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Supplemental Statement of Claim

Oleg Vladimirovich Deripaska

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The State of Montenegro

Svea Court of Appeal, Division 2

Case no T 731-20

15 May 2020

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As counsel for Oleg Vladimirovich Deripaska, hereinafter **Deripaska**, we hereby and in accordance with the Court order (File Exhibit 6) submit the Supplemental Statement of Claim in the set-aside proceedings against the award in case no PCA 2017-07 (the "**Arbitration**") between Deripaska and the State of Montenegro, hereinafter **Montenegro**, dated 15 October 2019, hereinafter the **Award**.[1]

In this Supplemented Statement of Claim, Deripaska will elaborate his case and present the evidence. The motions and grounds have been stated in the Statement of Claim submitted on 15 January 2020 (File Exhibit 1). Background to the present dispute, Mr Deripaska's investment in Montenegro, is also described in the Statement of Claim. All references to Deripaska in this brief and other documents are to be understood as references to Deripaska acting via counsel or other professional representatives

I. INTRODUCTION

1. Deripaska requests in the Statement of Claim that the Svea Court of Appeal sets aside the Award because the Tribunal has erroneously found to lack jurisdiction over the dispute.

2. As a ground for the Tribunal's jurisdiction, Deripaska invokes the Agreement between the Government of Russian Federation and the Federal Government of the Federal Republic of Yugoslavia for Promotion and Mutual Protection of Investments (the "**FRY-Russia BIT**"). The Tribunal found that it lacked jurisdiction due to the FRY-Russia BIT not being validly in force between Montenegro and the Russian Federation ("**Russia**").

3. In this brief, Deripaska will set forth that the Tribunal's assessment of its own jurisdiction was flawed both in light of the facts of the case and the applicable principles of international law.

4. The Tribunal's conclusion that the FRY-Russia BIT is not in force is primarily based on the Tribunal's interpretation of diplomatic notes exchanged between Montenegro and Russia in summer of 2006, i.e. shortly after Montenegro's declaration of independence. Deripaska finds that the Tribunal's conclusions are incorrect for several reasons.

5. *First*, Deripaska questions the Tribunal's approach under international law. Instead of a presumption of continuity, the Tribunal assumed that Montenegro, after its independence, began from a clean slate without any applicable treaties. *Second*, it is striking that the Tribunal did not make an overall assessment of the facts and evidence relied on, despite accepting that an agreement on succession could be derived even from silence or conduct. In this respect, the Tribunal set an

[1] Exhibit K-01 (File Exhibit 8), the Award.

unreasonably high standard of proof for the treaty succession. *Third*, it is noteworthy that the Tribunal chose to disregard the Russian Ministry of Foreign Affairs' (the "**Russian MFA**") position that the BIT is valid, citing that the statement was made in a letter to Deripaska's counsel.

6. Following the Arbitration, Deripaska has resumed the search for further evidence to substantiate the claim that the FRY-Russia BIT is in force. Searches have resulted in a number of new documents showing that both Montenegro and Russia at various times considered that the FRY-Russia BIT is valid and binding between the States since Montenegro's independence. The new documents confirm also the constant position of the Russian MFA that all the treaties between the State Union and Russia at the time of the declaration of independence continued to be in force between Montenegro and Russia. Montenegro's objection to the validity of the BIT should therefore not be sustained.

7. Deripaska has furthermore obtained an expert opinion from Professor Malcolm Shaw QC who has analysed the Tribunal's findings in the Award from a perspective of international law. Professor Shaw is one of the most prominent experts in international law and state succession. He is a Senior Fellow at Lauterpacht Centre for International Law, University of Cambridge and has during his almost five decades long career authored several established titles in international law, such as the standard text on the subject: International Law (Cambridge University Press). His expert opinion is enclosed as Exhibit K-16.

II. FACTS

8. In this section, Deripaska will present the facts showing that the FRY-Russia BIT is valid and binding between Montenegro and Russia. First, the Chapter II.A describes the historical context that surrounded Montenegro's path to independence in 2006, which has relevance for the approach chosen under international law of State succession. The brief will then follow the same outline as the Award, starting with an account of Montenegro's declaration of independence (Chapter II.B), exchange of diplomatic notes with Russia (Chapter II.C), the question of whether other treaties with Russia are in force (Chapter II.D), Montenegro's conduct with other States and its submissions to various organisations (Chapter II.E), to conclude with the Russian MFA's statements regarding the FRY-Russia BIT (Chapter II.F).

A. From SFRY via FRY and State Union to Montenegro

9. The Socialist Federal Republic of Yugoslavia ("**SFRY**") was a Balkan State formation that existed under various names from 1945 to 1992. The SFRY consisted of six sub-level republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. The SFRY was dissolved finally in 1992 after Slovenia declared its independence in June 1991, which was followed by Macedonia

and Croatia independence declarations in September and October 1991, as well as Bosnia and Herzegovina in March 1992. The SFRY ceased to exist formally as the Constitution of the Federal Republic of Yugoslavia ("**FRY**") was adopted in April 1992. The FRY consisted of the two remaining republics, Serbia and Montenegro. The FRY was a new state that did not inherit SFRY's legal personality. [2]

10. On 11 October 1995, the FRY Government and the Russian Government signed a bilateral investment protection treaty, the FRY-Russia BIT, which entered into force on 19 July 1996.[3] It follows from Article 8 of the BIT that States undertake to resolve disputes with investors from the other State through arbitration under the UNCITRAL Rules. This provision provides the jurisdictional ground for Deripaska's claims against Montenegro.[4]

11. Since its formation in 1992 until 2000, the FRY was ruled by Slobodan Milošević, who enjoyed the broad support Montenegro's Prime Minister Milo Dukanović and Montenegro's parliament during the first years of FRY. The turning point around 1996 when Montenegro, with Dukanović at the helm, gradually came to distance itself from Serbia.[5] Montenegro's independence movement had gained a clear majority support at the turn of the millennium, but Montenegro's allies and protectors, the United States and above all the EU, did not want to jeopardize the sensitive equilibrium in the region where the issue of Kosovo's independence was still unresolved.[6]

12. Following long negotiations, Montenegro and Serbia concluded, as two separate States and with the participation of the EU, the so-called Belgrade Agreement on 14 March 2002 (*Agreement on Principles of Relations between Serbia and Montenegro within the State Union*). The Belgrade Agreement formed the basis for the State Union of Serbia and Montenegro (the "**State Union**").

13. On 4 February 2003, the State Union Parliament adopted a constitution (*The Constitutional Charter of the State Community of Serbia and Montenegro*) that had been pre-approved by the Serbian and Montenegrin national parliaments. The fundamental principle of the Constitution was that both Serbia and Montenegro were separate and equal States. The Constitutional Charter allowed, after an initial period of three years, either Member State to withdraw from the State Union by organising a

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[2] Exhibit K-03, A. Zimmermann and J. G. Devaney, *Succession to treaties and the inherent limits of international law*, in C. J. Tams, A. Tzanakopoulos and A. Zimmermann (red.), *Research Handbook on the Law of the Treaties*, Elgar Publishing 2014, p. 529. [Exhibit CLA-168].

[3] Exhibit K-02 (File Exhibit 3), FRY-Russia BIT.

[4] The provision reads: *If a dispute cannot thus be settled within a period of six months from the time that it arose, it shall be submitted to:* [...] *(b) An ad hoc arbitration tribunal established in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).*

[5] Exhibit K-04, Darmanovic, *Montenegro: A miracle in the Balkans?*, Journal of Democracy, Vol. 18/2 (2007), p. 153.

[6] Exhibit K-05, ICG Balkans Report No 142 (2003), *A Marriage of Inconvenience: Montenegro 2003, p.* 3 et seq.

referendum,[7] which made the Charter a unique example of a fixed-term constitution in the history of modern constitutionalism. It was very clear at the time of formation of the State Union that it offered only a short-term solution.[8]

14. There was no interest in Serbia or Montenegro to devote to the development of the State Union. The Member States could not agree on neither the State Union flag nor the national anthem, nor did they issue new passports with the new State Union name.[9] The two Member States had far-reaching national powers and they often acted as *de facto* independent States, which is demonstrated by the following facts:

(i) Both States had their own national parliaments;

(ii) Both States had own central banks[10] and different currencies;

(iii) The State Union had no budgetary powers of its own, the Member States controlled their own budgets[11], economic policy and taxation system[12];

(iv) There was a guarded border between the States and both States had their own customs regulations and customs authorities;

(v) The States were allowed to be members of international, global and regional organisations;[13]

(vi) The States were allowed to establish own diplomatic relations and have own diplomatic missions in other States, which Montenegro also did.[14]

15. The relatively distant relationship between the two Member States is further demonstrated by the failed attempt to harmonize the countries' economic system. Montenegro and Serbia drafted an *Action Plan of Harmonization of Economic Systems of Member States of the State Union of Serbia and Montenegro*, as a part of a joint quest for EU membership.[15] However, the Action Plan could not be implemented and

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[7] Exhibit K-06, The Constitutional Charter of the State Community of Serbia and Montenegro [Exhibit RLA-23], Article 60.
[8] Exhibit K-05, ICG Balkans Report No 142, *A Marriage of Inconvenience: Montenegro 2003*, p. 5.
[9] *Ibid.*, p. 1.
[10] *Ibid.*, p. 2.
[11] *Ibid.*, p. 4.
[12] Exhibit K-07, Montenegro's Memorandum on the Foreign Trade Regime *WT/ACC/CGR/3* (WTO) dated 8 March 2005, p. 37.
[13] Exhibit K-06, The Constitutional Charter [Exhibit RLA-23], Art. 14 para. 2.
[14] *Ibid.*, Art. 15, para. 2.
[15] Exhibit K-07, Montenegro's Memorandum on the Foreign Trade Regime, WT/ACC/CGR/3 (WTO) dated 8 March 2005, p. 7 in the document.

following EU's proposal in October 2004, the Member States decided to continue separate negotiations with the EU and the World Trade Organization (WTO).[16]

16. Both Serbia and Montenegro acted as independent States also in relation to other countries. In relation to Russia, Montenegro acted independently prior to Montenegro's declaration of independence in June 2006. Montenegro's then Prime Minister and current President Djukanović met with Russia's Foreign Ministers in Moscow and Podgorica in July 2003, March 2004 and November 2005.[17] The meetings dealt *inter alia* with the countries' bilateral trade, economic relations and investment relations.[18] At the 2004 meeting, it was particularly emphasized that cooperation of mutual benefit could be achieved in the energy and metallurgy industries where Russian capital could be used in the privatization of industrial projects.[19]

17. In summary, it is established that, under the FRY, Montenegro had extensive powers to act as an independent State, which it also did in several different contexts. It was clear already before the formation of the State Union in 2003, and long before Montenegro's independence in 2006, that the State Union would be nothing more than a short stop on the way to complete separation. Montenegro was thus not a completely "new" State in the established meaning of the term. The basic elements that still make up Montenegro were there already during the time of the State Union. Montenegro maintained the same territorial borders, the same permanent population and even the same parliament and government as under the State Union.

18. Deripaska's investment in Montenegro was made in 2005, i.e. during the time of the State Union. The investment involved the purchase of shares in the aluminium smelting plant Kombinat Aluminijuma Podgorica A.D. ("**KAP**") and bauxite mine Rudnici Boksita A.D. Niksic ("**RBN**") from a number of government funds that belonged to Montenegro (not the State Union). The Montenegrin government was a party to both of the share purchase agreements.[20] It was uncontested in the

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[16] Exhibit K-07, Montenegro's Memorandum on the Foreign Trade Regime, WT/ACC/CGR/3 (WTO) dated 8 March 2005, p. 1.

[17] Exhibit K-08, Russian Minister of Foreign Affairs Igor Ivanov meets with Milo Djukanovic, Prime Minister of the Republic of Montenegro, Exhibit K-09, Russian Deputy Minister of Foreign Affairs Sergey Razov pays a visit to Serbia and Montenegro. Exhibit K-10, Transcript of Remarks by Russian Minister of Foreign Affairs Sergei Lavrov on the Results of Talks with Montenegro Prime Minister Milo Djukanovic, Podgorica, November 7, 2005.

[18] Exhibit K-10, Transcript of Remarks by Russia's Minister of Foreign Affairs Sergei Lavrov on the Results of Talks with Montenegro Prime Minister Milo Djukanovic, Podgorica, November 7, 2005.

[19] Exhibit K-09, Russian Deputy Minister of Foreign Affairs Sergey Razov pays a visit to Serbia and Montenegro.

[20] Exhibit K-11, Excerpt from *Agreement for the sale and purchase of the funds' shares in Kombinat Aluminijuma Podgorica a.d.* dated 27 July 2005 [*Exhibit C-3*], Exhibit K-12, Excerpt from *Agreement for the sale and purchase of the shares of the company Rudnici Boksita ad Niksic* dated 17 October 2005 [*Exhibit C-4*].

Arbitration that FRY-Russia BIT was then in force between Russia and the State Union, i.e. the investment was covered by the protection offered under the BIT at the time of making the investment.[21]

19. Montenegro's position in the Arbitration, i.e. that the FRY-Russia BIT does not apply to it after the dissolution of the State Union, means that Montenegro is retrospectively seeking to withdraw the investment protection offered to Deripaska in accordance with the international obligations and commitments in force in Montenegro at the time of the investment. Montenegro's actions in connection with and following the Declaration of Independence will be described in the next section.

B. Montenegro's statements in connection with the independence

20. Following Montenegro's referendum, the State Union ceased to exist after Montenegro's parliament decided to declare independence (the "**Decision on Independence**") and adopted the Declaration of Independence (the "**Declaration of Independence**") on 3 June 2006.

21. In the Decision on Independence, Montenegro expressed its intention to take over and continue to apply the international treaties and agreements that were concluded by the State Union:

> *3. The Republic of Montenegro shall apply and take over international treaties and agreements concluded by and acceded to by the State Union of Serbia and Montenegro which relate to Montenegro and which are in conformity with its legal order.*[22] [Our emphasis.]

22. Similarly, the Declaration of Independence provided that Montenegro would accept the rights and obligations arising from the existing intergovernmental agreements during the time of the State Union:

> *The Republic of Montenegro shall establish and develop bilateral relations with other countries on the basis of principles of the international law, accepting the rights and obligations stemming from the existing arrangements and shall continue with active policy of good-neighbourly relations and regional cooperation.*[23] [Our emphasis.]

23. Both Professor Christian J Tams, who was an expert in the Arbitration, and Professor Shaw, the expert in these proceedings, having reviewed the Decision on Independence and the Declaration of Independence, found that these documents

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[21] Exhibit K-01 (File Exhibit 8), The Award, ¶ 105: "*There is no dispute between the Parties that the State Union succeeded to the FRY-Russia BIT after the dissolution of the former Republic of Yugoslavia in 1991*[sic]." The Tribunal apparently refers to 2003 and "dissolution" of the FRY.

[22] Exhibit K-13, Montenegro's Decision on Independence [*Exhibit RLA-25*].

[23] Exhibit K-14, Montenegro's Declaration of Independence [*Exhibit C-365*].

are clear evidence of Montenegro's commitment to continue to apply all intergovernmental agreements.[24]

24. Montenegro has therefore in Decision on Independence and the Declaration of Independence announced its intention to continue to be bound by the existing obligations, including the FRY-Russia BIT.

C. Exchange of diplomatic notes with Russia

1. Description of the diplomatic notes

25. Following the Declaration of Independence, Montenegro sought to establish and maintain diplomatic relations with other States. On 4 June 2006, the Montenegrin Ministry of Foreign Affairs sent a diplomatic note to the Russian Ministry of Foreign Affairs ("**Montenegrin Note of June 2006**").

26. In the note, Montenegro reiterated its intention to continue to observe all principles of international law and all treaties and provisions of international agreements signed by the State Union, and demanded Russia's recognition of Montenegro as sovereign and independent State:

> *The Republic of Montenegro shall observe all principles of international law and all treaties and provisions of international agreements signed by the state union of Serbia and Montenegro. [...]*
>
> *We would highly appreciate if the Russian Federation would recognize the Republic of Montenegro as a sovereign and independent state and we stand ready to initiate the process of establishing diplomatic relations between our two States as soon as possible.*[25] [Our emphasis.]

27. On 10 June 2006, Russia recognized Montenegro's independence among the first States in the world. Subsequently, the Russian MFA responded in a diplomatic note of 26 June 2006 ("**Russian Note of June 2006**") and declared its readiness to establish diplomatic relations with Montenegro:

> *Ministry of Foreign Affairs of the Russian Federation presents its complements* [sic] *to the Ministry of Foreign Affairs of the Republic of Montenegro and, guided by the desire to develop bilateral cooperation between the Russian Federation and the Republic of Montenegro, has the honour to inform of the readiness of the Russian Federation to establish diplomatic relations with the Republic of Montenegro at the embassy level.*
>
> *In case the Montenegrin side agrees, this note and the note of the Ministry of Foreign Affairs of the Republic of Montenegro will form an agreement on the establishment of diplomatic relations, which will become applicable from the date of the exchange of notes.*[26]

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[24] Exhibit K-15, Professor Christian J Tam's First Expert Opinion [CER-2], ¶ 90. Exhibit K-16, Professor Malcolm Shaw's Expert Opinion dated 14 May 2020, ¶¶ 45-46.

[25] Exhibit K-17, Montenegrin note of 4 June 2006 [Exhibit R-74].

[26] Exhibit K-18, Russian note of 26 June 2006 in Swedish translation [Exhibit R-75].

28. On 4 August 2006, Montenegro's Ministry of Foreign Affairs sent another diplomatic note to Russian Ministry of Foreign Affairs ("**Montenegrin Note of August 2006**"), expressing its opinion that Montenegro was the successor State with regard to international treaties and agreements which were concluded by the State Union. The Montenegrin MFA further confirmed Montenegro's readiness to observe all treaties and agreements in force between Russia and the State Union:

> *Ministry of Foreign Affairs of the Republic of Montenegro presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to inform that in accordance with item 3 of the Decision of Assembly of the Republic of Montenegro on declaration of the independence of the Republic of Montenegro dated June 8, 2006* [sic], *the Republic of Montenegro is a state-successor to the State Union of Serbia and Montenegro with regard to international treaties and agreements which were concluded by the State Union of Serbia and Montenegro and to which it acceded and in this regard, the Republic of Montenegro confirms its readiness to observe all treaties and agreements that have been effective between the Russian Federation and the State Union of Serbia and Montenegro.*[27] [Our emphasis.]

29. The Russian MFA responded with a diplomatic note on 16 August 2006 ("**Russian Note of August 2006**"). In this note, Russia took note of Montenegro's readiness of being a successor State to the State Union and Montenegro's intention to comply with the international treaties concluded between Russia and the State Union:

> *Ministry of Foreign Affairs of the Russian Federation presents its complements* [sic] *to the Ministry of Foreign Affairs of the Republic of Montenegro and in connection with the note of the Ministry N2 03/04-1414 of 4 August 2006 respectfully informs that the Russian side takes note of the readiness of the Republic of Montenegro as a successor of the State Union of Serbia and Montenegro to exercise powers and discharge obligations arising out of all international treaties concluded between the Russian Federation and the State Union of Serbia and Montenegro.*[28] [Our emphasis.]

30. It is important to note here that should Russia have intended to revise in any way which of the earlier treaties would continue to apply, it should have been stated in the reply note. Russia did not do so, but expressed instead its consent to *all* treaties.

2. Implications of the exchange of notes

31. The Tribunal found that the exchange of notes did not reflect a mutual will of the parties implying that all treaties should continue to apply. The Tribunal considered that, at best, the exchange may be seen as reflecting an offer by Montenegro of global continuity, without a corresponding acceptance by Russia.[29] The Tribunal

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[27] Exhibit K-19, Montenegrin note of 4 August 2006 in Swedish translation [Exhibit C-18].

[28] Exhibit K-20, Russian note of 16 August 2006 in Swedish translation [Exhibit C-19]

[29] Exhibit K-01 (File Exhibit 8), The Award, ¶ 317: "*In this case, the Tribunal is unable to find that the exchange of notes between Montenegro and Russia reflected mutual consent to continuity as between them of all prior FRY-Russia bilateral agreements. At best, the exchange may be seen as reflecting an offer by Montenegro of global continuity, without a corresponding acceptance by Russia.*"

acknowledged that in certain contexts, a State's acceptance of another State's offer of treaty continuity might be presumed from its silence, but found that this was not the case here.[30]

32. Deripaska finds that the Tribunal's conclusions are incorrect for several reasons. To begin with, the Tribunal's interpretation of Montenegro's declaration in the Montenegrin Note of August 2006, i.e. that it is a "successor state to the State Union of Serbia and Montenegro", as a hope "to elicit an additional response from Russia" is flawed and lacks support in the wording of the notes.[31] On the contrary, Montenegro's choice of words testifies to the fact that it is a unilateral declaration that requires no response, since Montenegro only "has the honour to inform" and "confirms" its readiness to observe all agreements. The wording is different than in the Montenegrin Note of June 2006, where the State explicitly asked for response regarding the establishment of diplomatic relations, which was also answered by Russia in its Note of June 2006.

33. Further, the Tribunal's interpretation of Russian Note of August 2006 is mistaken. In the course of the arbitral proceedings, there was a discussion on the translation of the Russian phrase "принимает к сведению". Several translations into English were introduced, including "takes into consideration", "takes note of" and "acknowledges". The Tribunal concluded that the nuance differences in the different translations were of minor importance.[32]

34. The Tribunal seems to have overlooked the evidence showing that the expression is common in Russian diplomatic communication in situations such as the present, when the incoming note includes a statement that the State is a successor State. The Russian MFA has, as the question was raised in the in the Arbitration, clarified in a letter to Deripaska's counsel in the Arbitration that the expression is common in Russian diplomatic communication and that it is also used by other countries, for example, Germany:

> *The wording of the note "takes note of", as we believe, can be regarded as established practice because it is often used in the note correspondence. [...]*

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[30] Exhibit K-01 (File Exhibit 8), The Award, ¶ 318: "*The Tribunal acknowledges the Claimant's argument that in certain contexts, a State's acceptance of another State's offer of treaty continuity might be presumed from its silence, if surrounding circumstances support an inference that such silence was intended to convey acquiescence.* ¶ 319: "*However, this is definitively not such a case. [...] Moreover, Russia's response was not simply silence, but rather a phrase that (however translated) indicated studied non-committal. In the Tribunal's view, it is not possible to infer Russia's acquiescence (much less its agreement) from the use of either the phrase "takes note of," "acknowledges," or "takes into consideration."*

[31] Exhibit K-01 (File Exhibit 8), The Award, ¶ 314: "*Rather, the logical conclusion from Montenegro's repetition of the point,[...] is that it hoped to elicit an additional response from Russia, presumably one concurring that Russia too would continue to observe the predecessor treaties with respect to Montenegro.*"

[32] Exhibit K-01 (File Exhibit 8), The Award, ¶ 316. To avoid the linguistic uncertainty, Deripaska has in these proceedings obtained certified translations from the original language Russian to Swedish, where the expression has been translated into "takes note of (Sw. *beakta*)".

> *7. The wording "takes note of", for its part, was used in the diplomatic notes for confirmation of succession not only by the Russian Federation, but also by other states. For example, see the note of the Federal Republic of Germany on taking note of the fact of succession (continuation) of the Russian Federation with respect of obligations of the Union of SSR.*[33]

35. Another example where Russia used the same expression is the diplomatic notes exchanged between Russia and Serbia in connection with the dissolution of the State Union some weeks before the exchange of notes with Montenegro in August of 2006. On 5 June 2006, the Foreign Ministry of Serbia sent a diplomatic note to Russia in which Serbia informed Russia that it is a continuator state to the State Union and retains its international personality:

> *The Ministry of Foreign Affairs of the Republic of Serbia present its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to inform that, following the declaration of the state independence of Montenegro, […] the Republic of Serbia is continuing international personality of the state union of Serbia and Montenegro, […].*[34] [Our emphasis.]

36. Russia responded with a diplomatic note on 21 June 2006, using the same phrase "informs that the Russian side takes note of" (in Russian "принимает к сведению" is translated to "takes note of", in Swedish "*beakta*"):

> *The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Ministry of Foreign Affairs of the Republic of Serbia and in connection to the note of the Ministry No. 16163 dated 5 June 2006 respectfully informs that the Russian side takes note of the statement of the Ministry of Foreign Affairs of the Republic of Serbia on the continuity of the international legal identity of the State Union of Serbia and Montenegro by Serbia.*[35] [Our emphasis.]

37. The wording of Russian Note of August 2006 followed thus an established practice of diplomatic communication in State succession where the successor State (here Montenegro) informs the other state (Russia) of its new status and reaffirms its intention to continue to apply the existing treaties. Russia's response was not reserved nor "*studied non-committal*", as the Tribunal put it, but followed the usual diplomatic language to confirm the perception of the other State.[36]

38. Professor Shaw also questions the Tribunal's interpretation and argues that if one state submits a proposal with important legal consequences and the other state disagrees, the latter should announce its position:

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[33] Exhibit K-21, Letter from Russian MFA to Deripaska's counsel Egorov Puginsky Afanasiev & Partners ("EPAM") of 27 April 2018, [Exhibit C-301].
[34] Exhibit K-22, Serbian note to Russia of 5 June 2006.
[35] Exhibit K-23, Russian note to Serbia of 21 June 2006.
[36] Exhibit K-01 (File Exhibit 8), The Award, ¶ 319.

> *An important legal proposition is put forward and if it had been disputed, one would have expected an appropriate negative response. [...]*
>
> *The Tribunal concludes that the exchange of notes was "inconclusive", but the view can equally be taken that because Russia did not challenge Montenegro's assertion of the continuing validity of the bilateral treaties between the two States, it must be taken to have accepted the continuation. Why else did it not make an explicit comment denying Montenegro's assertion? Russia failed to contradict Montenegro's assertions on several occasions in 2006 and again in 2007.*[37]

39. After the arbitral proceedings, Deripaska became aware of two notes that Montenegro sent to Russia in 2007. In these notes, Montenegro emphasized that it "will apply and take over" all international treaties and agreements that the State Union had concluded:

> *The Ministry of Foreign Affairs of the Republic of Montenegro presents its compliments to the Embassy of the Russian Federation in Podgorica and has the honour to inform that, in accordance with the Decision of Assembly of the Republic of Montenegro on the Declaration of Independence dated June 3rd, 2006, the Republic of Montenegro will apply and take over international treaties and agreements which were concluded by and acceded to by the State Union of Serbia and Montenegro, and which relate to Montenegro and are in conformity with its legal order.*[38] [Our emphasis.]

40. In the second note four months later in May 2007, Montenegro repeatedly confirmed to Russia that it will apply and take over international treaties that the State Union had concluded:

> *The Ministry of Foreign Affairs of the Republic of Montenegro presents its compliments to the Embassy of the Russian Federation in Podgorica and has the honour to inform that by the Decision of Assembly of the Republic of Montenegro on the Declaration of Independence dated June 3rd, 2006, the Republic of Montenegro will apply and take over international treaties and agreements which were concluded by and acceded to by the State Union of Serbia and Montenegro, and which relate to Montenegro and are in conformity with its legal order.*[39] [Our emphasis.]

41. These two notes reflect clearly and unambiguously that Montenegro did not doubt the meaning of the 2006 Notes Exchange and regarded itself to be bound to all the treaties that were in force between the State Union and Russia.

42. It shall be stressed here that during the arbitral proceedings, Montenegro paid particular attention to the wording of Montenegro's notes of June and August 2006, emphasizing that the State had only "confirmed its readiness" to observe all treaties and agreements. According to the Respondent, Montenegro's notes of 2006 could therefore not be seen as an offer. But even if they were to be considered an offer,

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[37] Exhibit K-16, Professor Malcolm Shaw's Expert Opinion dated 14 May 2020, ¶¶ 73-74.
[38] Exhibit K-27, Montenegro's note to Russia of 9 January 2007.
[39] Exhibit K-28, Montenegro's note to Russia of 4 May 2007.

Russia's note of August 2006 was not an acceptance according to Montenegro.[40] However, the 2007 notes clarify that Montenegro has perceived the Russian Note of August 2006 as a mere acceptance. In the 2007 notes, Montenegro therefore confirms that the State "will apply and take over" all treaties and international agreements. Remarkably, Montenegro failed to produce these two notes in the arbitral proceedings. In the light of the 2007 notes, Montenegro's statements during the arbitral proceedings appear to have been fallacious.

43. The Tribunal considered that the 2006 notes were not sufficiently clear to show that there was a mutual consent to conclude a general agreement on treaty continuity between Russia and Montenegro.[41] The Tribunal would have come to an opposite conclusion regarding the mutual consent if it had known about the 2007 notes.

44. Another major reason for questioning the Tribunal's conclusions drawn from the exchange of the 2006 notes is the interpretation method applied by the Tribunal. The Award interprets the notes strictly, without taking into account the relevant events that took place simultaneously or in close connection to the exchange of notes. The context of the exchange of notes will be presented in the next section.

3. Russian conduct with respect to the notes

45. The exchange of notes in the summer of 2006 is to be seen in the light of a meeting between Montenegro's Foreign Minister M. Vlahović and Russia's Ambassador A.V. Jermolenko. The meeting occurred on the same day as the Russian Note of August 2006 was sent. The Montenegrin government later published a statement about the meeting on its website. It is clear from the statement that Vlahović emphasized the need for further strengthening of the countries' economic cooperation and the importance of Russian investment Montenegro. The Ambassador, for his part, emphasized the Russia's intention to continue applying the bilateral treaties:

> *Minister Vlahovic emphasised the need for further strengthening of cooperation on the economic plan is specifically emphasized and in this context, the significance of the investments of Russian investors in the territory of Montenegro. [...]*
>
> *He* [the ambassador] *has also pointed out the willingness of Russian side to continue the implementation of bilateral agreements concluded between ex state union of Serbia and Montenegro and the Russian Federation, with Montenegro as new independent and sovereign state.*[42] [Our amendment and emphasis.]

[40] Exhibit K-01 (File Exhibit 8), The Award, ¶ 138.
[41] Exhibit K-01 (File Exhibit 8), The Award, ¶ 317.
[42] Exhibit K-24, Montenegro's press release of the meeting between Montenegro's Minister of Foreign Affairs Vlahovic and Russian Ambassador Jermolenko: *Miodrag Vlahovic met with A.V. Jermolenko* [Exhibit C-370].

46. Hence, Russia clearly reaffirmed its position that all treaties in force between Russia and the State Union should continue to apply between Russia and Montenegro. The Tribunal's conclusion that, after the exchange of notes, Montenegro was left in uncertainty regarding Russia's position on the continuity of the agreements is thus incorrect. Russia expressed its acceptance clearly and unambiguously both in the notes and through its conduct. Furthermore, the 2007 notes establish that Montenegro was fully in agreement with the Russian position.

47. Another example of Russia's actions that the Tribunal chose to disregard is the announcement of Russia's Federal Customs Service a day before the Montenegrin Note of August 2006, stating that it had ceased to apply the Free Trade Agreement in relation to Montenegro due to lack of confirmation from Montenegro that it undertook the rights and obligations existing between Russia and the State Union:

> *According to information provided to the Federal Customs Service by the Ministry of Foreign Affairs of the Russian Federation, the Republic of Montenegro proclaimed state independence and withdrew from the State Union of Serbia and Montenegro.*
>
> *Subsequently, the Republic of Serbia reported on the legal acceptance of the rights and obligations of the State Union of Serbia and Montenegro. The Republic of Montenegro has not made such a statement to date.*
>
> *In this regard, the provision of the most favored nation and preferential regime in accordance with the Free Trade Agreement between the Russian Federation and the Federal Republic of Yugoslavia of 28 August 2000 and on the basis of the provisions of Order of the SCC of Russia No. 965 of 26 October 2000 in respect of goods, originating in and imported into Russia from the Republic of Serbia is retained, and with respect to goods originating in and imported into Russia from the Republic of Montenegro, has been suspended since 14 July 2006 [...].*[43] *[Our emphasis.]*

48. In a letter of 25 September 2006, the Federal Customs Service changed its position with reference to the information obtained from the Russian MFA about the Montenegrin Note of August 2006. The Federal Customs Service noted that Montenegro thereby informed Russia that Montenegro was still bound by the previously applicable treaties, including the FTA:

> *According to information submitted to the Federal Customs Service by the Ministry of Foreign Affairs of the Russian Federation, on 4 August 2006, the Ministry of Foreign Affairs of the Republic of Montenegro officially informed Russia about the fact that the Republic of Montenegro is a state successor of the State Union of Serbia and Montenegro in relation to international treaties and agreements and confirms its readiness to observe all treaties and agreements in force between Serbia and Montenegro and Russian Federation [...] This includes, among others, the Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia on trade*

[43] Exhibit K-25, Letter of the Federal Customs Service of Russia of 3 August 2006 [Exhibit R-215].

> *and economic cooperation of 24 August 1994 [...] and the Agreement [...] of 28 August 2000.*[44] [Our emphasis.]

49. The conduct of the Russian MFA and the Federal Customs Service show that Russia has actively expressed its agreement that all treaties should continue to apply and acted accordingly. Russia has also relied on and complied with Montenegro's statement in the Montenegrin Note of August 2006 that it has succeeded in the treaties that applied between the State Union and Russia.

50. Montenegro has not stated at any stage that the State does not consider itself bound by treaties and agreements concluded with Russia before independence. On the contrary, Montenegro has confirmed its position that the treaties and agreements with Russia continue to be in force as it evidently appears from the above-described notes of 2007.

51. Furthermore, at a meeting with the President of Russia's State Duma in July 2007, Montenegro's Prime Minister clearly confirmed that Montenegro has succeeded into the agreements that FRY had signed:

> *Referring to bilateral relations, the Prime Minister pointed out that Montenegro was dedicated to implementing a variety of agreements with the Russian Federation. The contractual and legal basis for cooperation has been preserved through Montenegros* [sic] *succession to treaties signed by the former Yugoslavia. However, there is a need for their adjustment to the new requirements and interests of the two countries.*[45] [Our addition and emphasis.]

52. Russia's conduct with the FTA is just one example of plenty. In the next section, an account will be given of the States' activities in respect of other bilateral treaties.

D. All treaties of the State Union continued to apply between Russia and Montenegro

53. During the Arbitration, the parties spent time and resources mapping which treaties had been entered into by the SFRY, the FRY, the State Union and Montenegro on one side and the Soviet Union or Russia on the other side, in order to find out whether these treaties were still in force between Russia and Montenegro. The purpose of the mapping was to show the parties' practice in relation to other bilateral treaties between them. The main reason for why the parties focused on the status of other treaties was that there was no evidence that either state before the Arbitration particularly had made any statements concerning the validity of the FRY-Russia BIT. After the Arbitration, Deripaska has resumed the search for such evidence, which has resulted in new documents presented in this section.

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[44] Exhibit K-26, Letter of the Federal Customs Service of Russia of 25 September 2006 [Exhibit R-174].
[45] Exhibit K-29, Montenegrin Press Release: *Prime Minister Zeljko Sturanovic meets Russian State Duma Speaker Boris Gryzlov* of 19 July 2007 [Exhibit C-305].

1. FRY-Russia BIT is in force

54. Some of the new documents that clearly show the States' position in relation to the FRY-Russia BIT come mainly from the WTO web archives[46] where both Montenegro and Russia at different times (prior to the Arbitration) have stated that the FRY-Russia BIT is in force between the states.

55. Montenegro applied for accession to the WTO in December 2004. After the WTO had received Montenegro's application, a special working group for accession to WTO was set up, so called *Accession Working Party*. The Working Party lead the work with scrutiny of the candidate states' economy and trade policy from different domestic and foreign perspectives. As part of this work, Montenegro had to submit reports and answer a number of detailed questions.

56. On 5 December 2011, the Working Party produced a final report that would form the basis for Montenegro's accession to the WTO: *Report of the Working Party on the Accession of Montenegro to the WTO*. The report contains a section in which Montenegro reports the intergovernmental trade agreements to which Montenegro is a party. Montenegro makes a clear statement that the starting point is that all intergovernmental treaties in force for the State Union continue to apply to Montenegro:

> *Upon Montenegro's independence, Montenegro's Parliament had adopted a resolution whereby all international Agreements signed by the State Union would continue to apply in Montenegro.*[47]

57. Further, Montenegro describes the applicable bilateral agreements regarding, inter alia, trade of goods and services, double taxation agreements and investment protection agreements. For a complete list of these agreements, she refers to *Annex 8* in an addendum to the report.[48] *Annex 8* includes a list of investment protection agreements in Table A8.3, where FRY-Russia BIT is listed as valid between Montenegro and Russia:[49]

Table A8.3 – Investments Promotion and Protection Agreements

Country	Signed	Ratified	Entered into force
[...]			
Russia	10.10.1995	20.12.1995	19.07.1996

58. Five years after the Declaration of Independence, Montenegro was thus of the opinion that the FRY-Russia BIT was valid. It has never been claimed that

[46] https://www.wto.org/english/thewto_e/acc_e/a1_montenegro_e.htm.
[47] Exhibit K-30, *Report of the Working Party on the Accession of Montenegro to the WTO, WT/ACC/CGR/38 WT/MIN(11)/7* dated 5 December 2011, p. 75, ¶ 275
[48] *Ibid.*, p. 74, ¶ 275
[49] Exhibit K-31, *Memorandum on the Foreign Trade Regime, Addendum*, WT/ACC/CGR/3/Add.1, Annex 8, p. 86.

Montenegro or Russia would have terminated it. Montenegro's changed position, that the treaty in question is not valid, should therefore be disregarded, especially as it was put forward many years later as a result of the Arbitration, and no conditions have changed since the WTO accession process.

59. Russia has also confirmed to the WTO that the FRY-Russia BIT is valid. Russia applied for membership in 1994 and became a member in August 2012. On 24 August 2016, the WTO Secretariat prepared a report on Russian trade policy after the WTO accession. The report describes the Russian investment policy and states that Russia has signed 80 investment protection agreements with various States, which are stated in a footnote, among them Montenegro:[50]

> *2.49 The Russian Federation has signed 80 investment promotion and protection agreements (IPPAs)* [37]*, and has concluded double taxation agreements (DTAs) with 66 countries.*[38] [Our emphasis.]

[37] Some of these are with: Albania; Algeria; Angola; Argentina; Armenia; Austria; Azerbaijan; Bahrain, Kingdom of; Belgium and Luxembourg; Bulgaria; Cambodia; Canada; China; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Ecuador; Egypt; Equatorial Guinea; Ethiopia; Finland; France; Germany; Greece; Guatemala; Hungary; India; Indonesia; Italy; Japan; Jordan; Kazakhstan; Korea, DPR; Korea, Republic of; Kuwait, the State of; Lao PDR; Lebanon; Libya Arab Jamahiriya; Lithuania; The Former Yugoslav Republic of Macedonia; Republic of Moldova; Mongolia; Montenegro; Namibia; Netherlands; Nicaragua; Nigeria; Norway; Philippines; Poland; Portugal; Qatar; Romania; Serbia; Singapore; Slovakia; Slovenia; South Africa; Spain; Sweden; Switzerland; Syrian Arab Republic; Tajikistan; Thailand; Turkey; Turkmenistan; Ukraine; United Arab Emirates; United Kingdom; United States; Uzbekistan; Bolivarian Republic of Venezuela; Viet Nam; Yemen; and Zimbabwe.

60. The Secretariat's report was subsequently discussed at a meeting with the WTO Trade Policy Review Body on 28 and 30 September 2016, in which Montenegro also participated. Meeting minutes show that Montenegro congratulated the Russian government on the first trade policy evaluation and made certain comments on Russia's economic development:

> *4.350. Montenegro has economic and trade relations with the Russian Federation, guided by the Joint Committee for trade, economic and technical cooperation between our two Governments. Montenegro would like to use this opportunity to express its strong interest to continue consultations on the Protocol concerning current trading framework and to expand cooperation, particularly in the sector of tourism.*[51]

61. There can be no doubt that Montenegro had reviewed the Secretariat's report and understood its contents. Montenegro did not comment on the statement that there was an existing investment protection agreement between Russia and Montenegro. On the contrary, Montenegro expressed a desire for deeper cooperation between the countries.

[50] Exhibit K-32, *Trade Policy Review, Report by the Secretariat, Russian Federation*, WT/TPR/S/345 of 24 August 2016, p. 38, ¶ 2.49 and n 37.

[51] Exhibit K-33, *Trade Policy Review, Russian federation, Minutes of the Meeting*, dated 25 November 2016, WT/TPR/M/345, p. 48, ¶¶ 4.346-4.351.

62. The Tribunal in the Award found that there is no consistent shared practice of reporting the FRY-Russia BIT as valid.[52] Had the Tribunal been aware of these reports it is likely that the Tribunal, even with the application of the highly set standard of proof, would have found there to be a common perception of the validity of FRY-Russia BIT.

63. At meetings with the WTO, Montenegro referred to the Joint Government Committee on Trade, Economic and Technical Cooperation (*Russian-Montenegrin Intergovernmental Committee for Trade, Economic and Scientific-Technological Cooperation*), the "**Joint Government Committee**".

64. From April 2007 to October 2011, the Joint Government Committee held annual meetings.[53] The Montenegrin delegation was led by Foreign Minister Milan Roćen. The Russian delegation was led by the Minister of Emergency Situations, Sergey Shoygu. The agenda included current issues on bilateral trade, economic cooperation and the main directions for further development. The Joint Government Committee made decisions and recommendations that would be implemented and taken into account by each government.

65. It should be noted here that the purpose of FRY-Russia BIT is to encourage investment and create favorable investment conditions, as stated in the Treaty's preamble:

> *[…] the Contracting Parties, intending to create favourable investment conditions for investors of one Contracting Party in the territory of the other Contracting party,*
>
> *recognising that the encouragement and reciprocal protection of such investments will promote the development of mutually beneficial trade and economic cooperation, have agreed as follows: […]*[54]

66. Precisely these issues were the subject of the Joint Government Committee's work. Already at the first meeting in April 2007, the Committee noted that the results achieved in privatization and investment by Russian companies in the Montenegrin economy had laid a solid foundation for increased bilateral trade. The parties expressed their willingness to support new investments in bilateral cooperation projects and agreed to inform each other about opportunities to participate in investment projects in the respective country.[55]

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[52] Exhibit K-01 (File Exhibit 8), the Award, ¶ 342.

[53] Exhibit K-34, Protocol of the Joint Government Committee meeting no 1 of 27 April 2007 [*Exhibit C-320*], ¶ 3.1; Exhibit K-35, Protocol of the Joint Government Committee meeting no 2 of 8 November 2008 [*Exhibit C-321*], ¶ 4.6; Exhibit K-37, Protocol of the Joint Government Committee meeting no 4 of 27 October 2010 [*Exhibit C-323*], ¶ 4.2; Exhibit K-38, Protocol of the Joint Government Committee meeting no 5 of 18 October 2011 [*Exhibit C-324*], ¶ 4.2.

[54] Exhibit K-02 (File Exhibit 3), FRY-Russia BIT.

[55] Exhibit K-34, Protocol of the Joint Government Committee meeting no 1 of 27 April 2007 [*Exhibit C-320*], ¶¶ 1.4-1.5.

67. A permanent item on the agenda included "Promising Areas for Bilateral Cooperation" where the States discussed potential collaborations in areas such as energy, industry, oil and gas, transport, science and technology, tourism, construction, banking and finance. The Committee discussed regularly the ongoing and potential Russian investments. The protocols specify, *inter alia*, investments from Lukoil (fuel), Novatek (gas), Inter RAO (energy), Power Machines (energy technology). Deripaska's investment in KAP and RBN was also discussed at multiple meetings. At the first meeting in 2007, for example, it was noted that the parties were satisfied with the investment:

> *Parties noted with satisfaction the progress achieved in recent years on the participation of Russian companies in the privatisation of industrial and energy facilities in Montenegro "Kombinat Aluminum Podgorica" and "Bauxite mine Niksic".*[56]

68. It can be noted here again that Deripaska's investment in Montenegro was made during the time of the State Union in 2005, but since the Declaration of Independence did not entail any changes to Montenegro's government or economy, there was no need to do any amendments to the share purchase agreements.

69. The Tribunal's conclusion that there was no evidence that Russia and Montenegro had taken any measures to implement the BIT is thus incorrect.[57] The work of the Joint Government Committee shows that the States have continuously taken comprehensive measures to implement the BIT by improving the investment climate and promoting investments, which is the primary purpose of the FRY-Russia BIT.[58] This work led accordingly to concrete results as the Russian investments in Montenegro increased manifold between 2003 and 2011. The report of the Russian Chamber of Commerce of January 2012 shows the significant growth of the numbers:

> *The volume of investments from Russia [prior] to the restoration of statehood was high. First significant investments were made in 2005 - the volume of investments was 14.0 million euros. In 2006 the volume of investments increased several times in comparison with the previous period. The growth trend was continuing up until the global financial crisis began.*[59] [Our emphasis.]

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[56] Exhibit K-34, Protocol of the Joint Government Committee meeting no 1 of 27 April 2007 [*Exhibit C-320*], p. 4, ¶ 3.1.

[57] Exhibit K-01 (File Exhibit 8), The Award, ¶ 335.

[58] Exhibit K-02, FRY-Russia BIT preamble: "*[…] the Contracting Parties, intending to create favourable investment conditions for investors of one Contracting Party in the territory of the other Contracting party, […] recognising that the encouragement and reciprocal protection of such investments will promote the development of mutually beneficial trade and economic cooperation, have agreed as follows: […]*".

[59] Exhibit K-39, *Delegation of the Chamber of Commerce and Industry of the Russian Federation in the Republic of Serbia and Montenegro: Economic cooperation between Russia and Montenegro* dated 18 January 2012 [*Exhibit C-299*], p. 3.

70. Finally, it should be noted that the Joint Government Committee on several occasions stated that the existing agreements could be improved in order to achieve more favorable conditions for bilateral cooperation:

> *1.3 The Committee emphasized that in the interests of expanding bilateral trade, measures should be taken to create more favorable economic conditions for the economic operators of the Parties, in particular: [...]*
>
> *- to improve the bilateral legal framework of trade and economic cooperation.*[60]

71. Russia and Montenegro thus agreed that the existing treaties should be reviewed and adapted. There was no question of concluding any new intergovernmental agreements.

72. It may be added here that Montenegro stated in the Arbitration that Russia and Montenegro had agreed to carry out special inventory consultations of the intergovernmental agreements.[61] Montenegro referred to a document, *Plan of Consultations* of March 2007, in support of the assertion that the countries' intention was to, through such an inventory, ascertain which treaties would continue to be valid.[62] The Tribunal acknowledged this argument and held it as further evidence of that the exchange of notes in 2006 did not constitute an agreement on succession.[63]

73. The document should be seen in the light of Montenegro's note of January 2007, where Montenegro confirmed that it will apply all treaties between the countries, and the work of the Joint Government Committee, which had its first meeting in April 2007 and where the starting point was that all treaties continued to apply. The document confirms the countries' agreement that a joint review of the existing treaties was needed in order to possibly adapt them to the current needs, not to determine which of them were valid. This is further confirmed by how the States dealt with various other treaties that will be presented in the next chapter.

2. Other treaties remain also in force after the independence

74. Deripaska's view in the Arbitration was and still is that all treaties between Russia and the State Union continued to apply and still continue to apply, as confirmed by the Russian MFA. However, during the Arbitration, Montenegro claimed that a treaty, which had been concluded prior to independence, would bind Montenegro

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[60] Exhibit K-35, Protocol of the Joint Government Committee meeting no 2 dated 18 November 2008 [Exhibit C-321], ¶ 1.3. Exhibit K-36, Protocol of the Joint Government Committee meeting no 3 dated 22 October 2009 [Exhibit C-322], ¶ 1.3.

[61] Exhibit K-40, Plan of consultations between the Ministry of Foreign Affairs of the Republic of Montenegro and the Ministry of Foreign Affairs of the Russian Federation for 2007-2008 from March 2007 [*Exhibit R-172*].

[62] Exhibit K-01 (File Exhibit 8), The Award, ¶ 143.

[63] *Ibid.*, The Award, ¶ 328.

only if an explicit succession agreement has been concluded, for example, through exchange of diplomatic notes that specifically designated such an agreement.[64]

75. It is striking that Montenegro did not announce this position or act accordingly against Russia prior to the Arbitration. There are a number of bilateral treaties that both Montenegro and Russia have considered to be in force without any specific succession agreements concluded through exchange of diplomatic notes or otherwise.

76. Out of the 19 treaties identified by the parties during the arbitral proceedings, it was established that 17 treaties were in force. As regards two treaties, the Russian Ministry of Foreign Affairs could not confirm whether they at all had entered into force. Below is a list of these 19 treaties with notes of Deripaska's[65] and Montenegro's[66] respective positions during the Arbitration:

	Date	Treaty (Exhibit in the Arbitration)	In force according to		Comment
			Montenegro	Deripaska	
1.	24 February 1962	Agreement on Legal Assistance (CLA-72).	Yes, Via exhange of notes	Yes	More on the exchange of notes below, see ¶ 83.
2.	15 March 1988	Agreement on Mutual Recognition of Documents on Education and Academic Degrees (RLA-312).	No	Yes	Confirmed by RF MFA[67] (C-389)[68]
3.	31 October 1989	Agreement on Mutual Travel of Citizens (CLA-78).	Unclear	Yes	New agreement 2008 stating that the previous agreement thereby is terminated[69]
4.	7 June 1990	Agreement on Air Services (CLA-207).	No	Yes	Draft agreement 2012 stating that the previous

[64] *Ibid.*, The Award, ¶ 136.

[65] Exhibit K-41, Chart with a summary of Montenegro's and Prof. Hollis' views on the effectiveness of certain pre-independence treaties with Russia, [Exhibit C-381].

[66] Exhibit K-42, Montenegro's chart, *2018-11-19 Hearing Book Demonstrative Predecessor State Agreements.*

[67] "RF MFA" stands for *Ministry of Foreign Affairs of the Russian Federation.*

[68] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].
In the Arbitration, Montenegro referred to a number of reply letters from various Russian agencies regarding different treaties between Russia and Montenegro. As a result of the varying responses, Deripaska asked the official position of the Russian MFA, being responsible for foreign affairs, in relation to the treaties identified by Montenegro. The MFA responded in its letter of 19 September 2018.

[69] Exhibit K-44, *Agreement on Conditions of Mutual Travel of Citizens of the Russian Federation and Citizens of Montenegro of 24 September 2008*,[Exhibit CLA-79], Article 11.

	Date	Treaty (Exhibit in the Arbitration)	In force according to		Comment
			Montenegro	Deripaska	
					agreement thereby is terminated[70]
5.	24 August 1994	Agreement on Trade and Economic Cooperation (CLA-75).	No	Yes	In the WTO-report Montenegro stated that the agreement is valid[71]
6.	24 August 1994	Agreement on Establishment of the Intragovernmental Committee on Trade, Economic and Scientific-Technological Cooperation (CLA-80).	No	Yes	In the WTO-report Montenegro stated that the agreement is valid[72]. The Joint Government Committee have had regular meetings.[73]
7.	19 July 1995	Agreement on Cooperation in Culture, Education, Science and Sport (RLA-315).	No	Yes	Confirmed by RF MFA (C-389)[74]
8.	12 October 1995	Convention on Avoidance of Double Taxation (CLA-70).	Unclear	Yes	Both Russia and Montenegro have stated that the agreement is valid[75]
9.	26 July 1996	Agreement on Cooperation in Preventing Industrial Accidents, Natural Disasters and Eliminating the Consequences thereof (RLA-321).	No	Yes	Confirmed by RF MFA (C-389)[76]

[70] Exhibit K-45, *Draft Agreement Between the Government of the Russian Federation and the Government of Montenegro on Air Services* [*Exhibit CLA-208*], Article 23(2): "*From the date of entry into force of this Agreement, the Agreement between the Government of the Union of Soviet Socialist Republics and the Union Executive Council of the Assembly of the Socialist Federal Republic of Yugoslavia on Air Service, signed in Moscow on June 7, 1990, shall cease to be in effect in the relations between the Russian Federation and Montenegro, with all amendments.*"

[71] Exhibit K-31, *Memorandum on the Foreign Trade Regime, Addendum*, WT/ACC/CGR/3/Add.1, Annex 8, p. 84.

[72] *Ibid.*

[73] Exhibit K-34, Protokoll från Regeringskommitténs möte nr 1 av den 27 april 2007 [*Exhibit C-320*]; Exhibit K-35, Protokoll från Regeringskommitténs möte nr 2 av den 18 november 2008 [*Exhibit C-321*]; Exhibit K-37, Protokoll från Regeringskommitténs möte nr 4 av den 27 oktober 2010 [*Exhibit C-323*]; Exhibit K-38, Protokoll från Regeringskommitténs möte nr 5 av den 18 oktober 2011 [*Exhibit C-324*].

[74] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].

[75] Exhibit K-46, Applicable Agreements for the Avoidance of Double Taxation, Publication from Russian Federal Tax Service website [Exhibit C-324], see also Exhibit K-48, Letter from Montenegro's Ministry of Finance dated 18 April 2018, [Exhibit C-303].

[76] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].

	Date	Treaty (Exhibit in the Arbitration)	In force according to		Comment
			Montenegro	Deripaska	
10.	31 October 1996	Agreement on Cooperation in the Field of the Agro-Industrial Complex (RLA-316).	No	Yes	Confirmed by RF MFA (C-389)[77]
11.	31 October 1996	Agreement on Cooperation in the Veterinary Field (RLA-318).	No	Yes	Confirmed by RF MFA (C-389)[78]
12.	31 October 1996	Agreement on Cooperation in the Field of Quarantine and Plant Protection (RLA-319).	No	Yes	Confirmed by RF MFA (C-389)[79]
13.	6 November 1996	Custom Services Agreement (RLA-311) (CLA-71).	No	Yes	Confirmed by Montenegro[80]
14.	5 December 1996	Scientific and Technical Cooperation Agreement (RLA-317).	No	Yes	Confirmed by RF MFA (C-389)[81]
15.	16 May 1997	Construction Cooperation Agreement (RLA-314).	No	Unclear	RF MFA could not confirm that the agreement has entered into force (C-389)[82]
16.	3 December 1997	Military-Technical Cooperation Agreement (RLA-320).	No	No	According to RF MFA, the agreement has not entered into force (C-389)[83]
17.	4 November 1998	Agreement on International Road Transport (CLA-76).	Unclear	Yes	In the WTO report, Montenegro indicated that the agreement is valid.[84]

[77] *Ibid.*

[78] *Ibid.*

[79] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].

[80] Exhibit K-48, Letter from Montenegro's Ministry of Finance dated 18 April 2018, [Exhibit C-303].

[81] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].

[82] *Ibid.*

[83] *Ibid.*

[84] Exhibit K-31, *Memorandum on the Foreign Trade Regime, Addendum*, WT/ACC/CGR/3/Add.1, Annex 8, p. 95. Also, a new agreement has been concluded 2010 stating that the previous agreement thereby is terminated, Exhibit K-49, *Agreement on International Road Transport* dated 27 October 2010, [Exhibit CLA-77], Article 17(3): *"Starting from the effective date of this Agreement, the Agreement between the Government of the Russian Federation and the Union Government of the Federal Republic of Yugoslavia on international road transport signed in Belgrade on 4 November 1998 shall cease to be in effect in the relationships between the Russian Federation and Montenegro."*

	Date	Treaty (Exhibit in the Arbitration)	In force according to		Comment
			Montenegro	Deripaska	
18.	28 August 2000	Free Trade Agreement (CLA-206).	Yes, due to explicit agreement	Yes	In the reports to WTO and EU, Montenegro indicated that the agreement is valid.[85]
19.	7 November 2005	Consular Convention (CLA-81).	Yes, due to explicit agreement	Yes	More on the agreement below in ¶ 82.

77. It follows from the list that all the 17 agreements that have entered into force are still valid and binding between Montenegro and Russia. None of them has been terminated.

78. It shall be noted that Montenegro changed its position in the arbitral proceedings on several agreements which the State previously considered valid in its report to the WTO (see agreements no. 5, 6, 17).

79. There are further examples of **new agreements** which have been entered into after renegotiation of previous agreements (see agreements no. 3, 4, 17). These confirm that the previous agreements were valid until the new agreements entered into force, as can be seen for example in the wording of the new Agreement on Mutual Travel for Citizens (no. 3):

> *3. Starting from the effective date of this Agreement, the Agreement between the Government of the Union of Soviet Socialistic Republics and the Union Executive Council of the National Assembly of the Socialist Federal Republic of Yugoslavia on mutual trips of citizens signed in Moscow on 31 October 1989 shall cease to be in effect in the relationships between the Russian Federation and Montenegro.*[86]

80. Before the Arbitration, Montenegro's Ministry of Finance held that a sole reference to the Decision on Independence was sufficient for the **Double Taxation Treaty** (no. 8) and the **Custom Services Agreement** (no. 13) to apply in relation to Montenegro, despite that Russia had concluded them with the FRY.[87] This view

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[85] Exhibit K-30, *Report of the Working Party on the Accession of Montenegro to the WTO WT/ACC/CGR/38* dated 5 December 2011, p. 75, ¶ 275 and Exhibit K-57, *Questionnaire, Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union, 30 External relations,* dated December 2009, [*Exhibit R-66*], p. 27 et seq.

[86] Exhibit K-44, *Agreement on Conditions of Mutual Travel of Citizens of the Russian Federation and Citizens of Montenegro*, [Exhibit CLA-79], Article 11. See also Exhibit K-45*Draft Agreement Between the Government of the Russian Federation and the Government of Montenegro on Air Services (2012)* [Exhibit CLA-208] and Exhibit K-49, *Agreement on International Road Transport* dated 27 October 2010, [Exhibit CLA-77]

[87] Exhibit K-47, Letter from the Ministry of Finance of Montenegro dated 4 October 2006, [Exhibit R-179], and Exhibit K-48, Reply from the Ministry of Finance of Montenegro (Tax and customs directorate) of 18 April 2018, [Exhibit C-303].

complies with Montenegro's statements in the WTO report, suggesting that the starting point is that all intergovernmental treaties in force for the State Union continue to apply in relation to Montenegro (see ¶ 56 above). Montenegro also submitted to the European Commission that the double taxation treaty with Russia was applicable with reference to the Independence Decision:

> *Under the Decision on Declaration of Independence of the Republic of Montenegro [...], Montenegro assumed 36 international treaties and agreements for double taxation avoidance entered into by SFRY and FRY and acceded by the state union of Serbia and Montenegro, which regard Montenegro and are in conformity with its legal order.*
>
> *Treaties with following country* [sic] *are in application: [...] Russia, [...].* [88]

81. Russia has relied on and complied with Montenegro's declarations. This appears e.g. from Russian Federal Customs Service's letter of 25 September 2006, as set forth in ¶ 48 above.[89] Similarly, the Russian Federal Tax Service's statement in a letter of 8 August 2007, the authority refers to the unilateral declarations and states that the Double Taxation Treaty (no. 8) continues to apply:

> *In the declaration adopted by the country's Parliament on 3 June 2006 the Republic of Montenegro was proclaimed an independent state and on 4 August 2006 it declared its succession with respect to international treaties and agreements that had been concluded by the former State Union of Serbia and Montenegro (SM).[...]*
>
> *In this regard the Republic of Serbia and the Republic of Montenegro retain the succession in relation to the signed on 12 October 1995 and ratified Convention between the Government of the Russian Federation and the Government of the Federal Republic of Yugoslavia for the avoidance of double taxation with respect to taxes on income and property.*[90] [Our emphasis.]

82. Another example is the **Convention on Consular Relations** of 7 November 2005 (no. 19), which was ratified by the State Union on 11 May 2006, i.e. shortly before Montenegro's independence. Montenegro's MFA then wrote to the Russian Consulate General in Podgorica announcing that Montenegro felt that it did not need to ratify the Convention again.[91] In the next note of 4 May 2007, Montenegro confirmed that the State had completed the domestic implementation procedures

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[88] Exhibit K-50, *Questionnaire, Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union, 16 Taxation,* dated December 2009, [Exhibit C-424], p. 42. See also Exhibit K-51, *List of DTTs available from Montenegro Tax Authority*, dated 24 January 2014, which lists a DTT with Russia, [Exhibit C-422]. As for Russia, se Exhibit K-46, Applicable Double Taxation Treaties, Website of the Russian Federal Tax Service, [Exhibit C-423], which in the DTT section states that Russia has a DTT with "Serbia, Montenegro", based on that 1995 FRY DTT. Note that Serbia and Montenegro are separated with a comma.

[89] Exhibit K-26, Letter issued by the Federal Customs Service of Russia, No. 06-53/33340, 25 September 2006 [Exhibit R-174].

[90] Exhibit K-52, Letter from Russian *Federal Tax Service* of 8 August 2007, [Exhibit C-384].

[91] Exhibit K-53, Letter from Montenegro's *Ministry of Foreign Affairs Consular Service Department* of 28 September 2006, [Exhibit C-330].

for the entry of the Consular Convention into force.[92] Russia ratified the Convention on 25 October 2007.[93]

83. The application of the 1962 **Legal Assistance Agreement** (no. 1) is another example of both countries' general assumption that previously applicable treaties continue to apply. On 6 December 2010, Montenegro sent a diplomatic note to the Russian MFA asking whether Russia applies the legal aid agreement:

> *The Embassy of Montenegro in the Russian Federation [...] has the honor to ask for an official response to the Embassy on whether the Russian Federation applies the Treaty on Legal Assistance in Civil, Family and Criminal Cases between the FRY and USSR of 24 February 1962.*[94]

84. Russia confirmed that the agreement applies:

> *The Ministry of Foreign Affairs of the Russian Federation [...] has the honor to confirm that the Russian Party deems the Treaty between the Union of Soviet Socialist Republics and the Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil, Family and Criminal Matters dated 24 February 1962 is* [sic] *applicable to the relationships between the Russian Federation and Montenegro; and, particular, is applicable to enforcement of court orders.*[95]

85. Further, regarding the **Free Trade Agreement** concluded between FRY and Russia in 2000 (no. 18), both Montenegro and Russia have assumed continuity of the agreement. There has not been any separate succession agreement has been between the States through exchange of diplomatic notes or otherwise, but the States have simply continued to apply the agreement. This appears clearly from Montenegro's report to the WTO in December 2011:

> *She* [Montenegro's representative] *said that Montenegro and the Russian Federation were negotiating Amendments to the Protocol of the existing FTA* [Free Trade Agreement] *which entered into force in May 2001. These negotiations were in the final stages and were expected to be finalized by the end of 2011.*[96]
> [Our addition and emphasis.]

86. The Free Trade Agreement can be viewed as a framework agreement creating a basis for all trade between the countries. It is not uncommon for free trade agreements to contain provisions regarding investments and investment protection. Bilateral investment treaties can be considered to supplement the framework established by the free trade agreements. It is striking that Montenegro highlights

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[92] Exhibit K-28, Montenegro's note to Russia of 4 May 2007.

[93] Exhibit K-54, *Protocol on the Exchange of Instruments of Ratification for the Consular Convention between Serbia and Montenegro, and the Russian Federation,* dated 14 March 2008, [Exhibit R-175].

[94] Exhibit K-55, Montenegro's note to Russia dated 6 December 2010, [Exhibit C-316].

[95] Exhibit K-56, Russia's note to Montenegro dated 22 December 2010, [Exhibit C-317].

[96] Exhibit K-30, *Report of the Working Party on the Accession of Montenegro to the WTO, WT/ACC/CGR/38* dated 5 December 2011, p. 75, ¶ 275. See also Exhibit K-57, *Questionnaire, Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union, 30 External relations,* dated December 2009, [Exhibit R-66], p. 27 et seq.

without hesitation the Free Trade Agreement in its correspondence regarding accession to the EU and the WTO, but the State does not acknowledge the BIT now that an investor wants to rely on a remedy offered in an investment treaty.

3. The Tribunal's reasoning

87. The Tribunal considered that there was no need to examine whether each separate treaty was in force. The Tribunal considered that Deripaska had not presented sufficiently clear, consistent and exhaustive intergovernmental practice to prove that a tacit agreement on continuity applied to all bilateral treaties.[97]

88. The above facts however show that the Tribunal was mistaken in its assessment. It is clear that Montenegro's intention, which was clearly expressed in the Declaration of Independence, was to succeed to all bilateral treaties. The same intention was specifically communicated to Russia in the Montenegrin Notes of June and August 2006 and in the Montenegrin Notes of 2007. Montenegro has thereby, through its actions, given Russia and its legal entities to understand that all agreements and treaties concluded with Russia would continue to be binding on Montenegro.

89. The Tribunal found further that the States had resolved the succession issues by a case-by-case approach and that the cases presented in the arbitral proceedings did not provide sufficient support for the assumption of continuity for treaties that had not been subject for application, as for example the FRY-Russia BIT.[98] It may be added that the Tribunal accepted Deripaska's argument that bilateral investment treaties are by their nature "dormant" agreements that will not come into direct application until an investment dispute has been referred to an arbitral tribunal under the investment treaty dispute settlement clause. However, the Tribunal considered that evidence was nevertheless required for a mutual consent to treaty continuity. The Tribunal found that Deripaska had not provided any evidence of concrete practical application of the FRY-Russia BIT.[99]

90. This conclusion is also incorrect, as it appears from the meetings of the Joint Government Committee's meeting minutes (see ¶¶ 64 - 70 above) that the States worked focused and intensively on encouraging and creating favorable conditions for investment in each other's territories, which indeed is the main purpose of a bilateral investment protection agreement. This work led de facto to increased investment from a number of Russian companies.

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[97] Exhibit K-01 (File Exhibit 8), The Award, ¶ 334: "*The Tribunal need not try to resolve definitively the status of each of these treaties, particularly on an incomplete record. It suffices to say that the Claimant has not demonstrated a sufficiently clear or consistent record of comprehensive State practice by Montenegro and Russia as to support an inference of a tacit agreement on continuity for all predecessor bilateral agreements.*"

[98] *Ibid.*, ¶ 334.

[99] *Ibid.*, ¶ 336.

E. Montenegro's conduct in relation to other States shows that the relationship with Russia was extraordinary

91. Having concluded that the exchange of notes between Montenegro and Russia did not entail that all treaties continued to apply, as Russia's response was deemed insufficient, the Tribunal examined Montenegro's correspondence with other States. The Tribunal found that Montenegro typically entered into separate succession agreements through exchange of notes referring to specific treaties.[100] This was considered to contrast with the exchange of notes with Russia, where individual treaties had not been mentioned. The Tribunal saw it as another fact indicating that the States had not signed an explicit succession agreement.[101]

92. To begin with, Deripaska questions the Tribunal's decision to attach particular importance to Montenegro's communication with other States when assessing contractual obligations between Montenegro and Russia. Reasonably, the evidence on the bilateral relations between Montenegro and Russia should be of decisive importance, and under all circumstances have a higher evidentiary value than Montenegro's correspondence with other countries.

93. Notwithstanding, it can be noted that the Tribunal has overlooked Montenegro's own statement to the European Commission in December 2009 that the country deliberately had chosen different approaches in its communication with other countries. In response to the EU Commission's question, Montenegro explained that its starting point was treaty continuity based on the Decision on Independence, but that Montenegro had chosen to inform *certain* countries about the commitments under the investment protection treaties which had been signed during the time of the State Union. Only the BITs that were explicitly confirmed by these countries or signed after Montenegro's independence were attached to the report:

> *21. With which countries have you concluded bilateral investment agreements? [...]*
>
> [Answer] *By the Decision on Declaration of Independence of the Republic of Montenegro (3 June 2006), Montenegro accepted application and commitment under all the international treaties and agreements the State Union of Serbia and Montenegro concluded and to which it acceded related to Montenegro and which are in compliance with its legal system. In the meantime, the Ministry of Foreign Affairs informed certain countries on commitment under the bilateral agreements which had been signed between those countries and former state union. We received feedback from Bosnia and Herzegovina, Cyprus, Macedonia, Poland and Austria. Applicable bilateral agreements on promotion and reciprocal protection of investments, which have been confirmed in the diplomatic note or they have been negotiated and signed after renewed Montenegrin independence follow (investment*

[100] Exhibit K-01 (File Exhibit 8), The Award, ¶¶ 320-321.
[101] *Ibid.*, ¶¶ 326-327.

agreements are submitted within the Annexes 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257).[102] [Our emphasis and additions.]

94. Thus, the treaties that were reported in and attached to the report did not constitute an exhaustive list of all existing investment protection agreements. This is further confirmed by Montenegro's report to the WTO (2011) and the list therein which refers to significantly more treaties, including the FRY-Russia BIT.

95. Given that Montenegro wrote to certain countries in particular, it is not surprising that the used language differed significantly from that used in the June and August notes to Russia. It is evident from the correspondence presented in the Arbitration that the expressions in the diplomatic communication between Montenegro and other countries is different.[103]

96. In all cases, it is stated that either Montenegro or the other country had proposed a review of the existing bilateral agreements or sent a list of existing treaties and asked for the views or approval of the counterparty. There was no other case where Montenegro would take advantage of the same unilateral declaration as in the notes to Russia where Montenegro *informed* of its status as a successor state to the State Union and *reaffirmed* Montenegro's readiness to comply with all treaties and agreements that have entered into force between the State Union and Russia.

97. Whether the communication with Russia was entirely unique cannot be determined because Montenegro announced in the Arbitration that a significant portion of the diplomatic communication with 14 countries, including Belgium, the Czech Republic, Switzerland, Denmark, Estonia, could not be submitted as it was impossible to find or had been lost. The Tribunal found that there was no reason to hold this against Montenegro.[104] Deripaska finds it remarkable that diplomatic communication with a number of important trading partners would have been lost.

98. When it comes to the States' reports of valid BITs to the international organizations compiling the data in databases,[105] it can be noted that the Tribunal found that the data could be assigned certain evidentiary significance despite the fact that the databases have no constitutive effect on the validity of the treaties.[106] The Tribunal considered it significant that there was inconsistency in respect of which BITs were listed at different times.

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[102] Exhibit K-57, *Questionnaire, Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union, 30 External relations,* dated December 2009, [Exhibit R-66], Q 21, p. 29.

[103] Exhibit K-01 [File Exhibit 8], The Award, pp. 115-118.

[104] *Ibid.*, ¶ 327 and n 791.

[105] For example, *United Nations Conference on Trade and Development* – UNCTAD and ICSID are bodies providing databases of bilateral investment treaties concluded by their Member States. The data in these databases is based on the Member States' reports.

[106] Exhibit K-01 [File Exhibit 8], The Award, ¶ 337.

99. The Tribunal noted e.g. that during a one-year interval in 2016-2017 the FRY-Russia BIT was reported as in force in the UNCTAD database until Montenegro's Ministry of Finance asked UNCTAD to remove the FRY-Russia BIT from the database in summer 2017 after it had received information from the MFA that the BIT is not in force.[107] The Tribunal disregarded that this correspondence took place during the arbitral proceedings in which Montenegro itself was a party. The Tribunal did not either attach any importance to the fact that Montenegro was unable to produce its report to UNCTAD from 2014, asserting that it could not be found, notwithstanding that Montenegro could submit its reports for the other years and despite the fact that Montenegro easily could have requested a copy from UNCTAD.[108]

100. With regard to the reporting, it should be noted that the Tribunal specifically emphasized that it would be highly relevant if both States would have reported the same status for the given treaty, since this would indicate that there was a shared understanding of the validity of the treaty.[109] It has now been shown that both Montenegro and Russia have reported to the WTO that FRY-Russia BIT applies, which undoubtedly shows that the States had a shared understanding in any case before the Arbitration. The fact that Montenegro has subsequently changed its view in the Arbitration and requested UNCTAD to remove the FRY-Russia BIT, which the country itself had reported, must be regarded as an afterthought.

101. It can be reiterated that Russia was not a party to the Arbitration. However, Russia is party to the disputed BIT. Russia's position on the validity of the BIT should therefore be given conclusive importance, especially since the other contracting party, Montenegro, has changed its position and is party to the Arbitration. In the next chapter, Deripaska will elaborate the position of the Russian MFA on the issue of FRY-Russia BIT's validity.

F. Russian MFA considers that FRY-Russia BIT is valid and binding

102. Approximately four months before initiating the arbitral proceedings, Deripaska's counsel contacted the Russian MFA and asked whether the FRY-Russia BIT was valid in relation to Montenegro.[110] The MFA responded in its letter of 16 August 2016 that the FRY-Russia BIT is still valid:

> *After the official proclamation of independence in 2006, the Republic of Montenegro (since 2007 the official name is Montenegro), by a note dated 4 August 2006, notified the*

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[107] Exhibit K-58, Correspondence between Montenegro's Ministry of Finance and UNCTAD, [Exhibit R-200].
[108] Exhibit K-01 (File Exhibit 8), The Award, ¶ 339.
[109] Exhibit K-01 (File Exhibit 8), The Award, ¶ 337: "*Finally, it is highly relevant whether both States report the same status regarding a given bilateral treaty, indicating a shared understanding regarding its validity.*"
[110] Exhibit K-59, EPAM's letter to the Russian Ministry of Finance of 8 August 2016 [Exhibit C-383]: "*[…] please advise if the Agreement is in effect as of today and whether it applies to relations between the Russian Federation and the Republic of Montenegro.*"

> *Russian Federation that Montenegro is "a state-successor to the State Union of Serbia and Montenegro with regard to international treaties and agreements which were concluded by the State Union of Serbia and Montenegro and to which it acceded and in this regard, the Republic of Montenegro confirms its readiness to observe all treaties and agreements that have been effective between the Russian Federation and the State Union of Serbia and Montenegro".*
>
> *[…] we acknowledge that the Agreement continues to operate in relations between the Russian Federation and Montenegro.*[111]

103. In a subsequent letter, Russia has also made it clear that its view is that consent to succession can be provided by other means than by explicit agreement. In the same letter, Russia confirmed that the State considers itself bound by both tacit consent and by consent expressed in a confirmatory diplomatic note:

> *The way of declaring that a successor state will continue obligations of the predecessor state depends on the political decision taken by new state authorities and it is not governed by peremptory norms of international law. According to the established practice, one may employ declarations of heads of states (the declaration of the president of the united Yemen of 1990), the statements of parliaments (petition of the National Council of the Slovak Republic to the parliaments and peoples of the world) and other types of statements. After that, generally, notifications of other states on succession usually follow with "mass" distribution of diplomatic notes and/or a letter from the head of state or foreign minister to the Secretary-General of the United Nations, etc. Such a statement can be noted silently or by acknowledgment via sending a note.*[112]

104. During the arbitral proceedings in September 2017, Russia's MFA received a letter from a certain Mr A.M. Borisov who asked if there were any existing investment protection agreements between Russia and either Bosnia and Herzegovina, Macedonia or Montenegro.[113] The Ministry of Foreign Affairs responded in a letter in September 2017 that an investment protection agreement between Macedonia and Russia had been signed in 1997 and entered into force in 1998, but that no such agreements had been concluded with Bosnia and Herzegovina or Montenegro.[114] In a follow-up letter in October 2017, the MFA clarified to A.M. Borisov that the FRY-Russia BIT was still valid as a result of Montenegrin Note of August 2006, in which Montenegro declared itself a successor state to the State Union of Serbia and Montenegro.[115]

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[111] Exhibit K-60, Russian MFA's letter to EPAM dated 16 August 2016 [Exhibit C-382].

[112] Exhibit K-21, Russian MFA's letter to EPAM dated 27 April 2018, ¶ 1, [Exhibit C-301].

[113] Exhibit K-61, A.M. Borisov's letter to Russian MFA dated 18 September 2017, [Exhibit R-191].

[114] Exhibit K-62, Russian MFA's letter to A.M. Borisov dated 28 September 2017 [Exhibit R-192]: "*The Agreement between Russian Federation and FYROM on encouragement and mutual protection of investments dated 21 October 1997 is effective between Russian Federation and FYROM. […] With Bosnia and Herzegovina and Montenegro such agreements have not been concluded.*"

[115] Exhibit K-63, Russian MFA's letter to A.M. Borisov dated 20 October 2017, [Exhibit R-193]: "*In addition to it, we wanted to inform you about the following. Because the Montenegrin Ministry of Foreign Affairs by note No. 03/04-1414 of 4 August 2006 notified that the Republic of Montenegro is a successor-State of the State Union of Serbia and Montenegro*

105. In the Arbitration, Montenegro disputed the Russian MFA's explanation, whereupon Deripaska's counsel addressed the MFA with follow-up questions. In a response letter of September 2018, the Russian MFA stated that their response to A.M. Borisov was based on the assumption that his inquiry was about whether any investment protection agreement had been made directly between Russia and Montenegro, which was not the case.[116]

106. The Tribunal considered that the MFA's letter was not sufficiently compelling to show that Russia considered that succession had taken place in 2006, mainly due to the inconsistent statements in the letters. The Tribunal noted finally that even if the Tribunal would have found that the letters showed the opposite, it would not say anything about Montenegro's position. Therefore, the Tribunal found that the letters could have no bearing on the question whether there was a mutual understanding that the States shared before the Arbitration.[117]

107. The Tribunal's conclusions in this respect are not convincing. The Russian MFA's explanation on the response to A.M. Borisov concerned the issue of whether investment protection agreements had been *concluded* directly between Russia and Montenegro seems reasonable.[118] Especially in light of the fact that Montenegro itself has made a corresponding distinction between the conclusion of new agreements and the application of agreements concluded by predecessor states (see above ¶ 93 with references).

108. The Tribunal's concluding remark as to the Montenegro's allegedly ambiguous position is contradictory. In the previous chapter of the Award, the Tribunal concluded that Montenegro's unilateral statements could be seen as an offer, but that a clear acceptance from Russia was lacking. The Tribunal had thereby established that Montenegro's position was that all treaties should continue to apply.

109. It is also important to note that, unlike Montenegro, the Russian MFA was not a party to the Arbitration and thus has no own interest in the case. The above cited letter of August 2016 clearly shows that Russia's position has remained unchanged

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with respect to international treaties and agreements, in the relations between the Russian Federation and Montenegro, the Agreement between the Government of the Russian Federation and the Federal Government of the Federal Republic of Yugoslavia for the Promotion and Reciprocal Protection of Investment of 11 October 1995, is in force."

[116] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].

[117] Exhibit K-01 (File Exhibit 8), The Award, ¶ 353: "*For these reasons, the Tribunal is unable to accept the MFA's 2016-2018 letters as sufficiently compelling evidence that Russia itself (prior to this dispute) viewed succession as having occurred as a result of the 2006 events. Even if the Tribunal arguendo were to assume otherwise, the MFA letters still would provide no evidence at all of Montenegro's contemporary view of the same events, and therefore could have no bearing on any mutual understanding that the two State Parties may have shared in the years preceding this arbitration.*"

[118] Exhibit K-43, Russian Ministry of Foreign Affairs' letter to EPAM dated 19 September 2018, [Exhibit C-389].

since 2006, i.e. long before the arbitral proceedings were initiated. The Tribunal should therefore not have dismissed the letters and drawn the conclusion that the Russian MFA did not hold the FRY-Russia BIT as valid. There is comprehensive written evidence since 2006 that together with other facts outlined above speak to the contrary.

110. After the Arbitration, the Claimant's Russian counsel became aware of that Montenegro contacted the Russian MFA as late as in October 2018, i.e. when the Arbitration was already coming to the end, and offered the Russian MFA to consider the possibility of holding consultations with regard to the consolidation of treaty and legal basis between Montenegro and Russia.[119] In its December 2018 reply note, the Russian MFA referred to the declaration of state succession in the Montenegrin Note of August 2006 and asked for an explanation of what the Montenegrin side intended with consolidation, what procedure it would follow and what was the expected result of such "consolidation".[120]

111. Montenegro's MFA responded in a note in January 2019 with a long description of how Montenegro had had such consultations with other countries and that the purpose was to do an inventory of which treaties remained acceptable to both countries and which needed to be renegotiated. Montenegro noted that until now the countries had not formally listed which treaties were in effect, instead some treaties were applied because of a particular interest of the respective authorities:

> *In the course of inventory/consolidation of international treaties, the assessment of interdepartmental structures is taken into account concerning the following: whether interdepartmental agreements correspond to the current and future interests of Montenegro, which is in the process of accession negotiations with the European Union, or whether the existing treaties shall be redrafted and renegotiated. [...]*
>
> *Up to the present, Montenegro and the Russian Federation, using the formal legal method, have not determined the list of international treaties concluded between the predecessor states (FPRY, CFRY, FRY, Serbia and Montenegro, on the one hand, and the USSR and the Russian Federation, on the other hand), which continue remain in force in relations between the two countries based on succession. In Montenegrin-Russian relations, there was a practice of accepting particular treaties based on the expressed interest of interdepartmental structures.*[121]

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[119] Exhibit K-64, Montenegro's note to Russia dated 24 October 2018: "*The Embassy of Montenegro in the Russian Federation presents its compliments to the IV European Department of the Ministry of Foreign Affairs of the Russian Federation and has the honour to offer to the Russian side to consider the possibility of holding of interdepartmental consultations with regard to the consolidation of treaty and legal basis for cooperation between Montenegro and the Russian Federation.*"

[120] Exhibit K-65, Russia's note to Montenegro dated 4 December 2018 translated to English: "*In addition, taking into account the position of Montenegro in respect of its succession to international treaties concluded by its predecessor States (as set out in the Note of the Ministry of Foreign Affairs of Montenegro No. 03/04-1414 dated August 4, 2006), within the framework of which such succession is aligned with the fact of conducting an inventory of agreements, the Ministry requests the clarification of the content of the procedure, particularly, the time period covered by it, the level of documents to be "consolidated" (whether interdepartmental documents are included), potential results of the "consolidation".*"

[121] Exhibit K-66, Montenegro's note to Russia dated 16 January 2019.

112. The Russian MFA disputed such description in the response note on 1 March 2019, reiterating its view that all treaties between Russia and the State Union would continue to apply in accordance with Montenegro's Note of August 2006 and Russia's response thereto. Russia expressed however its willingness to revisit the issue based on the approach set forth in the Montenegrin Note of August 2006 and that it could not be excluded that the parties would then be able to agree that certain treaties would cease to apply:

> *By the Note of the Ministry of Foreign Affairs No. 03/04-1414 dated August 4, 2006, Montenegro stated that the Republic is a successor State of the State Union of Serbia and Montenegro in respect of its international treaties and agreements. Based on the aforementioned statement, which the Russian Party took note of, the Russian Federation considers the international treaties that were in force in relations between Russia and the State Union of Serbia and Montenegro to continue remain in force in relations between the Russian Federation and Montenegro to the extent and unless otherwise agreed.*
>
> *Therefore, the Russian Party cannot agree with the legal position set forth in the mentioned Note of the Embassy dated January 16, 2019, and in this regard cannot consider it as an acceptable basis for consultations on inventory/consolidation in respect of the treaty and legal basis of bilateral relations.*
>
> *However, the Russian Party would be ready to return to the issue of holding such consultations based on the approach set forth in the aforementioned Note of the Ministry of Foreign Affairs of Montenegro dated August 4, 2006. It is not excluded that, based on the results of consultations, the Parties may decide on the appropriateness of termination of one or another international treaty.*[122]

113. The latest exchange of notes between Montenegro and Russia confirms Russia's position as it has been expressed since 2006 by way of the exchange of notes, at intergovernmental meetings and other official receptions, through implementation of various treaties over the years and in letters to counsel in the Arbitration.

114. It is peculiar that in the autumn of 2018, more than 12 years after Montenegro's independence, Montenegro suddenly realized that it needs to make an inventory of treaties with Russia, one of Montenegro's most important trading partners. Furthermore, Montenegro's explanation of the legal implications of the proposed inventory process bears striking similarities to the position that the State took in the Arbitration and that had previously not been announced to Russia. Finally, it can be noted that, to the best of our knowledge, Montenegro has not reverted to the Russian MFA on this issue after Russia's response roughly a year ago.

[122] Exhibit K-67, Russia's note to Montenegro dated 1 March 2019.

III. STATE SUCCESSION IN INTERNATIONAL LAW

115. There are two main principles in the international law concerning state succession to treaties. According to the so-called *clean slate approach* or *tabula rasa principle*, the new State begins without any inherited contractual obligations from the predecessor State.[123] This principle has been applied in the international customary law primarily to former colonies.[124] As to other States that have been more integrated with parts of the predecessor State, the main rule is that they take over all obligations entered into by the predecessor State, the so-called principle of continuity.[125] In addition, it is obvious that all States may also succeed to a bilateral agreement through an agreement between the State parties. The circumstances in each succession case must be assessed by due reference its prerequisites.

116. Deripaska finds that the Tribunal erroneously assumed that the legal starting point should be the so-called *clean slate approach*, which means that after Montenegro's independence, the country was without any intergovernmental agreements between Montenegro and Russia or other States.

117. On this basis, the Tribunal held that Deripaska had not shown that there was a mutual understanding between the countries that precisely the FRY-Russia BIT would continue to apply. The Tribunal further found that any general agreement covering all treaties had neither been concluded through Montenegro's statements in connection with the independence nor thereafter through the exchange of notes, nor through the conduct of the States in general.

118. However, based on the facts described above, it is evident that the Tribunal made a wrong assessment. Deripaska has presented compelling evidence that sets forth a mutual intention of the State parties that all treaties should continue to apply. Montenegro has clearly expressed its intention, which Russia has accepted and acted accordingly. Deripaska has thus fulfilled the burden of proof even under the Tribunal's legal approach.

119. However, Deripaska's view is that the legal starting point should be the principle of continuity, which implies that previously applicable treaties, including the FRY-Russia BIT, continue to apply in the event of state succession through separation. This principle is found in the Vienna Convention on Succession of States in respect of treaties (Article 34), which is discussed in the section below.

A. Automatic succession under Article 34 of the VCSST

120. The most prominent legal source for state succession to treaties can be found in the Vienna Convention on State Succession drafted by the United Nations International Law Commission and adopted on 23 August 1978 (*Vienna Convention*

[123] Exhibit K-15, Professor Christian J Tam's First Expert Opinion dated 5 June 2018, [Exhibit CER-2], ¶ 20.
[124] O Bring, P Wrange and S Mahmoudi, *Sweden and the international law*, Norstedts Juridik 2020, p. 80.
[125] O Bring, P Wrange and S Mahmoudi, *Sweden and the international law*, Norstedts Juridik 2020, p. 80.

on Succession of States in respect of Treaties, the "**VCSST**"). The VCSST entered into force on 6 November 1996 and has been ratified by 23 countries. Unlike Russia, Montenegro has acceded to the Convention.

121. Article 34 of the VCSST provides that the treaties which at the time of State succession by separation apply to the predecessor State shall continue to apply in respect of each successor State, the so-called automatic succession:

> *Succession of States in cases of separation of parts of a State*
>
> *1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed [...]*

122. It follows from the *travaux préparatoires* to the VCSST that the purpose of the treaty is to create stability and that the provision has its starting point in the principle of continuity:

> *The Commission, after a study of State and depositary practice, concluded that in modern international law having regard to the need for the maintenance of the system of multilateral treaties and of the stability of treaty relationships, as a general rule the principle of* de jure *continuity should apply.*[126]

123. The principle is not new, but it has long been considered that treaties continue to apply to autonomous or semi-autonomous regions even after the fall of an overarching alliance or union. D. P. O'Connell confirmed this already in 1956 in his established contribution to the field of State succession, *The Law of State Succession*:

> *(d) Attainment of independence by quasi-independent regions and dissolution of real and personal unions*
>
> *(A) The ordinary principle that a new State does not inherit the treaties of its predecessor does not, it would seem, apply to the case of the emergence to full sovereignty of a semi-sovereign or self-governing community. Where treaties are contracted for such a community by its suzerain, protector or constitutional superior acting as its agent, such treaties are properly personal to the autonomous or semi-autonomous region, and there is no reason why they should not continue to bind it after the agent's disappearance.*[127]

124. The *travaux préparatoires* to Article 34 also refer to the dissolution of the Union between Sweden and Norway in 1905.[128] Similar to the State Union, both Sweden and Norway were actually autonomous States with their own parliaments (the Norwegian *Stortinget* and the Swedish *Riksdagen*), but they had a common monarch and foreign administration. After the dissolution, both Sweden and Norway sent notes to other States where each State indicated that they would continue to be

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[126] Exhibit K-68, ILC Yearbook, vol. II/1, 1974, [Exhibit CLA-196], p. 196.
[127] Exhibit K-69, D. P. O'Connell, *The Law of State Succession*, Cambridge University Press 1956, p. 43.
[128] Exhibit K-68, ILC Yearbook, vol. II/1, 1974, [Exhibit CLA-196], p. 260 et seq.

bound by all the Union treaties. O'Connell refers also to the dissolution of the Union between Sweden and Norway:

> *(ii) Dissolution of the Union between Norway and Sweden, 1905*
>
> *[…] Both these States delivered Notes to foreign Powers to the effect that treaties made with the Union, but specifically for one member of it, concerned that member only, and bound it alone. Apart from this exception, both States considered themselves severally bound by all treaties of the Union, 'unless the dissolution of the Union between Sweden and Norway modifies in any way the dispositions which have hitherto regulated these relationships'. This view of the situation was accepted by the French and United States Governments.*[129]

125. The approach expressed in the VCSST Article 34 on automatic succession was also applied by the European Court of Human Rights in a case between Bijelić v Montenegro and Serbia. In this case, the Court took into account the views expressed by the United Nations Human Rights Committee that the protection of rights granted to individuals under the Covenant continues to apply notwithstanding State succession. Accordingly, the Court considered that Montenegro had automatically taken over the rights and obligations under the European Convention for the Protection of Human Rights and its Protocol No. 1, Article 1 on protection of property. In support of this view, the Court emphasized that the principle that fundamental rights protected by international human rights treaties should belong to individuals residing in the territory of the party concerned, regardless of its subsequent dissolution or succession.[130]

126. Professor Tams, the expert in the Arbitration, argues that there is strong support for the view that new states automatically take over not only treaties that protect human rights but also other forms of treaties that protect individuals' rights:

> *"[…] there is strong support for the view that new States automatically succeed to treaties protecting rights of individuals."*[131]

127. The principle codified in the VCSST Article 34 also reflects the actual perception of state succession in the dissolution of the SFRY in 1992. The EU-appointed committee, the *Badinter Arbitration Committee*, with the purpose to solve the problems under international law following the dissolution of the SFRY, noted in

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[129] Exhibit K-69, D. P. O'Connell, *The Law of State Succession*, Cambridge University Press 1956, p. 44 et seq.

[130] Exhibit K-70, *Bijelic v Montenegro and Serbia* (App no 19890/05), ECHR Final Judgment, 11 June 2009, [Exhibit CLA-180], ¶ 58: "*The Human Rights Committee has made clear, in the context of obligations arising from the International Covenant on Civil and Political Rights, that fundamental rights protected by international treaties "belong to the people living in the territory of the State party" concerned. In particular, "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession*".

[131] Exhibit K-15, Professor Christian J Tam's First Expert Opinion dated 5 June 2018 [Exhibit CER-2], ¶ 29.

its opinion that all States that emerged after the dissolution of Yugoslavia had in principle accepted the approach set forth in the Convention:

> *"2. As the Arbitration Commission pointed out in its first Opinion, the succession of states is governed by the principles of international law embodied in the Vienna Conventions of 23 August 1978 and 8 April 1983, which all* [former Yugoslavian] *Republics have agreed should be the foundation for discussions between them on the succession of states at the Conference for Peace in Yugoslavia.[...]"*[132]

128. Although it is debated in the doctrine whether the present provision in the VCSST reflects international customary law, it is clear that the underlying presumption of continuity is commonly accepted in State practice. This appears e.g. from a detailed study by the International Law Association ("**ILA**"). In a report published in 2008, the ILA noted that in the case of the succession to bilateral treaties, there is a general practice of more or less formal discussions between the states concerned and that the basic premise of these discussions is that there is a presumption of continuity, which aims to ensure stability of international relations after a State declares itself independent:

> *"With regard to bilateral treaties, the general practice is of more or less formal discussions held in order to clarify the situation. A thorough examination of the practice, however, appears to show that these discussions are based on the idea that there exists a rule of continuity of bilateral treaties"*[133]

129. During the Arbitration, the parties agreed that the VCSST Article 34 was not directly applicable since Russia has not acceded to the VCSST. However, Deripaska argued that the principle of automatic succession applies also outside the strict scope of the VCSST, namely in the case of succession to treaties that protect human rights.[134] An investment protection agreement bears also elements of protecting human rights by ensuring individual investor's protection of their property and the right to a fair trial. Therefore, the starting point for the legal assessment of the State succession should be that these treaties continue to apply.

130. The Tribunal did not acknowledge Deripaska's argument, stating that neither the State practice nor the doctrine supported the principle of automatic succession to investment protection agreements.[135]

131. Deripaska finds it remarkable that the Tribunal overlooked that Montenegro had explicitly accepted the rule of automatic succession. Both the SFRY and the FRY and the State Union were parties to the VCSST and also Montenegro confirmed

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[132] Exhibit K-71, Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 9 [Exhibit CLA-170], p. 1524 in the document.
[133] Exhibit K-72, International Law Association, Aspects of the Law of State Succession, Report 2008 [Exhibit CLA-172], p. 21.
[134] Exhibit K-01 (File Exhibit 8), The Award, ¶¶ 114-115.
[135] *Ibid.*, ¶ 227.

that the treaty was in force shortly after the dissolution of the State Union in 2006. Montenegro did not express any reservations against Article 34 or the principle of automatic succession itself. Montenegro's premise should therefore be assumed to have been that treaties concluded by the FRY or the State Union continue to bind Montenegro even after independence.

132. This is indeed supported by Montenegro's conduct upon the independence. The wording in the Declaration of Independence and the Decision on Independence[136] clearly show that it committed to treaty continuity. The same is evident from Montenegro's reports to the WTO, the EU as well as the exchange of notes with Russia. Montenegro declared in its Note of August 2006 to be a successor state to the State Union. In assessing the validity of the FRY-Russia BIT, it should therefore be borne in mind that Montenegro has, for its own part, explicitly accepted the principle of automatic succession to bilateral treaties.

133. It should also be noted that Montenegro and Russia have a long record of close mutual cooperation. One reason for this is the historical background outlined above. Following the SFRY's dissolution and the establishment of the FRY in 1992, a gradual separation was made between Serbia and Montenegro which could have resulted in independent states in the very early 2000's unless the EU had persuaded the States to continue for three more years in the even laxer constellation - the State Union. Montenegro began to act independently towards the international community, and not least towards Russia, already as a Member State of the State Union. It was therefore no surprise to the outside world or Russia that Montenegro, after the expiry of the initial three-year period prescribed by the Constitutional Charter, declared itself independent. Independence did not change much in the bilateral cooperation with Russia. Montenegro's Prime Minister Milo Djukanović met with Russian President Vladimir Putin on 28 August 2006 to discuss the development of political and economic cooperation. During the meeting, both leaders assured that the countries intended to forge an even stronger bond.[137]

134. In addition to Deripaska's argument that the rule of automatic succession was applicable, Deripaska also submitted in the Arbitration that the States had reached an agreement on succession. The legal prerequisites for succession through agreement will be dealt with in the next chapter.

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[136] Exhibit K-13, Montenegro's Decision on Independence, [Exhibit RLA-25]: "*3. The Republic of Montenegro shall apply and take over international treaties and agreements concluded by and acceded to by the State Union of Serbia and Montenegro which relate to Montenegro and which are in conformity with its legal order.*"

[137] Exhibit K-73, Article of RFE/RL "*Russia, Montenegro Pledge Stronger Ties*" dated 28 August 2006.

B. Succession through agreement

135. It should initially be noted that consent to succession to a bilateral treaty can be expressed in several ways and that no explicit agreement on succession is required, which was undisputed by the parties in the Arbitration. However, the parties did not agree on which prerequisites were required for an explicit or implied agreement to be deemed to exist or whether the evidence relied upon was sufficient to prove that the FRY-Russia BIT was applicable.[138]

136. The Tribunal required that there was convincing evidence to prove that an agreement had been concluded.[139] The Tribunal thus imposed a very high standard of proof which, in Swedish procedural law, corresponds to the evidentiary requirement of "obvious". The Tribunal gives no explanation as to why the standard of proof should be set so high in a case that is essentially a civil case, let alone against a State. Deripaska questions the Tribunal's assessment in particular, given that the burden of proof for the existence of the agreement lies with an individual who himself is not a party to the disputed intergovernmental agreement. The high standard of proof set by the Tribunal made it impossible for Deripaska, as a third party, to show that an agreement was concluded between Russia and Montenegro against the objection of the latter.

137. Professor Shaw considers the requirement to be set unjustifiably high even from an international law perspective:

> *[...] in cases where there are no criminal allegations or claims of egregious conduct in the sense of "systematic and widespread violations of international law", the standard of proof is, as Wolfrum and Moldner State, the preponderance of evidence, that is "the evidence adduced by one party on the basis of reasonable probability weights heavier than the evidence produced by the other side". [...]*
>
> *In such circumstances, whatever term is used (sufficient, balance of probabilities or preponderance of evidence) it is clear that the standard of proof required falls below that of "only if there is convincing evidence" as used by the Arbitral Tribunal.*[140]

1. Unilateral declarations can lead to treaties being binding

138. In the Arbitration, Deripaska relied on the Declaration of Independence and Decision on Independence to establish Montenegro's intention to take over (succeed to) all treaties previously applicable to the State Union, including the FRY-

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[138] Exhibit K-01 (File Exhibit 8), The Award, ¶ 287: "[...]*The Parties agree that in principle, succession agreements may be either express or tacit, although they disagree on the requisite elements of such agreements and on the sufficiency of the evidence presented in this case.*"

[139] Exhibit K-01 (File Exhibit 8), The Award, ¶ 287: "*In the absence of an applicable rule of automatic succession derived either from treaty or customary international law, the FRY-Russia BIT would bind Montenegro and Russia only if there is convincing evidence of an agreement on succession.*". See also ¶ 317.

[140] Exhibit K-16, Professor Malcolm Shaw's Expert Opinion dated 14 May 2020, ¶¶ 31-31.

Russia BIT.[141] Montenegro contested and argued that succession cannot be achieved through a unilateral declaration or unilateral action.[142]

139. The Tribunal concluded that the Declaration of Independence and the Decision on Independence were generally unilateral political declarations and that they were not as such sufficient to confirm that the FRY-Russia BIT was still valid between Montenegro and Russia.[143] The Tribunal appears to have disregarded a number of court cases that had been invoked in the Arbitration showing that unilateral declarations can be binding.

140. There are numerous examples in State practice of how unilateral declarations have been considered to bind States to treaties. For example, the International Court of Justice ("**ICJ**") made an indicative statement in a case between New Zealand and France regarding nuclear weapon testing (the Nuclear Tests case). The ICJ found that a unilateral and publicly given declaration conveying the State's intention to remain bound by a treaty is binding and that no reaction from other states is required, but they may rely on the unilateral declaration:

> *It is well recognized that (specific) declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations [...] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being hence forth legally required to follow a course of conduct consistent with the declaration.*
>
> *An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made [...] [W]hether a statement is made orally or in writing makes no essential difference [...] Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.*[144] [Our emphasis.]

141. Another example is the case decided by the Supreme Court of Austria which found that the Mutual Legal Assistance Treaty between Austria and the SFRY was

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[141] Exhibit K-01 (File Exhibit 8), The Award, ¶ 129.

[142] *Ibid.*, ¶ 121.

[143] *Ibid.*, ¶¶ 289-290: "*[...] The threshold question is whether such broad unilateral statements of political will could be sufficient, as a matter of law, to confirm the FRY-Russia BIT as continuing in force for the Montenegro-Russia relationship following Montenegro's secession from the State Union. 290. The Tribunal concludes that Montenegro's unilateral declarations could not have this effect on their own.*"

[144] Exhibit K-74, *New Zealand v. France, Nuclear Tests*, ICJ Reports 1974, 457, ¶¶ 46-49, [Exhibit RLA-47].

applicable between Austria and Croatia.[145] This is despite the fact that Croatia has joined the VCSST unlike Austria. In particular, the Court relied on Croatia's declaration of independence, where Croatia undertook to comply with "all rights and obligations" arising from the treaties previously entered into by SFRY.[146]

142. Similarly, a unilateral declaration issued by the Serbian and Montenegrin Assembly of Parliamentarians was considered to constitute a valid consent to the succession to a multilateral treaty in a case between Croatia and the FRY, subsequently Serbia, regarding the application of the Genocide Convention (Croatian Genocide Case)[147]. Alike Montenegro in the Arbitration, Serbia argued in the Genocide Case that the FRY's Parliament's declaration of 1992 could not create any legal effects, inter alia, because a general declaration concerning all treaties was not sufficiently specific. In the declaration, the FRY announced its intention to continue applying the treaties concluded by the predecessor state, the SFRY. The ICJ did not accept Serbia's objection, but found that this unilateral declaration of intent was sufficient to convey commitment to succession and that Serbia was thus bound by the Genocide Convention.[148]

143. The Tribunal referred to this ICJ ruling, pointing out that the Court had taken into account not only the FRY's unilateral declaration of 1992 but also the FRY's diplomatic note to the UN Secretary-General as well as the FRY's conduct in general. The Tribunal emphasized that the ICJ's decision was based on an overall assessment. The Tribunal's own assessment, however, was more limited than that of the ICJ and went no beyond the Declaration of Independence and Decision on Independence and Montenegro's note to the UN Secretary-General, which as a matter of fact refers to Montenegro's decision to accede to all treaties to which the State Union was a party.[149] This alone establishes that Montenegro's intention with the Declaration of Independence and the Decision on Independence was that all

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[145] Exhibit K-75, *Supreme Court of Austria*, Decision on Case 2 Ob 69/92 16 December 1992 [Exhibit CLA-193] and Exhibit K-15 Professor Christian J Tam's First Expert Opinion dated 5 June 2018 [Exhibit CER-2], ¶¶ 88-89.

[146] Exhibit K-75, *Supreme Court of Austria*, Decision on Case 2 Ob 69/92 16 December 1992, [Exhibit CLA-193]: *"In clause III of the Declaration on the Establishment of an Independent and Sovereign Republic of Croatia, acting in accordance with international law, Croatia, as a successor to the former Socialist Federal Republic of Yugoslavia, guarantees to other states and international organizations full and in good faith exercise and discharge of the SFRY's rights and obligations in its territory."*

[147] Exhibit K-76, *Croatian Genocide case*, ICJ Reports, 2008, p. 412, [Exhibit CLA-67].

[148] *Ibid.*, ¶ 109: *"In the particular context of the case, the Court is of the view that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different."*

[149] Exhibit K-77, Letter from the Ministry of Foreign Affairs of Montenegro to the Secretary-General of the United Nations, 10 October 2006 [Exhibit RLA-29]: *"On behalf of the Government of the Republic of Montenegro I have the honor to inform you that the Government of the Republic of Montenegro decided to succeed to the treaties to which the State Union of Serbia and Montenegro was a party or signatory."*

treaties should continue to apply, both multilateral and bilateral – which however was overlooked by the Tribunal.

144. The Tribunal also found that the identity of the counterparty is particularly important in bilateral relations. Both States, and not just the new successor State, should therefore have the opportunity to express their views as to whether the previous agreement should continue to apply. Therefore, the Tribunal referred to Article 9 of the VCSST[150] and argued that it is generally accepted that unilateral declarations *per se* cannot bind all counterparty States. A mutually binding obligation can only arise if and when the other State somehow confirms that it accepts the declaration.[151]

145. As Professor Shaw notes in his Opinion, the Tribunal's reasoning is not compelling, inter alia, because the principle, expressed in Article 9 of the VCSST, refers to situations where a whole new State has emerged, for example from former colonial States.[152] As discussed above, Montenegro is not a newly independent state but has come about as a result of dissolution of a temporary and fragmented union.

146. Professor Shaw further notes that it is clear under international law that unilateral commitments can create legal obligations.[153] In addition to a number of cases, he refers to the International Law Commission ("**ILC**"), that in 2006 drafted ten guiding principles: *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*. One of the starting points for the ILC's work on these principles was the finding that States may be bound by unilateral conduct under certain conditions. Such conduct may refer to formal declarations but also to informal actions, including even silence, which other States can reasonably rely on:

> ***Noting that*** *States may find themselves bound by their unilateral behaviour on the international plane,*
>
> ***Noting that*** *behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely, […]*

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[150] Article 9 VCSST: "*Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.*" [Our emphasis.]

[151] Exhibit K-01 (File Exhibit 8), The Award, ¶ 293: "*Where the treaty counterpart changes its identity, therefore, both States – and not just the new successor State – have the option whether to continue the predecessor relationship, on the same or different terms or potentially not at all. For this reason, it is generally accepted that unilateral statements by one State are insufficient to create a mutually binding obligation, which will not arise unless or until the other State in some fashion confirms its corresponding agreement.*"

[152] Exhibit K-16, Professor Malcolm Shaw's Expert Opinion dated 14 May 2020, ¶¶ 62-64.

[153] *Ibid.*, ¶ 43: "*Thus, the framework of unilateral statements as creative of obligation is essentially clear*".

> *1. Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.*[154]

147. The Tribunal mentions these *Guiding Principles* but dismisses them as irrelevant to the issue of unilateral declarations which may be binding upon State succession, which according to the Tribunal is a special area of international law.[155] The Tribunal admits, however, that unilateral declarations are not entirely without normative effect, since even relatively informal communication can result in binding obligations if it demonstrates a mutual intention. However, according to the Tribunal, a prerequisite for binding obligations is that the other State makes a statement or acts in a manner that reflects a comparable intention.[156]

148. It must be reiterated that the Tribunal in its assessment focused solely on Montenegro's Declaration of Independence and Decision on Independence, detached from facts showing Montenegro's other conduct. Notwithstanding that the Tribunal itself pointed out, with reference to the Croatian Genocide case, that in that case the Court made a comprehensive assessment of all the circumstances, including subsequent notes and actions, before concluding that Serbia was bound by the treaty in question.

149. In addition, the Tribunal took a narrow view as to what constitutes a unilateral declaration. Based on the above-mentioned State practice and the ILC's *Guiding Principles*, it is clear that Montenegro's Declaration of Independence and Decision on Independence together with the Montenegrin Notes of June and August 2006 reconfirmed by 2007 Notes can be seen as unilateral declarations that have a binding effect because

i. they were clear, sufficiently detailed and were separately addressed to a specific recipient (Russia),
ii. Montenegro expressed its intention to be bound to all the existing treaties,
iii. statements were made by a competent authority, and finally
iv. Russia relied on them and conveyed its consent to continued application, both through its diplomatic notes and through its conduct in connection with the Montenegrin independence and thereafter.

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[154] Exhibit K-78, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, A/61/10 (2006), [Exhibit RLA-26].

[155] Exhibit K-01 (File Exhibit 8), The Award, ¶ 294.

[156] *Ibid.*. Professor Shaw states also that unilateral declarations can found obligations where they are part of conduct that affirms such declarations, see Exhibit K-16, ¶ 54: " *It thus seems to me to be clear that unilateral declarations of a general nature can found obligations (or acceptance of continuing obligations) where this is part of a pattern of conduct affirming the same. It is then up to the other party or parties to the instrument in question to determine their views in the face of this assertion of continuance.*"

150. The requirements to prove that a State has consented to succession will be outlined in the next section.

2. Conduct and silence can imply recipient's consent

151. In treaty succession between an entirely new State and the original contracting party, there is considered to be a customary principle implying that a bilateral treaty will continue to apply if the parties have explicitly agreed to this or if they by way of their conduct are deemed to have agreed on succession. The principle has been codified in the VCSST Article 24:

> *1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:*
>
> *(a) they expressly so agree; or*
>
> *(b) by reason of their conduct they are to be considered as having so agreed.*

152. The Tribunal also found, with reference to Article 24 and the expert opinions of both parties, that a State's intention to remain bound by a treaty may be expressed through a tacit agreement.[157] Thus, there are no requirements in form for agreement on succession.

153. In view of the fact that consent does not have to meet any specific formal requirements, it is not necessary for the consent of both parties to be expressed in writing or manifested through active action. It is entirely enough to establish that an implicit agreement has been reached.[158]

154. A unilateral declaration of succession is a clear manifestation of a State's will to succeed and to assume the rights and obligations arising from the treaties covered by the declaration. Similarly, the original treaty party's conduct may constitute evidence of a silent or implied consent to succession. Consent can be derived from silence if it reflects the intention of the party that the existing treaty shall continue to apply. In an article published in the *Max Planck Encyclopaedia of Public International Law*, it is expressed as follows:

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[157] Exhibit K-01 (File Exhibit 8), The Award, ¶ 329: "*The Tribunal accepts that despite the absence of any express agreement between Montenegro and Russia either on global continuity of all predecessor treaties, or on a specific list of such treaties through an inventory process or otherwise, there remains the theoretical possibility of a tacit continuity agreement between the two States, as evidenced by subsequent conduct revealing a mutual understanding. As a matter of principle, it is widely accepted – and accepted by both experts in this case – that States may manifest intent to be bound by a treaty not only expressly but also tacitly, through conduct that reflects such an intention to be bound.*"

[158] Exhibit K-68, ILC Yearbook, vol. II/1, 1974, [*Exhibit CLA-196*], p. 240: "*But subject to the application of that principle* [principle of good faith applied in article 45 of the Vienna Convention], *the problem is always one of establishing the consent of each State to consider the treaty as in force in their mutual relations either by express evidence or by inference from the circumstances.*" [Our addition].

> *2. In international law, the term 'acquiescence'—from the Latin quiescere (to be still)—denotes consent. It concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State (Protest) would be called for. Acquiescence is thus consent inferred from a juridically relevant silence or inaction. Qui tacit consentire videtur si loqui debuisset ac potuisset (he who keeps silent is held to consent if he must and can speak).*[159]

155. Similarly, the *travaux préparatoires* to the VCSST set forth that a State may be bound by a treaty by a tacit consent, especially if the successor State through its conduct has caused the other State to rely on that the treaty in question shall continue to apply:

> *The Commission* [ILC] *is aware that a rule which hinges upon the establishment of mutual consent by inference from the conduct of the States concerned may also encounter difficulties in its application in some types of case. But these difficulties arise from the great variety of ways in which a State may manifest its agreement to consider itself bound by a treaty, including tacit consent; and they are difficulties found in other parts of the law of treaties.*
>
> *[…] Moreover, in all cases it is not simply a question of the intention of one State but of both: of the inferences to be drawn from the act of one and the reaction—or absence of reaction—of the other. Inevitably the circumstances of any one case differ from those of another and it seems hardly possible to lay down detailed presumptions without taking the risk of defeating the real intention of one or other State. Of course, one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty, in which event account has to be taken of the principle of good faith applied in article 45 of the Vienna Convention (often referred to as estoppel or preclusion).*[160] [Our emphasis and addition.]

156. The Tribunal has also taken note of the statement in the *travaux préparatoires* and, for its own part, agreed that the issue of estoppel or preclusion may arise if the State makes a unilateral commitment in order to induce the other State to take concrete measures which are then also taken.[161] However, the Tribunal found that there was no issue of estoppel in this case as there was no evidence that either State had relied specifically on any assurances regarding the FRY-Russia BIT.[162]

157. The Tribunal's conclusion is incorrect. As stated above, the Russian MFA has taken special measures following the receipt of the Montenegrin Note of August 2006. For example, the MFA has forwarded the information on Montenegro's succession to the Federal Customs Service and the Tax Administration, which continued to

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[159] Exhibit K-79, Nuno Sérgio Marques Antunes, "Acquiescence", *Max Planck Encyclopedia of Public International Law* (2006), [Exhibit CLA-241], ¶¶ 2 and 21.

[160] Exhibit K-68, ILC Yearbook, vol. II/1, 1974, [Exhibit CLA-196], p. 240.

[161] Exhibit K-01 (File Exhibit 8), The Award, ¶ 295: "*Likewise, if the unilateral declaration is intended to induce the other State to take concrete steps in reliance and has this demonstrable effect, this potentially could give rise to arguments about preclusion or estoppel, with the aim of preventing the successor State thereafter from disputing its own intent to be bound.*"

[162] *Ibid.*, ¶ 335: "*Nor is there any evidence that either State concretely relied on actions or assurances from the other regarding the FRY-Russia BIT, so as to give rise to any arguable basis for estoppel or preclusion.*"

apply the previously applicable Free Trade Agreement and Double Taxation Treaty with reference to the Montenegrin Note of August 2006. The work of the Joint Government Committee also testifies that Russia has assumed that all treaties continued to apply and worked persistently with the promotion of investments in both countries. It is also obvious from Russia's report to the WTO that Russia considered the FRY-Russia BIT to be in force. All of these facts refer to the time before the Arbitration.

3. Montenegro has lost its right to invoke invalidity of the BIT

158. As set forth above, Montenegro has explicitly stated that all treaties shall remain in force. Russia has accepted this declaration and acted correspondingly. Hence, Montenegro's objection that the BIT is not valid lacks all credibility and must be disregarded. Montenegro should also, under international law, be precluded from raising the objection.

159. Both Montenegro and Russia have acceded to the Vienna Convention on the Law of Treaties (1969) ("**VCLT**"), which in Article 45 provides for the loss of the right to invoke the Treaty's invalidity:

> *A State can no longer invoke a ground for the invalidity of a treaty, repeal, resignation or suspension of a treaty under Articles 46 to 50 or Articles 60 and 62, if the State, after becoming aware of the facts*
>
> *(a) explicitly stated it being aware that the treaty is valid, or remains in force or has continued application; or*
>
> *(b) by virtue of its position, must be regarded as having accepted the validity of the Treaty, or its retention in force or continued application.*

160. Notwithstanding that the present situation is not attributable to the invalidity grounds under Articles 46-50, 60 and 62 VCLT, Article 45 establishes that there is a corresponding principle in the international customary law that is based on a principle of good faith in international relations.

161. The ILC's *Guiding Principles* articulate a corresponding rule that prohibits a State to arbitrarily revoke a unilateral declaration if the recipient has relied on it:

> *10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:*
>
> *(a) Any specific terms of the declaration relating to revocation;*
>
> *(b) The extent to which those to whom the obligations are owed have relied on such obligations;*

(c) The extent to which there has been a fundamental change in the circumstances.[163]

162. Professor Shaw is also of the opinion that the principle of good faith is applicable here and implies that Montenegro should not be allowed object to validity of treaties:

> *Accordingly, Montenegro having so clearly maintained that it was bound by pre-succession treaties of the State Union, cannot now as a matter of good faith or perhaps even of estoppel indeed be heard to deny this position without some consequence. It constitutes part of the contextual matrix of the case in question.*[164]

163. The Tribunal noted that the issue of preclusion under Article 45 of the VCLT did not arise in the Arbitration because Deripaska could not point to any specific conduct that Montenegro had taken in relation to the FRY-Russia BIT and which he or Russia would have relied on.[165]

164. The Tribunal's finding can be questioned given that Deripaska presented evidence in the Arbitration which showed that Montenegro had derived benefit from its previous position. Both Montenegro and Russia had worked actively, among other things within the Joint Government Committee, and encouraged Russian companies to invest in Montenegro. The actual result of the work with the increasing investment volumes of Russian companies is demonstrated in the report of the Montenegrin Chamber of Commerce and Industry.[166] Montenegro has thus taken active measures and followed the development of the Russian investment projects in Montenegro. Furthermore, it is unlikely that Russia would have encouraged individuals to invest in Montenegro without having ensured that the investments would be protected by an investment protection agreement.

165. Moreover, it is clear that the Tribunal has again adopted a narrow approach by requesting evidence for a specific conduct of Montenegro in relation to the FRY-Russia BIT. If the States have entered into a general succession agreement that covers all treaties, then the requirement for a specific conduct in relation to a specific treaty is redundant. It should be emphasized that both Montenegro's counsel and the State-appointed expert, Professor Hollis, agreed in the Arbitration that could it be inferred that a general succession agreement had been concluded, it would be sufficient for treaty succession, and no specific conduct regarding the

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[163] Exhibit K-78, *ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, A/61/10 (2006), [Exhibit RLA-26], ¶ 10.

[164] Exhibit K-16, Professor Malcolm Shaw's Expert Opinion dated 14 May 2020, ¶ 59.

[165] Exhibit K-01 (File Exhibit 8), The Award, footnote 815: "*The issue* ["estoppel or préclusion" based on the principle of good faith reflected in Article 45 of the VCLT] *does not arise in this case, however, because Claimant has not pointed to any specific conduct by Montenegro with respect to the FRY-Russia BIT upon which either he or his home State, Russia, supposedly relied.*" [Our addition.]

[166] Exhibit K-39, Delegation of the Chamber of Commerce and Industry of the Russian Federation in the Republic of Serbia and Montenegro: *Economic cooperation between Russia and Montenegro* dated 18 January 2012 [*Exhibit C-299*].

application of individual treaties would need to be proved.[167] As set forth above, there are convincing facts showing that a general succession agreement has been concluded. Accordingly, Montenegro should now be prevented from objecting that treaties, including the BIT, are not valid.

166. Finally, it shall be recalled that the investment was made in the territory of Montenegro during the time of the State Union and with the Government of Montenegro as a contracting party. It was later the same government that took the measures that caused the expropriation of the investment. Any attempts to have the Montenegro's conduct re-examined before Montenegrin courts have been unsuccessful. The Cypriot company CEAC has sought to have the dispute tried under the BIT between Cyprus and Montenegro. However, the majority of the tribunal in those proceedings held that it had no jurisdiction over the case finding that CEAC did not have its seat in Cyprus. What then remained for Deripaska was to personally initiate arbitral proceedings under the FRY-Russia BIT, that demonstrably is valid and binding.

167. Given that the Tribunal granted Montenegro's objection to jurisdiction, Montenegro has so far avoided to face the merits of the dispute. As the set-aside action before Svea Court of Appeal is the last available forum and remedy for Deripaska to establish that there is jurisdiction over an investment protection dispute against Montenegro, Deripaska's right to a fair trial should also be taken into account when assessing Montenegro's new-found objections to the validity of the FRY-Russia BIT.

IV. EVIDENCE

168. The preliminary statement of evidence is enclosed as a separate document.

169. Deripaska reserves his right to amend the statement of evidence when Montenegro's position has become known.

As above,

/signature/
Ginta Ahrel

/signature/
Emma Bliman Blomstervall

/signature/
Therese Isaksson

/signature/
Kristians Goldsteins

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[167] Exhibit K-80, Claimant's Post-Hearing Brief on Jurisdiction dated 15 January 2019 [CPHB], ¶ 25 and footnote 51: "Exchange between the Arbitrator, Professor Douglas QC and Counsel for Respondent, Mr Pawlak [...]: "*PROFESSOR DOUGLAS: If I understand your submission correctly, your position is that if there were a global, general agreement, then there would be no need for the subsequent practice relating to the individual treaties. MR PAWLAK: That is true...*"."

EXHIBITS

No.	*Exhibit*	*No. in the Arbitration*
K-01	Final Award in PCA Case No. 2017-07 dated 15 October 2019.	
K-02	FRY-Russia BIT (*Agreement between the Government of Russian Federation and the Federal Government of the Republic of the Federal Republic of Yugoslavia for Promotion and Mutual Protection of Investments*) dated 11 October 1995.	C-1
K-03	A. Zimmermann and J. G. Devaney, *Succession to treaties and the inherent limits of international law*, in C. J. Tams, A. Tzanakopoulos and A. Zimmermann (red.), *Research Handbook on the Law of the Treaties*, Elgar Publishing 2014	CLA-168
K-04	S. Darmanovic, *Montenegro: A miracle in the Balkans?*, Journal of Democracy, Vol. 18/2 (2007)	
K-05	ICG Balkans Report No 142 (2003), *A Marriage of Inconvenience: Montenegro 2003*	
K-06	The Constitution of the State Union (*The Constitutional Charter of the State Community of Serbia and Montenegro*).	RLA-23
K-07	Montenegro's Memorandum on the Foreign Trade Regime *WT/ACC/CGR/3* (WTO) dated 8 March 2005	
K-08	Press release of the Russian MFA: Russian Minister of Foreign Affairs Igor Ivanov meets with Milo Djukanovic, Prime Minister of the Republic of Montenegro dated 18 July 2003	
K-09	Press release of the Russian MFA: Russian Deputy Minister of Foreign Affairs Sergey Razov pays a visit to Serbia and Montenegro dated 18 March 2004	
K-10	Transcript of Remarks by Russia's Minister of Foreign Affairs Sergei Lavrov on the Results of Talks with Montenegro Prime Minister Milo Djukanovic of 7 November 2005.	
K-11	Excerpt from *Agreement for the sale and purchase of the funds' shares in Kombinat Aluminijuma Podgorica a.d.* dated 27 July 2005	C-3
K-12	Excerpt from *Agreement for the sale and purchase of the shares of the company Rudnici Boksita ad Niksic* dated 17 October 2005	C-4

K-13	Montenegro's Decision on Independence in English translation	RLA-25
K-14	Montenegro's Declaration of Independence in English translation	C-365
K-15	Professor Christian J Tam's First Expert Opinion dated 5 June 2018	CER-2
K-16	Professor Malcolm Shaw's Expert Opinion dated 14 May 2020	
K-17	Montenegro's note to Russia dated 4 June 2006 in English original	R-74
K-18	Russia's note to Montenegro dated 26 June 2006 in Swedish translation from Russian	R-75 (English translation)
K-19	Montenegro's note to Russia dated 4 August 2006 in Swedish translation from Russian	C-18 (English translation)
K-20	Russia's note to Montenegro dated 16 August 2006 in Swedish translation	C-19 (English translation)
K-21	Letter from Russian MFA to Deripaska's counsel Egorov Puginsky Afanasiev & Partners ("EPAM") dated 27 April 2018	C-301 (updated)
K-22	Serbia's note to Russia dated 5 June 2006	
K-23	Russia's note to Serbia dated 21 June 2006	
K-24	Montenegro's press release of the meeting between Montenegro's Minister of Foreign Affairs Vlahovic and Russian Ambassador Jermolenko on 4 August 2006	C-370 (updated)
K-25	Letter of the Federal Customs Service of Russia of 3 August 2006	R-215
K-26	Letter of the Federal Customs Service of Russia of 25 September 2006	R-174
K-27	Montenegro's note to Russia dated 9 January 2007	
K-28	Montenegro's note to Russia dated 4 May 2007	
K-29	Montenegro's Press Release: *Prime Minister Zeljko Sturanovic meets Russian State Duma Speaker Boris Gryzlov* of 19 July 2007	C-305

K-30	Report of the Working Party on the Accession of Montenegro to the WTO, WT/ACC/CGR/38, dated 5 December 2011	
K-31	Memorandum on the Foreign Trade Regime, Addendum, WT/ACC/CGR/3/Add.1 dated 8 March 2005	
K-32	Trade Policy Review, Report by the Secretariat, Russian Federation dated 24 August 2016	
K-33	Trade Policy Review, Russian federation, Minutes of the Meeting, dated 25 November 2016	
K-34	Protocol of the Joint Government Committee meeting No. 1 dated 27 April 2007	C-320 (updated)
K-35	Protocol of the Joint Government Committee meeting No. 2 dated 18 November 2008	C-321 (updated)
K-36	Protocol of the Joint Government Committee meeting No. 3 dated 22 October 2009	C-322 (updated)
K-37	Protocol of the Joint Government Committee meeting No. 4 dated 27 October 2010	C-323 (updated)
K-38	Protocol of the Joint Government Committee meeting No. 5 dated 18 October 2011	C-324 (updated)
K-39	Report by the *Delegation of the Chamber of Commerce and Industry of the Russian Federation in the Republic of Serbia and Montenegro: Economic cooperation between Russia and Montenegro* dated 18 January 2012	C-299
K-40	Plan of consultations between the Ministry of Foreign Affairs of the Republic of Montenegro and the Ministry of Foreign Affairs of the Russian Federation for 2007-2008 from March 2007	R-172
K-41	Deripaska's Chart with a summary of the effectiveness of certain pre-independence treaties with Russia	C-381
K-42	Montenegro's Chart with a summary of the effectiveness of certain pre-independence treaties with Russia dated 19 November 2018	2018-11-19 Hearing Book Demonstrative Predecessor State Agreements
K-43	Letter from the Russian MFA to EPAM dated 19 September 2018	C-389

K-44	*Agreement on Conditions of Mutual Travel of Citizens of the Russian Federation and Citizens of Montenegro of 24 September 2008*	CLA-79
K-45	*Draft Agreement Between the Government of the Russian Federation and the Government of Montenegro on Air Services*	CLA-208
K-46	Applicable Double Taxation Treaties, Website of the Russian Federal Tax Service	C-423
K-47	Letter from the Ministry of Finance of Montenegro dated 4 October 2006	R-179
K-48	Letter from Montenegro's Ministry of Finance dated 18 April 2018	C-303
K-49	*Agreement on International Road Transport* av den 27 oktober 2010	CLA-77
K-50	*Questionnaire, Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union, 16 Taxation,* dated December 2009	C-424
K-51	*List of DTTs available from Montenegro Tax Authority*, dated 24 January 2014	C-422
K-52	Letter from Russian *Federal Tax Service* of 8 August 2007	C-384
K-53	Letter from Montenegro's *Ministry of Foreign Affairs Consular Service Department* of 28 September 2006	C-330
K-54	*Protocol on the Exchange of Instruments of Ratification for the Consular Convention between Serbia and Montenegro, and the Russian Federation, signed on 7 November 2005*	R-175
K-55	Montenegro's note to Russia dated 6 December 2010	C-316
K-56	Russia's note to Montenegro dated 22 December 2010	C-317
K-57	*Questionnaire, Information requested by the European Commission to the Government of Montenegro for the preparation of the Opinion on the application of Montenegro for membership of the European Union, 30 External relations,* dated December 2009	R-66
K-58	Correspondence between Montenegro's Ministry of Finance and UNCTAD	R-200
K-59	EPAM's letter to the Russian Ministry of Finance of 8 August 2016	C-383
K-60	Russian MFA's letter to EPAM dated 16 August 2016	C-382

K-61	A.M. Borisov's letter to the Russian MFA dated 18 September 2017	R-191
K-62	The Russian MFA's letter to A.M. Borisov dated 28 September 2017	R-192
K-63	The Russian MFA's letter to A.M. Borisov dated 20 October 2017	R-193
K-64	Montenegro's note to Russia dated 24 October 2018	
K-65	Russia's note to Montenegro dated 4 December 2018	
K-66	Montenegro's note to Russia dated 16 January 2019	
K-67	Russia's note to Montenegro dated 1 March 2019	
K-68	ILC Yearbook, vol. II/1, 1974 (excerpt)	CLA-196
K-69	D. P. O'Connell, *The Law of State Succession,* Cambridge University Press 1956 (excerpt)	
K-70	*Bijelic v Montenegro and Serbia* (App no 19890/05), ECHR Final Judgment, 11 June 2009 (excerpt)	CLA-180
K-71	*Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 9*	CLA-170 (updated)
K-72	*International Law Association, Aspects of the Law of State Succession, Report 2008*	CLA-172
K-73	Article of RFE/RL "Russia, Montenegro Pledge Stronger Ties" dated 28 August 2006.	
K-74	*New Zealand v. France, Nuclear Tests,* ICJ Reports 1974, p. 457	RLA-47
K-75	*Supreme Court of Austria*, Decision on Case 2 Ob 69/92, 16 December 1992	CLA-193
K-76	*Croatian Genocide case*, ICJ Reports, 2008, p. 412	CLA-67
K-77	Letter from the Ministry of Foreign Affairs of Montenegro to the Secretary-General of the United Nations, 10 October 2006	RLA-29
K-78	*ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* A/61/10 (2006)	RLA-26
K-79	Nuno Sérgio Marques Antunes, "Acquiescence", *Max Planck Encyclopedia of Public International Law* (2006)	CLA-241

K-80	Claimant's Post-Hearing Brief on Jurisdiction dated 15 January 2019 (excerpt)	CPHB