitted either by KAP or by CEAC:

- KAP has initially participated in this procedure, but has not sought payment of the outstanding subsidy nor has it submitted any other prayer for relief.
- CEAC cannot seek to recover now, as a mere shareholder, the € 8.72 million subsidy whose exclusive creditor is KAP. As examined at length in Section V.3, there is no causal link between the prayer for relief and the identified breach: CEAC has not proved that it suffered any direct damage or loss of value from Montenegro's breach, and the outstanding € 8.72 million subsidy owed to KAP cannot be recovered by one of its

shareholders (to the detriment of the other shareholders and stakeholders in KAP).

927. Accordingly, the Tribunal has limited itself to find that Montenegro did not comply with its obligations regarding payment of VAT under the Settlement Agreement. It is for KAP to recover the outstanding amount of electricity subsidies, or for CEAC to prove that it suffered a direct damage or loss of value as a consequence of Montenegro's breach.

928. The Tribunal has included a reference to this finding in the *dispositive* of this Award, with a cross-reference to its discussion in Section V.3.

Fourth claim: Montenegro failed to safeguard KAP's electricity supply.

929. CEAC has alleged that Montenegro breached its legal duties under the Settlement Agreement by not securing an affordable, long-term electricity supply agreement starting March 2012.

930. The Tribunal has found (see Section V.4) that Claimant's claim is barred by the exclusion of claims agreed upon in Clause 28.5 of the Settlement Agreement.

Fifth claim: Montenegro filed a petition for the commencement of bankruptcy proceedings against KAP.

931. CEAC has claimed that Montenegro breached its contractual and statutory duties by filing a bankruptcy petition against KAP in July 2013.

932. The Tribunal has concluded in Section V.5 that the claim brought by CEAC does not arise out of, or relate to, the Settlement Agreement. Rather, it is based on the allegation that Montenegro breached its own bankruptcy laws. Accordingly, this claim falls outside the scope of the arbitration agreement: the proper venue to adjudicate this claim is not the present arbitration but *inter alia* the bankruptcy courts or the judicial system of Montenegro.

Sixth claim: Montenegro repeatedly violated the law during KAP's bankruptcy proceedings.

933. CEAC has contended that throughout KAP's bankruptcy proceedings Montenegro has repeatedly violated its own laws on bankruptcy.

934. The Tribunal has concluded in Section V.6 that the claim brought by CEAC does not arise out of, or relate to, the Settlement Agreement. Rather, it is based on a number of irregularities allegedly committed by Montenegro in breach of its procedural laws and, in particular, the MBL, after the Settlement Agreement was not any longer in force. Accordingly, this claim falls outside the scope of the arbitration agreement: the proper venue to adjudicate this claim is not the present arbitration but *inter alia* the bankruptcy courts or the judicial system of Montenegro

3. CEAC'S PRAYER FOR RELIEF

935. In its final prayer for relief, CEAC has submitted a principal and a subsidiary request.

936. First, CEAC has submitted a Primary Damage Claim, based on claims arising from the First Arbitration. Under this Claim CEAC asked the Tribunal to order Respondents to pay the same compensation which would have accrued if the claims brought in the First Arbitration had been admitted.

937. The Tribunal has dismissed this Primary Damage Claim as explained at length in Section IV.8 and IV.9.

938. Second, CEAC has subsidiarily submitted a Secondary Damage Claim, based on the hypothetical value of KAP. Under this Claim CEAC asked the Tribunal to order Montenegro and its agencies, jointly and severally, pay compensation equal to the entire "hypothetical value of KAP", set at € 104 million (plus interest).

939. After dismissing all of Claimant's claims, the Tribunal has also disregarded this Secondary Damage Claim as well, as explained in Sections IV.8 and 9 and Section V.7.

4. MONTENEGRO'S COUNTERCLAIMS

4.1 CONTRACTUAL PENALTY PAYMENTS

940. Montenegro has asked the Tribunal to order CEAC and En+, jointly and severally, to pay the amount of € 10,035,000 (with interest until September 30, 2015, € 12,367,993), averring that CEAC breached four undertakings under the Settlement Agreement, and incurred contractual penalties for such amount.

941. The Tribunal has found for Montenegro and its agencies in only two of the four instances.

First counterclaim: CEAC did not provide investment reports

942. Montenegro and its agencies contended that CEAC had breached Clause 19.1(a) of the Settlement Agreement. This clause required CEAC to provide every year a an Investment Report.

943. The Tribunal has concluded – as Section VI.1 explains at length – that CEAC failed to provide the Investment Report in 2011, and that CEAC must pay Montenegro the sum of € 29,000 in contractual penalties. With respect to the Investment Report in other years, the claim has been dismissed.

Second counterclaim: CEAC did not invest the minimum amount of money in KAP

944. Montenegro and its agencies have asserted that CEAC breached Clause 20.1(a) of the Settlement Agreement. Under this clause, CEAC undertook to ensure that KAP invested a minimum amount of money every year from 2010 through 2014.

945. The Tribunal has found for Montenegro (see Section VI.2). CEAC failed to comply with the Minimum Investment Programme, and in accordance with Clause 22.2(a) of the Settlement Agreement, CEAC must pay Montenegro a total amount of € 259,000 in contractual penalties.

Third counterclaim: CEAC did not provide a € 2 million bond in favor of Montenegro

946. Montenegro and its agencies have alleged that CEAC breached Clause 20.1(g) of the Settlement Agreement. In this clause CEAC undertook to provide a € 2 million bond in favor of Montenegro by the end of 2012.

947. As explained in Section VI.3, the Tribunal has dismissed this counterclaim because it arises from a breach of the Settlement Agreement that allegedly took place on January 1, 2013, about nine months after the Failure of Restructuring occurred. The exclusion of liability provided for in Clause 28.6 does apply.

Fourth claim: CEAC allowed KAP to fall behind in the payment of its electricity bills for longer than three months

948. Montenegro and its agencies have stated that CEAC breached Clause 21.1(l) of the Settlement Agreement. In this clause CEAC promised it would not allow KAP to fall behind in the payment of its electricity bills for longer than three months.

949. The Tribunal has dismissed this counterclaim as set out in Section VI.4. By triggering a Failure of Restructuring, Montenegro chose to waive its right to seek any contractual penalties for this breach of the Settlement Agreement.

4.2 SUBSIDIES PAID TO AND GUARANTEES CALLED ON BEHALF OF KAP

950. Montenegro also asked the Tribunal to order CEAC and En+, jointly and severally, to pay damages in the amount equal to (i) the subsidies paid to KAP plus (ii) the State guarantees granted to KAP and called by the lenders, in a total amount of € 191,205,011 (with interest until September 30, 2015, € 231,728,900).

951. The Tribunal has rejected this request, because, as explained in Sections IV.9 and VI.6 above, En+ and CEAC enjoy, under Clause 28.6 of the Settlement Agreement, an exclusion of liability (i) for any damage arising from the Failure of Restructuring and (ii) for any claim filed by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement. Thus Clause 28.6

excludes the possibility that Montenegro recovers any damages flowing from the Failure of Restructuring or deriving from any other clause of the Settlement Agreement.

4.3 JOINT AND SEVERAL LIABILITY

952. Montenegro and its agencies submitted that CEAC and En+ should be jointly and severally liable for all damages and penalties arising from the counterclaims under Montenegrin law, the Settlement Agreement, and the general principles that permit "piercing the corporate veil."

953. The Tribunal has decided to dismiss the claim (*see* Section VI.5). In the Tribunal's opinion the facts alleged by Montenegro and its agencies in support of their position would only prove, even if accurate, the close connection between the parent company and its subsidiary. By themselves, they are not enough to justify an extraordinary measure like the piercing of the corporate veil.

5. MONTENEGRO'S PRAYER FOR RELIEF

954. Montenegro and its agencies ask the Tribunal to order CEAC and En+ jointly to pay compensation equal to

- The Subsidies and Guarantees Claim, which represents the electricity subsidy paid out to KAP and the amount of State guarantees provided to KAP and called by the respective lenders and
- The Contractual Penalties Claim, which represents the contractual penalties owed by CEAC and En+ under the Settlement Agreement

955. In accordance with the correct methodology of calculation, Montenegro and its agencies request the following payments:

- The Subsidies and Guarantees Claim: € 191,205,011 (with interest until September 30, 2015, € 231,728,900) plus
- The Contractual Penalties Claim: € 10,035,000 (with interest until September 30, 2015, € 12,367,993).

The Subsidies and Guarantees Claim

956. Montenegro's Subsidies and Guarantees Claims is affected by Clause 28.6 of the Settlement Agreement, which provides that En+ and CEAC enjoy an exclusion of liability

- for any damage arising from the Failure of Restructuring and
- for any claim submitted by Montenegro and its agencies "of whatsoever kind" arising from the Settlement Agreement.

957. This agreed contractual exclusion of liability does not affect all claims, but only those that meet a double requirement:

- that they arose as a consequence of the Failure of Restructuring or after such Failure (*i.e.* after March 1, 2012), and
- that the Party in breach did not act intentionally or with gross negligence.

958. Montenegro's Subsidies and Guarantees Claim arose after March 1, 2012 and precisely because a Failure of Restructuring. Consequently the Subsidies and Guarantee Claim has become barred by application of Clause 28.6 of the Settlement Agreement.

Contractual Penalties Claims

959. The Tribunal has analyzed Montenegro's four claims for contractual penalties, and has (partially) accepted the two following claims:

- CEAC's promise to provide every year a report an Investment Report: the Tribunal has found CEAC liable for breach with regard to the submission of the 2011 Investment Report and has ordered CEAC to pay Montenegro € 29,000 in contractual penalties.
- CEAC's promise that KAP invested a minimum amount every year from 2010 through 2014, in accordance with a Minimum Investment Programme: The Tribunal has found CEAC liable for breach of this undertaking and has ordered CEAC to pay to Montenegro € 259,000 in contractual penalties.

6. INTEREST

960. The Parties are in agreement, and the Tribunal concurs, that the Default Interest Rate shall be a variable interest rate, fixed for each calendar half year on the first day of such half year, equal to a margin of 7% above the interest rate published by the European Central Bank for main refinancing operations. The default interest shall be simple. (*See* Part VII).

961. The specific principal amounts, *dies a quo,* and *dies ad quem* are the following:

- € 259,000 (for contractual penalties under Clauses 20.1(a) and 22.2(a) of the Settlement Agreement) with interest thereon accruing at the Default Interest Rate from September 30, 2015 until payment; interest accrues in favour of the creditor, Montenegro;
- € 29,000 (for contractual penalties under Clauses 19.1(a) and 22.2(b) of the Settlement Agreement) with interest thereon accruing at the Default Interest Rate from September 30, 2015 until payment; interest accrues in favour of the creditor, Montenegro.

7. COSTS

962. Each Party sought that the counterparty be ordered, jointly and severally, to bear all costs and expenses of the proceedings.

963. The Tribunal has dismissed this request, as explained in Part VIII, and found it reasonable that the costs shall be divided in the following way:

- each Party shall bear its own Legal Costs;
- as for the rest of costs – *i.e.* Arbitrators' Fees and Expenses and Other Costs –, they shall be split by half between the Parties and paid with the amounts already deposited with the PCA; once these expenses have been disbursed, any unexpended balance shall be returned to the parties, as provided for by Art. 43(5) UNCITRAL Rules.

8. OTHER CLAIMS AND COUNTERCLAIMS

964. The Tribunal has dismissed all other claims and counterclaims raised in this arbitration.

X. DECISION

965. For the foregoing reasons, the Arbitral Tribunal unanimously decides as follows:

> 1. Orders CEAC to pay the State of Montenegro an amount of € 259,000, as contractual penalties under Clauses 20.1(a) and 22.2(a) of the Settlement Agreement, plus interest thereon accruing at the Default Interest Rate from September 30, 2015 until payment.
>
> 2. Orders CEAC to pay the State of Montenegro an amount of € 29,000, as contractual penalties under Clauses 19.1(a) and 22.2(b) of the Settlement Agreement, plus interest thereon accruing at the Default Interest Rate from September 30, 2015 until payment.
>
> 3. Refers to its findings at para. 610 of this Award, as regards CEAC's claim that the State of Montenegro failed to pay electricity subsidies in an amount of € 8,720,000 pursuant to Clause 11 of the Settlement Agreement.
>
> 4. Orders that each Party bear its own Legal Costs, and that all other costs incurred in this arbitration be split by half between the Parties and be paid with the amounts deposited with the PCA, any unexpended balance to be returned to the Parties.
>
> 5. Dismisses all other claims and counterclaims.

Seat of Arbitration: Vienna, Austria

Date of the Award: January 12, 2017

THE ARBITRAL TRIBUNAL

Prof. Dr. Rolf Trittmann
Arbitrator

Dr. Stefan Rützel
Arbitrator

Juan Fernández-Armesto
Presiding Arbitrator