INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
(Additional Facility)

MNSS B.V.
RECUPERO CREDITO ACCIAIO N.V.

Claimants

v.

REPUBLIC OF MONTENEGRO

Respondent

REQUEST FOR ARBITRATION

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1. INTRODUCTION

1. This Request for Arbitration is served by (1) MNSS B.V. and (2) Recupero Credito Acciaio N.V. (together, "**the Claimants**"), upon the Republic of Montenegro ("**the Respondent**").

2. The Claimants hereby demand that the dispute that has arisen between them and the Respondent be referred to arbitration pursuant to the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (the "**Additional Facility Rules**").

2. NAMES AND ADDRESSES OF THE PARTIES

(Additional Facility Rules, Art. 3(1)(a))

3. *The Claimants:* MNSS B.V. ("**MNSS**") is a company incorporated under the laws of The Netherlands, with its registered office at Koningslaan 17, 1075 AA Amsterdam, The Netherlands.

4. Recupero Credito Acciaio N.V. ("**RCA**") is a Curaçao company incorporated under the laws of the former Netherlands Antilles, with its registered office at Fransche Bloemweg 4, Willemstad, Curaçao.

5. Service of any correspondence upon the Claimants' may be effected through their solicitors, as follows:

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CMS Cameron McKenna LLP
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with a copy to: Toby Landau QC and
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24 Lincoln's Inn Fields
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Email: tlandau@essexcourt.net and
dsarooshi@essexcourt.net
Facsimile: +44 (0)20 7813 8080
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6. *The Respondent:* The Respondent is the Republic of Montenegro. Its contact details are as follows:

The Prime Minister, Dr I. Luksic
The Minister of Finance, Dr M. Katnic

The Minister of Justice, Mr D. Markovic
The Government of the Republic of Montenegro
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and

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3. AGREEMENT OF THE PARTIES TO REFER THE DISPUTE TO ARBITRATION UNDER THE ICSID ADDITIONAL FACILITY

(Additional Facility Rules, Art. 3(1)(b))

3.1. The Parties' express consent to ICSID (AF) Arbitration

7. The Respondent has expressly consented to the submission of investment disputes – such as the present one – to arbitration under the ICSID Additional Facility ("**ICSID (AF) Arbitration**"), by way of standing unilateral offers contained in:

(1) Article 9 of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Federal Republic of Yugoslavia

and the Kingdom of the Netherlands, concluded on 29 January 2002 ("**the BIT**")[1];

as well as

(2) Article 30, paragraph 2, of the Foreign Investment Law of Montenegro, published in the Official Gazette of the Republic of Montenegro no. 18/2011 dated 1 April 2011[2] ("**the 2011 Montenegrin Foreign Investment Law**").

8. *The BIT:* The BIT entered into force on 1 March 2004.

9. The BIT was succeeded to in express terms by the Respondent in an Exchange of Notes between the Kingdom of the Netherlands and the Republic of Montenegro dated 15 November 2006 and 18 January 2007.[3]

10. Article 9(2) of the BIT provides in part as follows:

> "If the dispute referred to in paragraph 1 of this Article [between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party] cannot be settled within three months from the date on which either party to the dispute requested in writing an amicable settlement, the investor shall be entitled to submit the dispute, at his choice, for settlement to:
>
> (a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965;
>
> (b) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the

[1] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia, dated 29 January 2002 (Claimants' Exhibit No. 1).
[2] Foreign Investment Law, published in the Official Gazette of Montenegro, no. 18/11, dated 1 April 2011 (Claimants' Exhibit No. 2) (together with an English translation retrieved on 7 July 2012 from http://www.mipa.co.me/page.php?id=32).
[3] Exchange of notes between the Embassy of the Kingdom of the Netherlands in Belgrade and the Ministry of Foreign Affairs of the Republic of Montenegro, dated 15 November 2006 and 18 January 2007 respectively (Claimants' Exhibit No. 3).

> Administration of Conciliation, Arbitration and Fact-Finding Proceedings (Additional Facility Rules), if one of the Contracting Parties is not a Contracting State to the Convention as mentioned in paragraph (a) of this Article;"

11. On 4 August 2011 the Claimants notified the Respondent of the dispute.[4] The matters in dispute were further presented, *inter alia*, in a meeting with the Respondent's representatives held in Podgorica, Montenegro, on 7 September 2011. Despite the Claimants' repeated attempts, the Respondent failed to enter into amicable settlement negotiations.

12. The three month period specified in the *chapeau* of Article 9(2) of the BIT expired on 4 November 2011.

13. The Kingdom of the Netherlands has ratified the ICSID Convention and is thus a State party to the Convention. As the Respondent is not a State party to the ICSID Convention,[5] the Claimants have opted to submit this dispute to arbitration under the Additional Facility Rules.

14. Article 9(3)-(4) of the BIT provides as follows:

> "(3) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international conciliation or arbitration in accordance with the provisions of this Article.
>
> (4) The consent given by the Contracting Party in paragraph (3) of this Article, together with either the written submission of the dispute to resolution by the investor or the investor's advance written consent to such submission, shall constitute the written consent and the written agreement of the parties to the dispute to its submission for settlement for the purposes of Chapter II of the ICSID Convention, the ICSID Additional Facility Rules ... and Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention')."

[4] Notice of Submission of Dispute to Amicable Settlement Negotiations, dated 4 August 2011 (Claimants' Exhibit No. 4).

[5] On 19 July 2012 the Republic of Montenegro signed, but did not ratify, the ICSID Convention. As such, the ICSID Convention has not yet entered into force for the Republic of Montenegro.

15. This unilateral offer by the Respondent to arbitrate in accordance with the Additional Facility Rules was duly accepted by the Claimants in their Application to Access the Additional Facility dated 7 November 2011.

16. *The 2011 Montenegrin Foreign Investment Law:* Article 30 of the 2011 Montenegrin Foreign Investment Law provides as follows:

> "Any dispute arising from foreign investment shall be resolved by the competent court in Montenegro, unless the decision on establishment i.e. the agreement on investment stipulates that such disputes are settled before domestic or foreign arbitration, in compliance with international conventions.
>
> If a contracting party is the Government, then until the Convention of the International Center for the Settlement of Investment Disputes (ICSID Convention) is signed, the disputes arising from foreign investments shall be resolved before domestic or foreign arbitration in accordance with the additional rules of the ICSID Convention for countries that are not signatories to the ICSID Convention.
>
> If the contracting parties are domestic or foreign legal entities and natural persons, then disputes arising from foreign investments shall be resolved before domestic or international arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Rules."[6]

17. Article 30, paragraph 2, of the 2011 Montenegrin Foreign Investment Law constitutes a unilateral offer by the Respondent to arbitrate in accordance with the Additional Facility Rules. This offer was duly accepted by the Claimants on 12 June 2012, in their Second Application to Access the ICSID Additional Facility.

18. *Consolidation:* As detailed below, the ICSID Secretary-General has given her permission to the Claimants to access the ICSID Additional Facility in relation to both the BIT and the 2011 Montenegrin Foreign Investment Law. The Claimants seek to consolidate these two proceedings in a single arbitration, and invite the Respondent's consent in this regard.

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[6] Article 30(2) of the 2011 Montenegrin Foreign Investment Law is identical to the earlier Article 39(2) of the 2000 Montenegrin Foreign Investment Law, published in the Official Gazette of the Republic of Montenegro no. 52/2000 dated 3 November 2000.

3.2. The Claimants as Investors

19. The Claimants are investors within the terms of both:

(1) Article 1(b)(ii) of the BIT, being legal persons (companies) constituted under the laws of The Netherlands and Curaçao (formerly part of the Netherlands Antilles); and

(2) Article 2 of the 2011 Montenegrin Foreign Investment Law, which provides that a "*foreign investor*" includes, *inter alia*, a "*foreign legal entity*".

3.3. The Claimants' Investments in the Republic of Montenegro

20. The Claimants' investments in the Republic of Montenegro fall within the definition of an "*investment*" under both:

(1) Article 1(a) of the BIT, which provides (*inter alia*) that "*the term 'investments' means every kind of asset and more particularly, though not exclusively ... (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures; ... (iii) claims to money, to other assets or to any performance having an economic value; ... (v) rights granted under public law or under contract, ...*";

(2) Article 3 of the 2011 Montenegrin Foreign Investment Law, which provides that "*for the purpose of this Law, a foreign investment shall be a pecuniary investment, investment in goods, services, proprietary rights, and securities, in accordance with the law.*"

21. The Claimants have made investments in the Republic of Montenegro. These include (without limitation):

(1) MNSS' majority shareholding in the company Zeljezara Niksic ("**ZN**"), a steel production company located in Niksic, Montenegro, which was acquired by virtue of an agreement of assignment concluded with the Respondent; and

(2) significant loan investments advanced by both MNSS and RCA to ZN in order to finance its operations and investment programme, as part of ZN's continuing financing arrangements.

22. Each of these investments is detailed in turn below.

23. *Shareholding in ZN:* MNSS' shareholding in ZN was acquired as follows:

(1) On 8 November 2006, the Government of Montenegro sold its majority stake of the shares in ZN to MN Specialty Steels Limited ("**MN**") pursuant to a Privatisation Contract (the "**SPA**").[7] MN is a special-purpose vehicle backed by individual investors from the UK and Australia, and is incorporated in England. The parties to the SPA included the "*Government of the Republic of Montenegro, the Republic of Montenegro*", and MN.

(2) Thereafter, on 28 February 2008, MN assigned and transferred its rights and obligations under the SPA to MNSS, and agreed to transfer its shares in ZN to MNSS, pursuant to an Assignment Agreement entered into between MN, MNSS, and the Government of Montenegro (the "**Assignment Agreement**").[8]

24. *Investments in ZN:* MNSS subsequently advanced loans to ZN (one of which was assigned later to RCA) pursuant to the following five loan facility agreements:

(1) A Loan Facility Agreement between MNSS and ZN dated 26 September 2008 (the "**First Loan Agreement**") in the sum of €50 million.[9]

On 30 October 2009, MNSS assigned and sold to RCA its outstanding loan claims against ZN under the First Loan Agreement (which at that time comprised an outstanding principal amount of €44,597,329.22,

[7] Agreement for the Sale and Purchase of 66,7008% of Shares in Zeljezara Nikisc A.D., by Public Tender, dated 8 November 2006 (Claimants' Exhibit No. 5).
[8] Assignment Agreement, dated 28 February 2008 (Claimants' Exhibit No. 6).
[9] Loan Facility Agreement, dated 26 September 2008 (Claimants' Exhibit No. 7).

plus outstanding interest).[10] A Notice of Assignment was sent to ZN on 30 October 2009.

The repayment date under the First Loan Agreement was subsequently extended from 31 December 2012 to 31 December 2014 pursuant to an agreement between RCA and ZN dated 19 March 2010 "*in order to enable [ZN] to complete a restructuring and refinancing plan (which plan was approved by the Government of Montenegro on or about February 3, 2010)*".[11] The repayment date for the principal and outstanding interest was then further extended to 30 June 2015 pursuant to an Amendment Agreement between RCA and ZN dated 28 June 2010.[12]

The funds disbursed under the First Loan Agreement in the amount of €44,597,329.22, together with interest of €2,368,185.15,[13] were claimed, initially unsuccessfully,[14] by RCA against the bankruptcy estate of ZN. Although the claims were subsequently accepted as valid claims against the bankruptcy estate, the funds remain wholly unrecovered following the sale of ZN's assets.

(2) MNSS and ZN concluded a second Loan Facility on 22 July 2009 (the "**Second Loan Agreement**") for a loan amount of €10 million with the funds to be repaid by 31 December 2013.[15] This Second Loan Facility was then replaced and superseded by a new Loan Facility Agreement concluded between MNSS and ZN dated 19 March 2010 (the "**Second Revised Loan Agreement**") in the same amount of €10 million.[16] The loan pursuant to this Second Revised Loan Agreement was interest bearing, at a rate of 9.5 per cent per annum, payable quarterly, with the

[10] Assignment Agreement, dated 30 October 2009 (Claimants' Exhibit No. 8).
[11] Loan Facility Agreement, dated 19 March 2010 (Claimants' Exhibit No. 9).
[12] Amendment Agreement, dated 28 June 2010 (Claimants' Exhibit No. 10).
[13] As of 15 April 2011, the date of the opening of the bankruptcy.
[14] Following the bankruptcy administrator's rejection of the claims, the Claimants obtained an order from the English High Court confirming that the amounts under the First Loan Agreement are due and owing by ZN to RCA (Claimants' Exhibit No. 11). The costs of the English court proceedings have not yet been recovered from ZN.
[15] €10,000,000 Loan Facility Agreement, dated 22 July 2009 (Claimants' Exhibit No. 12).
[16] €10,000,000 Loan Facility Agreement, dated 19 March 2010 (Claimants' Exhibit No. 13).

principal to be repaid initially by 31 December 2014. This repayment date was subsequently extended to 30 June 2015 pursuant to an Amendment Agreement between MNSS and ZN dated 29 April 2010.[17]

This loan was fully disbursed, and a total amount of €10,273,583.33 (which includes both the principal and interest) was claimed, initially unsuccessfully,[18] by MNSS against the bankruptcy estate of ZN. Although the claims were subsequently accepted as valid claims against in the bankruptcy estate, the funds remain wholly unrecovered following the sale of ZN's assets.

(3) MNSS and ZN B.V., a wholly-owned subsidiary of ZN, concluded a third Loan Facility on 22 December 2009 (the "**Third Loan Agreement**") for an amount of €3 million.[19] ZN guaranteed this loan,[20] which was interest bearing at a rate of 5 per cent per annum, to be repaid by 31 December 2012. The borrower drew down €500,000 pursuant to this Third Loan Agreement, and this amount was claimed, initially unsuccessfully, by MNSS against the bankruptcy estate of ZN. Although the claims were subsequently accepted as valid claims against the bankruptcy estate, the funds remain wholly unrecovered following the sale of ZN's assets.

(4) MNSS and ZN concluded a fourth Loan Facility on 26 January 2011 (the "**Fourth Loan Agreement**") for an amount of €200,000.[21] The principal amount actually disbursed to ZN under this facility was €257,198.15 (i.e. an additional amount of €57,198.15). The loan was interest bearing at a rate of 5 per cent per annum, and the loan and accrued interest was to be repaid in three short term tranches. A total

[17] Amendment Agreement, dated 29 April 2010 (Claimants' Exhibit No. 14).
[18] Following the bankruptcy administrator's rejection of the claims, the Claimants obtained an order from the English High Court confirming that the amounts under the Second Loan Agreement are due and owing by ZN to MNSS (Claimants' Exhibit No. 11). The costs of the English court proceedings have not yet been recovered from ZN.
[19] Loan Facility Agreement, dated 22 December 2009 (Claimants' Exhibit No. 15).
[20] Guarantee, dated 17 December 2009 (Claimants' Exhibit No. 16).
[21] Loan Facility Agreement, dated 26 January 2011 (Claimants' Exhibit No. 17).

amount of €259,799.36 (including interest) was claimed, initially unsuccessfully, by MNSS against the bankruptcy estate of ZN. Although the claims were subsequently accepted as valid claims against the bankruptcy estate, the funds remain wholly unrecovered following the sale of ZN's assets.

(5) MNSS and Novi Celik D.O.O., a wholly owned subsidiary of ZN, concluded a fifth Loan Facility on 26 January 2011 for an amount of €550,000 (the "**Fifth Loan Agreement**").[22] This loan was interest bearing at a rate of 5 per cent per annum, and the loan was to be repaid in three tranches in February and March 2011. A total amount of €475,000 (including interest) was claimed, initially unsuccessfully, by MNSS against the bankruptcy estate of ZN. Although the claims were subsequently accepted as valid claims against the bankruptcy estate, the funds remain wholly unrecovered following the sale of ZN's assets.

4. APPROVAL BY THE ICSID SECRETARY-GENERAL ALLOWING ACCESS BY THE CLAIMANTS TO THE ICSID ADDITIONAL FACILITY IN RELATION TO THE PRESENT DISPUTE

(Additional Facility Rules, Art. 3(1)(c))

25. The Claimants have made two applications to the ICSID Secretary-General requesting her consent to access the ICSID Additional Facility pursuant to Article 4(2) of the Additional Facility Rules, and on both occasions this consent was granted:

(1) On 5 December 2011, the Secretary-General approved access to the ICSID Additional Facility in respect of arbitration proceedings to be commenced by the Claimants against the Respondent pursuant to the BIT. The Claimants' claims under the BIT are described in outline in Section 5.1 below.

[22] Loan Agreement, dated 26 January 2011 (Claimants' Exhibit No. 18).

(2) On 27 July 2012, the Secretary-General approved access to the ICSID Additional Facility in respect of arbitration proceedings to be commenced by the Claimants against the Respondent pursuant to Article 30, second paragraph, of the 2011 Montenegrin Foreign Investment Law. The Claimants' claims under this statute are described in outline in Section 5.2 below.

5. OUTLINE OF THE NATURE OF THE DISPUTE

(Additional Facility Rules, Art. 3(1)(d))

26. Soon after the conclusion of the Assignment Agreement, the global recession started to affect ZN's business. The position was made worse for MNSS when, due to the liquidity problems in the local banking system, it was unable to access its own funds deposited in Montenegro. MNSS complained both to the Central Bank of Montenegro and to the Government of Montenegro, but its own funds were still not made available for its use, notwithstanding that all bank deposits in the country were guaranteed by law.

27. The new market circumstances required ZN to implement urgent measures such as financial and operational restructuring; seeking of additional funding; staff reductions above the limit envisaged in the SPA; and a streamlining of the company's operations. However, by reason of the Respondent's acts and omissions (as outlined below), ZN could not adopt the requisite measures to keep the business afloat and was driven into bankruptcy.

28. On 15 April 2011, following a petition for bankruptcy filed by the employees of ZN on the basis of unpaid wages, ZN entered into bankruptcy proceedings. The Montenegrin Bankruptcy Court subsequently appointed a Bankruptcy Administrator. The acts of the Bankruptcy Administrator and the Montenegrin Courts following the opening of the bankruptcy procedure, only served to aggravate the Claimants' losses, and prevented the Claimants from regaining control over, and receiving the economic benefits from, their investments.

29. On 30 April 2012, a sale of the property of ZN to Toscelik, a Turkish steel investor took place, for €15.1 million. This was facilitated by the Respondent. The sale having now completed, the distribution of the proceeds to the first class creditors has commenced. It appears almost certain that there will be no proceeds left for distribution to the Claimants.

30. The Claimants' claims as creditors represented ca. 50% of all of the creditors' claims against the bankruptcy estate of ZN, but as a result of the Respondent's actions and omissions, the Claimants' have not recovered a single Euro of their investments.

31. The dispute between the parties arises from the treatment accorded to the Claimants by the Respondent, including (without limitation):

(1) the refusal by the Respondent to permit the taking and implementation by ZN of proposed business decisions that were required for the continuing viability of ZN, these refusals having caused the business to go into bankruptcy;

(2) the treatment of the Claimants by (*inter alia*) the Government of Montenegro; the Montenegrin Bankruptcy Administrator; the Montenegrin Courts; and the Central Bank of Montenegro; and

(3) the failure by the Respondent to provide protection for the investments, with the consequence that ZN management was unable to operate the plant.

32. By its actions and omissions, the Respondent has breached its obligations owed to the Claimants under international law, including the violation of rights conferred by Articles 3, 5(1) and 6 of the BIT, and Article 12 of the 2011 Montenegrin Foreign Investment Law.

33. The nature of these breaches is further described below.

Reservation

34. The following description is by way of broad outline only, for the limited purposes of Article 3(1)(d) of the Additional Facility Rules. The Claimants' full case will be set out in due course, and the Claimants reserve all their rights to modify their claims, and add further claims, in the course of the proceedings.

5.1. Outline of Breaches of the BIT

35. By its acts and omissions, the Respondent has breached (*inter alia*): the right to fair and equitable treatment (Article 3(1) of the BIT); the right to operate, manage, and enjoy investments without being subjected to unreasonable or discriminatory measures (Article 3(1) of the BIT); the right to be treated according to the Most Favoured Nation Treatment standard (Article 3(2) of the BIT); the right to enjoy the most constant protection and security (Article 3(1) of the BIT); the right to the free transfer of payments related to their investments (Article 5 of the BIT); the right for any agreements to be observed pursuant to the (so-called) "umbrella clause" (Article 3(4) of the BIT); and guarantees with respect to expropriation (Article 6(1)-(2) of the BIT).

36. *Right to fair and equitable treatment*: Article 3(1) of the BIT provides in part as follows:

> "1) Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party ..."

37. The Respondent has acted in breach of this provision. By way of example, and without limitation:

(1) The Respondent failed to protect the Claimants' legitimate expectations relating to their investments. For example, the expectation derived from Article 5.1.1 of the Assignment Agreement, which provided that ZN "*shall*" be granted approval by the Respondent for changes to ZN's business plan if such changes were required by market conditions:

> "5.1.1 The Investment Programme specified in the Business Plan (as set out in Annex 7 to the SPA), in respect of amounts and structure by investment years, may be amended. **The amendments to be proposed by the Assignee shall be approved by the Sellers provided that such amendments are reasonable as justified by the Assignee's analysis of the technological process, market conditions or timetable for equipment supply and such analysis will be provided together with the proposed amendment by the Assignee to the Sellers.** The Sellers agree that neither the amended terms of the SPA nor any deviations from the Investment Programme as set out in Annex 7 to the SPA during the period prior to the amendment of the SPA, shall constitute a breach of the SPA and the Sellers shall have no cause to terminate the SPA as a result thereof."
>
> (Emphasis added.)

This notwithstanding, the Respondent subsequently refused to allow such reasonable amendments to be made.

(2) The Respondent failed to act transparently in its dealings with the Claimants and their investments. For example, the Respondent agreed that ZN could reduce its staff headcount. However, during an extremely sensitive period of negotiations on employee levels between ZN and the Trade Union for ZN's employees, the Respondent advanced an unsecured and interest-free loan of €1.25 million to the Trade Union for the express purpose of paying the salaries and annual bonuses of ZN's employees. This was done without the consent or knowledge of ZN, and undermined ZN's bargaining position with the Trade Union and the ability to operate its business. As an email from the Claimants to the Respondent dated 11 March 2011 stated:

> "the unions have meetings with the Government almost every day – not once has MNSS and/or ZN been invited. In fact, ZN's role appears to have been simplified to a 3rd party responsible for paying salaries. The only 'feedback' that we get from the Government is through unions – 'Government will pay us and you will go.' By talking to the unions, the Government is effectively supporting the union's stand of disobedience and promoting mostly incorrect, populist and

nationalistic dogmas which result in threats to the safety of ZN's management and staff."

The Respondent in effect contributed to the exacerbation of the relationship between ZN and the Trade Union when in March 2011, shortly before the commencement of the bankruptcy and without the knowledge of ZN and/or MNSS, the Respondent paid an additional €1.5 million to ZN's Trade Union.

Moreover, there was a marked lack of transparency by the Respondent in relation to the key issue of securing third-party funding for ZN. This was evidenced in part by the fact that the representatives of the Respondent on ZN's Board voted against receiving a critical €20 million in third party funding that had been secured by MNSS - without any explanation by the Respondent.

(3) The Respondent engaged in arbitrary and discriminatory acts or omissions in relation to the Claimants' operation of their investment. For example:

i. the Respondent refused to allow ZN to dismantle and scrap its obsolete plant equipment, which would have generated much needed short-term working capital for ZN – and yet, less than a year later, once ZN had entered bankruptcy, the Respondent allowed exactly the same thing to be done (albeit not then by ZN); and

ii. the Respondent unfairly discriminated against the Claimants when compared to the treatment afforded by it to the Russian foreign investor – Oleg Deripaska's En+ Group – who purchased a majority shareholding in the privatised Kombinat Aluminijuma Podgorica AD ("**KAP**") in 2005. For example, the Respondent allowed KAP – pursuant to a restructuring agreement concluded with the Respondent in October 2010 – to reduce the number of employees from approximately 4000 to approximately 1300 in order to help the majority owner "*to*

overcome the problems brought by the economic downturn". This is to be contrasted with the persistent refusal by the Respondent to allow the necessary reduction in the number of employees in ZN, as explained below.

(4) Several of the Respondent's decisions – being discriminatory and prejudicial in nature against the Claimants – constituted a denial of justice. For example, the Bankruptcy Administrator made clear public statements that he was acting for the benefit of "[*ZN*] *and Niksic*" rather than for the benefit of all creditors (which included the Claimants) as was his legal responsibility. The Bankruptcy Administrator gave effect to this discriminatory intent when deciding to reject out of hand the claims of both Claimants for ca. €60 million, comprising, *inter alia*, monies owing under loan agreements made between the Claimants and ZN. This is to be contrasted with the Bankruptcy Administrator's acceptance of dubious claims by the Respondent against the bankruptcy estate for (i) a loan of €1.25 million advanced to the Trade Union, despite it being inappropriate for ZN to owe any liability for a loan that was made unilaterally by the Respondent, and for which the Respondent had provided contemporaneous written assurances to ZN and MNSS that the same would not constitute a liability of ZN and/or MNSS; and (ii) a claim for €1.6 million, despite this claim having been subrogated to MNSS by way of a share transfer of 25% of MNSS's shares to the Respondent. These claims by the Respondent had no legal basis whatsoever: indeed they were advanced contrary to the Respondent's prior express acknowledgement that ZN would not be liable for any such claims.

(5) The Respondent failed to act in good faith towards the Claimants. The Claimants rely (*inter alia*) in this regard on the Respondent's interference with their right to operate, manage, and enjoy their investments (examples of such acts being set out below).

38. *Right to operate, manage, and enjoy investments*: Article 3(1) of the BIT provides in part as follows:

> "1) Each Contracting Party ... shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors ..."

39. The Respondent has acted in breach of this provision. By way of example, and without limitation:

(1) The Respondent refused to allow crucial amendments to be made by ZN to its business plan as specifically envisaged by Article 5.1.1 of the Assignment Agreement (set out above), despite the collapse in the global steel market and the consequential decline in the financial performance and viability of ZN. For example, it became evident to MNSS that it would be necessary for ZN to take a number of essential business restructuring measures, the most pressing of which was the reduction of the chronically overstaffed workforce of the steel mill. Despite repeated requests based on reasoned explanations, the Respondent refused for several years to agree to a staff reduction below 1200 employees and, moreover, refused at all to allow involuntary redundancies. Indeed the bankruptcy process has proven that the Claimants' repeated requests for an appropriate staff reduction were justified. As Minister Kavaric stated in an Extraordinary Session of the Montenegrin Parliament on 21 December 2011, in response to a question on ZN and MNSS:

> "Since initiation of bankruptcy until today, Zeljezara sold over 50 million Euros, if not more, abroad. ... If under bankruptcy without one cent of investments it managed to do something like that, **now with a reduced number of employees, we believe that the potential exists**."
>
> (Emphasis added.)

(2) The Respondent simply refused, unreasonably, to allow ZN to scrap certain obsolete machinery, despite this being necessary in order to generate crucial cash flow for the company;

(3) The Respondent refused to allow several of ZN's key creditors the option to convert their debt into equity. This exacerbated considerably ZN's position, since being able to do this would have eased the burden on ZN's balance sheet, reduced its financing costs, and enhanced its ability to raise working capital funding and any other funding to support the business;

(4) The Respondent refused to support publicly ZN's Restructuring Plan which damaged further the Claimants' investments and weakened ZN's negotiating position with the Trade Union at a critical juncture. For example, ZN wrote a letter to the Respondent on 30 November 2010 which warned that:

> "any delay or failure to implement the Restructuring Plan will result in Željezara Nikšić defaulting under the loans provided by Credit Suisse and MNSS B.V. ... [and] would be extremely detrimental to Željezara Nikšić and the economy of Montenegro".

It continued that:

> "unless the Government publicly supports the Restructuring Plan that it has already approved and assists in preventing the illegal actions of certain members of the unions who act as a 'state within a state' and refuse to accept the authority of law and the Board of Directors, it will be impossible to rejuvenate ZN".

The Respondent simply refused to reply to this letter and declare its public support for the Restructuring Plan.

(5) The Respondent's nominees on ZN's Board voted against the adoption of the essential proposed Act of Systematization.

On 14 December 2010, MNSS gave a presentation to the Respondent setting out the scale of the issues faced by ZN in relation to, *inter alia*, ZN's current cash flow problems; the restrictive nature of the employment commitments under the SPA; the militant nature of the Trade Union in negotiations; and MNSS' inability to raise further third-

party funding as a result of these factors. The Respondent was previously consulted concerning the strategy on staff reduction as set out in the presentation. During the meeting, MNSS and the Respondent agreed to an approach entitled '3B', which involved, *inter alia*, the following:

i. The SPA being amended so that the expiry date for employment-level commitments was to be changed to 12 January 2011;

ii. MNSS and other third parties to invest not less than €20 million of new funding into ZN;

iii. ZN to implement a Systematization Programme reducing combined headcount from ca. 1485 to ca. 600 with those employees being made redundant to receive €8,000 each from ZN (at a cost of €7.9 million to ZN), with the balance of any redundancy payments due to employees to be paid by the Respondent.

Despite having agreed in the meeting to a potential staff reduction to ca. 600 employees, the Respondent issued a Press Release the next day which unilaterally announced that the reductions would only be to a level of ca. 700 employees. This unilateral statement by the Respondent created a false expectation for ZN's workers and caused problems for ZN in its subsequent dealings with the Trade Union, as foreshadowed in an email from the Claimants to the Respondent dated 15 December 2010.

The adoption by ZN of this crucial Systematization Programme had earlier been put to the ZN Board, and the minutes of the ZN Board Meeting held on 20 October 2010 record as follows:

> "**G. Nikolic and D. Darmanovic [the two representatives of the Respondent]** supported the plan of activities [for the restructuring of ZN's staff base], but they **voted against adopting the [Systematization Programme** which could ultimately have led to involuntary redundancies] because it

envisages a lower number of people than according to the Annex of the SPA". (Emphasis added.)

In the matter concerning the restructuring of the workforce of an affiliate of ZN (Radvent AD), the Respondent's nominees to ZN's Board again voted against a similar systematization proposal – this resulted in an email being sent by ZN to the Respondent on 17 February 2011. The Respondent in an email reply supported the idea of systematization, but it was in the event too late to reverse the wrong message that had been sent to the employees, the Trade Union, and management of ZN by the Respondent's nominee directors voting against the proposals. Following the bankruptcy of ZN, Radvent was placed into bankruptcy and the Respondent offered a redundancy package to the 183 workers of this ZN affiliate.

(6) The Respondent refused to allow ZN to secure essential third party funding. ZN made a presentation to the Respondent on 24 February 2011 regarding its proposal to raise €20 million by way of third party funding in line with alternative "3B", which had already been approved by the Respondent in December 2010, as explained above. The presentation made clear that there was a significant risk that ZN would fall into bankruptcy if new funding was not secured swiftly. A potential third-party funder was secured by ZN in early March 2011, at which time a draft subscription agreement was sent to the Minister of Economy of the Respondent under cover of a letter dated 24 February 2011, with a follow-up letter sent to the Prime Minister of the Respondent on 3 March 2011. ZN followed this up on 11 March 2011 seeking a response by the Respondent, but no response was forthcoming. Also, the potential third party funder unsuccessfully sought, through MNSS, to obtain the Respondent's support in relation to the proposed conditions of investment. When the Respondent finally responded to MNSS on 17 March 2011, it stated that it did not consent to such a subscription agreement.

Moreover, the two representatives of the Respondent on the ZN Board voted against the investment of €20 million that had been negotiated by ZN and the Claimants on the basis that the investment agreement first needed to be approved by the Respondent.

The Respondent's actions deliberately frustrated ZN's ability to restructure its capital base, and this contributed, together with the Respondent's other actions and omissions detailed in this Request, to ZN being forced into bankruptcy.

(7) The Respondent refused to allow ZN to make necessary payments from its own bank account held with Erste Bank in relation to operating expenses, other than those related to the payment of salaries, during the period 22 March – 5 April 2011. The refusals by the Respondent to permit ZN to make payments from its own bank accounts caused ZN serious difficulties in relation to its ability to continue its trading activities and to manage its own business. This position is, moreover, in sharp contrast to the position following the bankruptcy of ZN on 15 April 2011. The Bankruptcy Administrator has, since ZN's bankruptcy, freely used the funds held in ZN's account, which include the loan from MNSS, to cover the expenses of the bankruptcy estate.

(8) The Respondent's representatives on ZN's Board voted against ZN accepting a required further loan from MNSS. On 17 February 2011, the ZN Board of Directors considered a proposed resolution that would have allowed MNSS to provide short-term loans to ZN in order for key suppliers to be paid. The two representatives of the Respondent on the Board voted against the resolution, and the resolution was therefore not approved. This constituted a very serious impediment to the management, further necessary capitalization, and running of the Claimants' investments. Indeed a letter from MNSS to the Respondent dated 28 February 2011 asked the Respondent how MNSS:

> "is supposed to advance funding to ZN – it cannot do so via equity increases and its ability to advance funding via loans is effectively blocked when the Government's representatives on

> the Board of ZN vote against the resolutions that are required to facilitate this ... ."

(9) The Respondent engaged in private meetings with the ZN Trade Union and gave a large loan to the Trade Union. As previously explained above, on 20 December 2010, just one week after the Respondent had agreed to implement the option "3B" to reduce ZN's staff headcount and introduce other measures, and during an extremely sensitive period in which negotiations were continuing between ZN and the Trade Union, the Respondent advanced an unsecured and interest-free loan of €1.25 million to the Trade Union. This was done without the consent or knowledge of ZN. It completely undermined ZN's bargaining position with the Trade Union and its ability to manage the company. As the letter from ZN to the Respondent dated 20 January 2011 provides:

> "... I would like to get a clear and unequivocal answer from you as to whether the Government intends to transfer any further funds to the union for the purposes of salary payments (as was the case in late December 2010) as we understand that the Government is considering making an additional transfer.
>
> Another such transfer would severely undermine the ability of ZN management to manage the factory: the Union would obtain more power and further labour disobedience would affect the planned start of production, with highly negative financial consequences for the company. I therefore strongly urge the Government to express its support for the management and not to make another transfer of funds to the union. Payment or funds would be contrary to basic management rights and rules in any industrial site and would be an unprecedented step taken by the Government towards a private company in Montenegro."

The Respondent failed to give any assurance – despite being asked – that it would abstain from further undue interference in ZN's business and its support of the trade unions against the management of ZN. In a letter from ZN to the Minister of Economy of the Respondent dated 9

March 2011, the detrimental effect of such intervention by the Respondent was detailed by ZN as follows:

> "I write in relation to the strong rumours that we have been hearing that the Government has agreed to make a loan to the Union of Zeljezara Niksic a.d. ("Zeljezara"), either directly or indirectly, to facilitate the payment of salaries to Zeljezara's employees.
>
> **We would ask that, if these rumours are correct, the Government urgently reconsider its intended course of action, as the funding by the Government of the payment of salaries to Zeljezara's employees would seriously undermine and prejudice the ability of Zeljezara's management to manage and operate business. It is the legal right of Zeljezara's management to manage and operate Zeljezara's business, and any undermining of this right by the Government results in damage to both Zeljezara and its various stakeholders (including, for example, its shareholders and creditors).**
>
> We note that Zeljezara's management has, on numerous occasions over the past ca. three weeks, offered to pay 50% of one monthly salary to employees on March 4, 2011, with the remaining 50% paid by March 11, provided that the Union agreed not to commence its strike action on March 1 and allowed both production and deliveries to customers to continue until at least March 4. The Union has on each occasion turned down this offer and decided instead to commence (or continue with) its strike.
>
> The Union's actions are hurting not only Zeljezara's employees but also its customers and its suppliers, as Zeljezara needs to be able to produce what customers have ordered and to deliver the finished products to customers in order to generate cash to pay both salaries and suppliers.
>
> The fact that the Government is (if these rumours are correct) funding and facilitating the payment of salaries means that, inter alia:
>
> - the Union can 'hold out' and resist the proposals of Zeljezara's management, and continue with strike and other protest actions, for a longer period of time. This cuts across management's efforts to (i) get employees to continue/recommence production and (ii) get the Union

and employees to understand that Zeljezara cannot survive unless its headcount is reduced dramatically, to ca. 600 employees, and that such reductions (accompanied by what management believes is a very fair social programme) are both necessary and in all parties' best interests;

- the Union is being given a message that the Government will 'support' it in its 'battle' against management. This encourages the Union to be more bold and aggressive in its protest actions and to make greater demands of Zeljezara and its management; and
- Zeljezara's discussions with new investors could well be damaged, as the new investors are likely to be concerned that the Government can interfere in the affairs of Zeljezara, without consulting with Zeljezara's management.

To the extent that the Government wishes to assist Zeljezara or its employees at the current time, we would suggest that the Government rather provide a loan directly to Zeljezara on appropriate repayment terms, assist in extending payment terms for Zeljezara's input VAT, and/or provide other forms of assistance to Zeljezara after due consultation with me."

(Emphasis added.)

Accordingly, ZN had made clear to the Respondent exactly how its provision of funds to the Trade Union would very significantly undermine and prejudice the ability of ZN to manage and operate its business, and as such ZN requested that the Respondent not provide any funds directly to the Trade Union. Despite this, the Respondent shortly thereafter went on to give an additional €1.5 million in March 2011 to ZN's Trade Union without the knowledge of ZN, which completely undermined ZN's management of its business. Moreover, this undermining by the Respondent of ZN's management of its business was exacerbated by the Respondent's numerous meetings with the unions – without the involvement of ZN/MNSS – between September 2010 and April 2011, in which, based on press reports, redundancy levels were discussed. The serious difficulties which these

meetings caused ZN were communicated to the Respondent, but no response was forthcoming.

40. *Right to Most Favoured Nation Treatment*: Article 3(2) of the BIT provides in part as follows:

> "2) ... each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded ... to investments of investors of any third State, whichever is more favourable to the investor concerned."

41. The Respondent has acted in breach of this provision. By way of example, and without limitation, the Respondent has acted in a discriminatory manner, given the treatment afforded by it to the Russian foreign investor – Oleg Deripaska's En+ Group – who purchased a majority shareholding in the privatised Kombinat Aluminijuma Podgorica AD in 2005. Several of these discriminatory acts by the Respondent have already been set out above.

42. *Right to enjoy the most constant protection and security*: Article 3(1) of the BIT provides in part as follows:

> "1) ... Each Contracting Party shall accord to such investments the most constant protection and security."

43. The Respondent has acted in breach of this provision. By way of example, and without limitation, on 27 September 2010, the representatives of the Claimants became aware that a protest would be staged at ZN's factory the next day by the employees of ZN, and were warned by the Human Resources Manager that there would be a risk to their personal safety if they remained on the premises. As a result, ZN emailed the Respondent (including several relevant Government Ministers) on 27 September asking for the police:

> "to be on site to protect the premises and personnel. There are +100 foreign workers on site ... and the consequences of an invasion may be very negative for all concerned."

44. No response was ever received to this email. Subsequently, on 28 September 2010 a police car turned up at the factory as a result of the notification to the

police directly by ZN. Three officers only were in the vehicle, the most senior of whom was not even in uniform, but was dressed in a t-shirt. These officers told management that they could offer no protection and advised the management to leave. During the demonstration on 28 September 2010, Trade Union leaders interrupted a meeting of ZN's senior management and instructed them to leave ZN's premises under threat of physical violence. Due to lack of police protection and considering the imminent threat posed by a protesting crowd of ca. 800-1000 employees, the management was left with no choice but to leave the premises. Management attempted to return to ZN premises, but was repeatedly denied access by the union leaders. Management was unable to return to the factory until the following Monday, 4 October 2010.

45. On 13 December 2010, a further employee protest was held at ZN's premises, resulting in ZN's Executive Director being physically assaulted. This incident was reported in an email sent to the Respondent on 13 December 2010 which provides:

> "We advise that the Union of ZN, together with ZN's employees under the Union's direction, a short while ago stormed and invaded ZN's management building. Despite having prior knowledge of the Union strike action and protest, there was no police presence at ZN's premises. ZN's security personnel were unable to hold back the Union and employees. The Executive Director of ZN was physically assaulted by the workers and had no alternative other than to leave the premises – still under assault as he made his way out [of] the building."

46. This incident was further reported in an email sent from the President of ZN's Board of Directors to the Prime Minister of the Respondent, and other relevant Ministers, dated 13 December 2010 in which it was made clear that "*[i]t is impossible for ZN to operate or for anybody to invest further in Montenegro under these circumstances.*"

47. Moreover, in a letter from ZN's Executive Director to the Minister of Economy in the Respondent dated 15 December 2010, it was stated that

> "The Union and a number of employees continue to occupy ZN's managerial building and I have been advised by our security team that

conditions remain too volatile to allow me to try to return to ZN or to access my office. It is unfortunately not yet safe for me or for any of the international directors of ZN to be at ZN. ... I also need to advise you that a person or persons threw stones at the windows of my home in Niksic during the course of last night. Stones were thrown at my windows at regular intervals (every two hours) throughout the night. I have reported this to the police, who have unfortunately informed me that they are unable to protect me."

48. In this same letter, ZN's Executive Director stated:

> "ZN has made considerable progress in recent months in attracting new, important customers, including some steel industry 'majors' such as Kloeckner and Stemcor. This is despite regional demand for rebar continuing to be extremely slack, and demand for quality steels in Western Europe remaining weak.
>
> ZN has however needed to cancel orders because the disruption of production caused by the Union is preventing ZN's ability to make deliveries on time. The reputational damage resulting from the Union's actions is now also affecting our ability to secure new orders. ...
>
> The Union's ongoing activity has impacted on our ability to make payments to suppliers on due dates and on suppliers' willingness to provide ZN with goods and services. Against this constraint, we are managing our relationship with suppliers to the best of our capabilities."

49. This situation was ongoing as reported by ZN in a letter dated 9 March 2011 sent to the Minister of Economy of the Respondent which provides:

> "The fact that the Union and a number of employees are becoming increasing bold – and increasingly lawless – in their protest actions is demonstrated by the fact that, over the past few days:
>
> - Mr Janko Vucinic, the Union's President, has been quoted in the press as saying that 'the workers will take over factory and I warned the Government about it'. This is (once again) a direct threat of the use of force and other illegal actions against the management team;
> - a number of members of Zeljezara's management team (in particular, the female members of the team) have received highly threatening and degrading text messages on their mobile telephones from one or more

(unidentified) employees of Zeljezara. The text messages express clear threats of harm to the members of the management team to whom they have been sent; and

- employees have cause damage to a number of Zeljezara's assets and have threatened further sabotage to Zeljezara's plant and equipment.

The last two matters have been reported to the police."

50. *Right to the free transfer of payments*: Article 5(1) of the BIT provides in part as follows:

> "Each Contracting Party shall guarantee to the investors of the other Contracting Party the free transfer of payments related to their investments. The transfers shall be made ... without restriction or delay. Such transfers include in particular though not exclusively:
> (a) capital and additional amounts to maintain or increase investments;
> (b) profits, interests, dividends and other current income;
> (c) funds in repayment of loans; ..."

51. The Respondent has acted in breach of this provision. By way of example, and without limitation, the Respondent continually refused to approve necessary payments by ZN from its own bank account held with Erste Bank in respect of operating expenses other than wages, as explained above. Moreover, the Prva Bank – which was for a significant period the bank acting for both ZN and MNSS – caused losses to be incurred by both ZN and MNSS by, *inter alia*, refusing on occasions to execute legitimate payment requests from MNSS; caused constant and long delays in the execution of legitimate payment requests from MNSS; and created a false payment document and false bank statements. These factors all contributed to ca. €25 million of MNSS' funds being effectively "trapped" in Prva Bank for a significant period, which put significant constraints on ZN and caused significant delays in the implementation of its capital investment strategy.

52. Prva Bank at that time was the largest domestically-owned Montenegrin bank, and it was approximately half-owned by the family of the then Prime Minister Milo Djukanovic. By the end of 2008, the Prime Minister's brother Aco Djukanovic was by far the largest shareholder with 46%; the Prime Minister

owned 2.86% of Prva Bank, and their sister Ana Djukanovic owned 1% of the Bank.

53. MNSS informed the Prime Minister by facsimile dated 2 December 2008 of the difficulties experienced with Prva Bank, but no response was forthcoming.

54. MNSS met with representatives of the Central Bank of Montenegro, and subsequently wrote to the Central Bank, on 13 February 2009 and requested that it take appropriate action against Prva Bank on the basis that MNSS considered it had been the victim of a fraud on the basis of the false payment confirmation issued by Prva Bank.

55. The Central Bank responded in a letter dated 16 February 2009 stating that it was not within the competence of the Central Bank to intervene in this matter, and that MNSS should commence proceedings in the Montenegrin court if it wished to pursue its claim. MNSS did commence a claim against Prva Bank in the Montenegrin courts, but this was to no avail.

56. Again MNSS tried to follow up the matter by a letter dated 16 February 2009 sent to several Ministers (including the Prime Minister of the Respondent) to outline the problems with Prva Bank, and to request intervention. And again no response was received.

57. In 2008 the Respondent moved to guarantee by law the deposits in Montenegrin banks. In addition, in December 2008 the Respondent provided €44 million liquidity support to Prva Bank. Notwithstanding these measures, Prva Bank still did not release MNSS' funds.

58. Prva's ongoing conduct led to the deterioration in relationships with suppliers; considerable delays in payments being made; a failure to implement a capital expenditure programme; a weakening of ZN's balance sheet generally; cash-flow issues; delays in payments of salaries to employees; and a general loss of business opportunity. The situation was only resolved when MNSS reluctantly agreed, on 19 June 2009, to come to an arrangement with Prva to transfer the 'trapped' funds in its investment account to pay off ZN's existing overdraft under a protocol between MNSS, Prva and ZN. The amount retained on the

account of ZN's overdraft was claimed, unsuccessfully, by MNSS against the bankruptcy estate of ZN.

59. *The "umbrella clause"*: Article 3(4) of the BIT provides as follows:

> "4) Each Contracting Party shall observe any legal obligation it may have entered into with regard to investments of investors of the other Contracting Party."

60. This provision of the BIT imposes an obligation on the Respondent to respect any obligations that it has entered into concerning any investments protected by the treaty. In the present case, by way of example, this has the consequence that the Respondent is under a treaty obligation to ensure that it respects the obligations it has undertaken relating to the investments as set out in, *inter alia*, the Assignment Agreement. As explained briefly above, the Respondent has violated the terms of Article 5.1.1 of the Assignment Agreement, and by operation of the umbrella clause this violation also constitutes a breach by the Respondent of its obligation set out in Article 3(4) of the BIT.

61. *Any expropriation must be for a lawful purpose and must be carried out lawfully*: Article 6 of the BIT provides as follows:

> "1. Investments by investors of either Contracting Party shall not be nationalized, expropriated or subjected to any other measure having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except where expropriation is:
> (a) for a purpose which is in the public interest;
> (b) carried out under due process of law;
> (c) non-discriminatory, and
> (d) against prompt, adequate and effective compensation, which shall be effected without delay.
>
> Such compensation shall correspond to the fair market value of the investment expropriated immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

> The compensation shall include interest at a normal commercial rate until the date of payment and shall be freely transferable without delay.
>
> 2. The investor affected shall have a right to prompt review, under the laws or regulations of the Contracting Party making the expropriation, by a judicial or other competent and independent authority of that Contracting Party, of his or its case, of the valuation of his or its investment and of the payment of compensation in accordance with the principles set out in this Agreement."

62. The Respondent has by its acts and omissions deprived the Claimants of the economic benefit of their investments on a permanent basis, including by causing a chain of events that pushed ZN into bankruptcy and by preventing the Claimants from regaining control over their investments. In so doing the Respondent has unlawfully expropriated the Claimants' investments in contravention of Article 6(1)-(2) of the BIT. Moreover, the Claimants have received nil compensation, let alone the payment of "*prompt, adequate and effective compensation*" as required by Article 6 of the BIT.

63. The Respondent, through the Bankruptcy Administrator in charge of ZN's bankruptcy estate, has worked towards the sale of ZN to an entity other than MNSS through public auction – indeed, the Bankruptcy Judge (who oversees the activities of the Bankruptcy Administrator) rejected MNSS's Reorganization Plan for ZN and the appeal by MNSS against this rejection was itself dismissed by the Court of Appeal of Montenegro.

64. The role played by the Respondent in relation to the bankruptcy process and the sale of ZN was highlighted by the statement of the Minister Kavaric in an Extraordinary Session of the Montenegrin Parliament:

> "... the implementation of the bankruptcy process which is now in the phase that a tender for the sale of assets of Zeljezara can be expected very quickly. That is something that we all will take as very good and towards which we all need to help. **The Government is working on that very intensely**, I hope that it will be successful."
>
> (Emphasis added.)

65. The sale of ZN has now been effected by the Respondent to a Turkish steel investor, and the Claimants have still received no compensation.

66. *Amounts being claimed:* The acts and omissions of the Respondent have led to losses on the part of the Claimants provisionally assessed in the region of not less than €72.3 million. This represents the amounts involved in the equity investment by MNSS into ZN, the significant loans advanced by MNSS and RCA to ZN, and interest due.

67. The quantum of the Claimants' claim will be detailed in due course.

5.2. Outline of Breaches of Montenegrin Law

68. Article 12 of the 2011 Montenegrin Foreign Investment Law provides:

> "A foreign investor shall be entitled to compensation for damage caused by unlawful or irregular work of a public official or public authority, in accordance with the Law."

69. The Respondent has breached this provision in relation to the Claimants by, for example and without limitation, the following acts or omission which were unlawful and/or irregular:

(1) The Respondent acted in an unlawful and/or irregular way by several decisions of the Bankruptcy Administrator, as explained in brief above at paragraph 37(4), which have caused losses to the Claimants' investments. The Bankruptcy Administrator publicly stated that he was acting for the benefit of "[*ZN*] *and Niksic*" rather than for the benefit of all creditors (which included the Claimants) as was his legal responsibility;

(2) The Respondent acted in an irregular way by the decision of the Bankruptcy Judge, as explained in brief above at paragraph 63, who rejected MNSS's Reorganization Plan that would have taken ZN out of bankruptcy. This caused the Claimants to be deprived of the economic benefits of their investments on a permanent basis;

(3) The Respondent acted in an irregular way causing damage to the Claimants' investments by its refusal to allow ZN to dismantle and scrap its obsolete plant equipment, which would have generated much needed short-term working capital for ZN. The irregularity of this refusal is further evidenced by the fact that less than a year later, once ZN had entered bankruptcy, the Respondent allowed exactly the same thing to be done (albeit not then by ZN);

(4) The Respondent acted in an irregular way causing damage to the Claimants' investments by its failure to provide protection and security to ZN and its staff as explained in brief above at paragraphs 43-49 of this Request;

(5) The Respondent acted in an irregular way causing damage to the Claimants' investments by its failure to allow several of ZN's key creditors the option to convert their debt into equity. This exacerbated considerably ZN's position, since being able to do this would have eased the burden on ZN's balance sheet, reduced its financing costs, and enhanced its ability to raise working capital funding;

(6) The Respondent acted in an irregular way causing damage to the Claimants' investments by its failure to allow ZN to accept essential third party funding that had been potentially secured in the amount of €20 million as explained in brief above at paragraph 39(6) of this Request;

(7) The Respondent acted in an irregular way causing damage to the Claimants' investments by its failure to allow ZN to make necessary payments from its own bank account held with Erste Bank in relation to operating expenses as explained in brief above at paragraph 39(7) of this Request;

(8) The Respondent acted in an irregular way by its representatives on ZN's Board voting against ZN's acceptance of a further required loan from MNSS as explained in brief above at paragraph 39(8) of this Request, thereby causing damage to the Claimants' investments;

70. *Amounts being claimed:* The unlawful and/or irregular acts by the Respondent have led to losses on the part of the Claimants provisionally assessed in the region of not less than €72.3 million. This represents both the amounts involved in the equity investment by MNSS into ZN, and the significant loans advanced by MNSS and RCA to ZN, and interest due.

71. The quantum of the Claimants' claim will be detailed in due course.

6. RESOLUTIONS BY THE CLAIMANTS' BOARDS AUTHORISING THE PRESENT REQUEST

(Additional Facility Rules, Art. 3(1)(e))

72. The Boards of both Claimants have adopted Resolutions which provide the requisite internal authorisation to allow both Claimants to make this Request for arbitration.[23]

Respectfully submitted

CMS Cameron McKenna LLP

CMS Cameron McKenna LLP

6 November 2012

[23] Board Resolutions of MNSS and RCA, dated 3 November 2011 and 7 June 2012 (Claimants' Exhibit No. 19 and 20, respectively).