

PARTIAL AWARD ON JURISDICTION

In the matter of an arbitration under the
UNCITRAL Arbitration Rules
Between:

Mytilineos Holdings SA

(Claimant)

and

1. The State Union of Serbia & Montenegro
2. Republic of Serbia

(Respondents)

Arbitral Tribunal

Professor Dr. August Reinisch (Presiding Arbitrator)
Professor Dr. Stelios Koussoulis
Professor Dr. Dobrosav Mitrović

Zurich, 8 September 2006

TABLE OF CONTENTS

I.	THE PARTIES	3
II.	PROCEDURAL HISTORY	4
III.	SUMMARY OF FACTS	7
IV.	GENERAL CLAIMS AND DEFENSES OF THE PARTIES	10
	A. RESPONDENTS' SUBMISSIONS IN SUPPORT OF THEIR PLEA CONTESTING THE TRIBUNAL'S JURISDICTION	10
	B. CLAIMANT'S SUBMISSIONS.....	16
V.	ANALYSIS OF ISSUES FOR DECISION	22
	A. ARE CLAIMANT'S BUSINESS OPERATIONS PROTECTED BY THE BIT AS AN "INVESTMENT"?	23
	(a) Are the agreements an "investment" under international law as defined in the jurisprudence of investment tribunals?.....	28
	(b) Is the broad asset-based definition of investments in the applicable BIT limited by the requirement that these assets must be "invested"?	32
	B. WHAT IS THE JURISDICTIONAL RELEVANCE OF THE REQUIREMENT THAT INVESTMENTS MUST BE MADE "IN ACCORDANCE WITH THE LEGISLATION" OF THE HOST STATE?	35
	C. JURISDICTION <i>RATIONE PERSONAE</i>	40
	(a) Are Respondents who are not parties to any of the "seven agreements" the proper parties to this arbitration?.....	41
	(b) Is Second Respondent who is not a party to the BIT a proper party to this arbitration?.....	43
	D. DOES THE NEED FOR A <i>PRIMA FACIE</i> CASE CONSTITUTE AN OBSTACLE TO THE JURISDICTION OF THE TRIBUNAL?	45
	E. IS THE PRINCIPLE OF THE EXHAUSTION OF LOCAL REMEDIES A BAR TO THE JURISDICTION OF THIS TRIBUNAL?	49
VI.	DECISIONS.....	56
	ANNEX I: LIST OF AGREEMENTS BETWEEN THE CLAIMANT AND RTB-BOR DATED 19 FEBRUARY 1998.....	58
	ANNEX II: AGREEMENT BETWEEN THE GOVERNMENT OF THE HELLENIC REPUBLIC AND THE FEDERAL GOVERNMENT OF THE FEDERAL REPUBLIC OF YUGOSLAVIA ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS	59

I. THE PARTIES

1. Claimant:

Mytilineos Holdings SA
5-7 Patroklou Street
15125 Marousi
Greece

hereinafter referred to as “Claimant” or “Mytilineos”.

2. Mytilineos has its place of business at the above-mentioned address in Marousi, Greece, and is represented in this arbitration by its duly authorized attorneys, Mr. Nicholas Moussas and Mr. Efstratios Voulgaridis of Moussas & Tsibris, 34 Asklipiou Street, Athens 10680, Greece.

3. Respondents:

State Union of Serbia & Montenegro
Bulevar Mihajla Pupina
11070 New Belgrade
Serbia and Montenegro

First Respondent

and

Republic of Serbia
Nemanjina 11
11000 Belgrade
Serbia and Montenegro

Second Respondent

hereinafter referred to as “Respondents” or “Serbia and Montenegro” and “Serbia” and, with Claimant, the “Parties”.

4. Respondents are represented in this arbitration by its duly authorized attorneys Mr. Radomir Milošević of Law Office Milošević, 9 Molerova Street, 11000 Belgrade, Serbia and Montenegro, and Dr. Miroslav Paunović of Law Office Paunović, 30 Knez Mihailova Street, 11000 Belgrade, Serbia and Montenegro.

II. PROCEDURAL HISTORY

5. These Proceedings concern a dispute that has arisen between Claimant and Respondents relating to the rights and obligations of Claimant concerning a series of seven contracts dated 19 February 1998 entered into between Claimant and RTB-BOR, a company organized under the laws of the then Federal Republic of Yugoslavia (together, the “Agreements”; a list of the Agreements is set out in Annex 1).
6. Claimant is a company incorporated under the laws of the Hellenic Republic and is engaged in the metallurgy, energy and defense sectors, including metals trading. The Agreements provided *inter alia* for general cooperation in the mineral extraction and metallurgy business operated by RTB-BOR, the provision of capital for updating of RTB-BOR industrial infrastructure, the supply of spare parts and for the sale and purchase of copper, zinc and copper concentrates.
7. On 27 January 2004, Claimant sent notice to Respondents pursuant to Article 9 of the 1997 Agreement between the Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments (hereinafter referred to as the “BIT” or “Treaty”; the text of the BIT is set out in Annex 2). On 8 April 2005, Claimant served Respondents with a Statement of Claim dated 30 March 2005 setting out its claims and submitting the dispute to *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”) pursuant to Article 9(3)(b) of the BIT (the “Statement of Claim”).
8. In its Statement of Claim, Claimant requests an award in the sum of US\$ 31,327,530.38 together with costs and interest. Claimant alleges Respondents breached certain provisions of the Treaty by its interference with, or failure to protect Claimant’s commercial interests with RTB-BOR under the Agreements and in respect of certain bank guarantees issued as security for the performance of RTB-BOR’s obligations under those Agreements.
9. On 8 April 2005, Claimant appointed Professor Dr. Stelios Koussoulis as its arbitrator under Article 7(1) of the UNCITRAL Rules. Professor Dr. Christoph Schreuer was designated as an appointing authority by the Secretary-General of the Permanent Court of Arbitration (the “PCA”) under Article 7(2)(b) of the UNCITRAL Rules on 30 June 2005.

10. On 1 August 2005, Professor Dr. Schreuer appointed Professor Dr. Dobrosav Mitrović as second arbitrator on behalf of Respondents under Article 7(2)(b) of the UNCITRAL Rules.
11. In accordance with the list-procedure provided for in Articles 7(3) and 6(3) of the UNCITRAL Rules, during the process of which both parties expressed their preference for the same candidate, the appointing authority appointed Professor Dr. August Reinisch as presiding arbitrator on 20 September 2005 (together with Professors Koussoulis and Mitrović, the “Tribunal”).
12. Following consultation with the Parties, the Parties and the Tribunal signed Terms of Appointment on 8 November 2005.
13. On 30 November 2005, the Parties and the Tribunal attended a preliminary meeting convened in Zurich (the “Preliminary Meeting”) in order to establish certain procedural and practical matters regarding the conduct of the arbitration. Respondents indicated at the Preliminary Meeting that they would contest the Tribunal’s jurisdiction.
14. Following consultations with the Parties by written correspondence and at the Preliminary Meeting, the Tribunal issued Procedural Order No. 1 on 2 December 2005 (“PO 1”) setting out a procedural calendar and certain practical matters concerning the conduct of the arbitration. The procedural calendar set out in Section 2 of PO 1 provided for a preliminary phase in which the Tribunal would make a determination in respect of its own jurisdiction. In addition, the Tribunal appointed as Secretary Mr. Guillaume Tattevin, of the International Bureau of the PCA, who was assisted during parts of the jurisdictional phase by Mr. Henry Warwick, also of the International Bureau of the PCA.
15. On 21 December 2005, the Tribunal issued Procedural Order No. 2 (“PO 2”) which provided for the payment of a deposit sum by the Parties pursuant to Article 41(4) of the UNCITRAL Rules. The Tribunal circulated a report of the Preliminary Meeting in agreed form by letter of the same date.
16. On 20 January 2006, Respondents filed a Plea Contesting Jurisdiction of the Tribunal pursuant to paragraph 2.2(a) of PO 1 (hereinafter referred to as “R-I (PCJ)”). Following consultation with the Parties, the Tribunal issued Procedural Order No. 3 (“PO 3”) on 9 February 2006, amending the procedural calendar for submissions on jurisdiction.

17. On 17 February 2006, Claimant filed Claimant's Answer to Plea Contesting Jurisdiction of the Arbitral Tribunal (hereinafter referred to as "C-APCJ"). Respondents filed their Replica on Jurisdiction of the Arbitral Tribunal on 7 March 2006 (hereinafter referred to as "R-II (ROJ)") and Claimant its Duplica on Jurisdiction of the Arbitral Tribunal on 22 March 2006 (hereinafter referred to as "C-DOJ"). A further document, entitled Respondents' Further Submission on Jurisdiction of the Arbitral Tribunal, was filed by Respondents on 31 March 2006 and a corrected version of this document was filed on 6 April 2006.
18. By letter dated 8 March 2006, the PCA informed the Parties of the Tribunal's decision, taken following consultation with the Parties, that a hearing on jurisdiction would take place in Zurich on 8 and 9 May 2006 (the "Hearing"). By letter dated 28 March 2006, and following a request for clarification by Claimant, the Tribunal established the procedural calendar for the Parties' submissions and certain practical matters concerning the Hearing.
19. An additional folder of supporting documents was filed by Claimant on 31 March 2006. On 6 April 2006, Claimant filed the Consolidated Bundle of Claimant's Documentary Evidence and Claimant's list of Witnesses, comprising Dr. Radoje Prica (expert) and Mr. Seraphim Abatzioglou (witness of fact). A Consolidated Bundle in Joint Chronological Order was filed by Respondents on 7 April 2006.
20. On 28 April 2006, the Tribunal convened a Pre-Hearing telephone conference, with representatives of both Parties, in accordance with paragraph 2.3(c) of PO 1 and 3(c) of the Tribunal's letter concerning procedural matters dated 28 March 2006. Minutes of the teleconference were circulated on 2 May 2006 outlining agreed practical matters concerning the conduct of the Hearing.
21. The Hearing took place before the Tribunal in Zurich on 8 and 9 May 2006 and was attended by representatives for both Parties and all witnesses called by the Parties. Both of Claimant's witnesses were questioned on their written evidence by way of direct, cross and re-direct examination and submissions were heard from both Parties concerning the Tribunal's jurisdiction under Article 9 of the Treaty.
22. Following receipt of submissions from the Parties at the Hearing, the Tribunal issued a Procedural Order No. 4 ("PO 4") on 12 May 2006, concerning the filing of Post-Hearing Briefs as contemplated under paragraph 8 of PO 1.

23. Claimant and Respondents simultaneously submitted Post-Hearing Briefs on 7 June 2006 (hereinafter referred to as “R-IV (PHB)” and “C-PHB” respectively).

III. SUMMARY OF FACTS

24. Since its creation in 1990, Claimant has engaged extensively in the business of metal trading within the Federal Republic of Yugoslavia (Serbia and Montenegro), from 2003 until 2006 officially called the State Union of Serbia and Montenegro.
25. In February 1998, Claimant and RTB-BOR, a socially-owned company organized and existing under the laws of the Federal Republic of Yugoslavia, concluded the Agreements listed at Annex 1. In general, the Agreements provided for cooperation in the mineral extraction and metallurgy business operated by RTB-BOR. These contracts between private parties all contain choice-of-law clauses providing for English law to govern and most of them include choice-of-forum clauses in favor of English courts.
26. These Agreements were negotiated and concluded as a package as is confirmed by the “General Cooperation Agreement” (Annex 1.1) of 19 February 1998. They were all concluded for a period of seven years. According to the General Cooperation Agreement, the parties had “agreed to form a strategic alliance” (Article 1) which was intended to lead to an equity participation of Claimant in RTB-BOR in the event RTB-BOR was privatized (Article 3).
27. The individual Agreements are as follows:

(i) General Cooperation Agreement: Claimant was to invest in a modern smelter plant which would increase RTB-BOR’s efficiency. In addition, the General Cooperation Agreement provided that :

“(a) If RTB BOR is privatised, Mytilinaios [sic] will be given priority, within the possibilities offered by the Ownership Transformation Act.

(b) In case of privatisation Mytilineos shall have the right to convert any outstanding claims against RTB BOR to shares, according to the Ownership Transformation Act and the program of privatisation of RTB BOR.”

(ii) Working Capital Agreement: Claimant agreed to make available to RTB-BOR a credit for an amount of US\$ 10 million. This credit was to be secured by a bank guarantee.

(iii) Sale of Copper Agreement: RTB-BOR agreed to sell copper to the Claimant.

(iv) Spare Parts Agreement: Claimant agreed to sell spare parts to RTB-BOR. In addition, all amounts due to Claimant would be secured by a bank guarantee.

(v) Sale of Zinc Agreement: Claimant agreed to sell Zinc to RTB-BOR.

(vi) Copper Concentrates Agreement: RTB-BOR was to process Claimant's copper concentrates and deliver the resulting metal to Claimant.

(vii) Agreement for the Modernization of the Metallurgical Capacities in RTB-BOR: Claimant was to assist RTB-BOR in purchasing machinery to be used in Bor, at a total cost of US\$ 44 million. This amount was to be secured by bank guarantees. In addition, Claimant was to retain ownership of the equipment until it had been repaid by RTB-BOR.

28. As provided by the Agreements, the following bank guarantees were issued:
- i. A bank guarantee for an amount of US\$ 11 million (the "First Guarantee") was issued in favour of Claimant by Jugobanka. This guarantee pre-existed the Agreements and was initially intended to cover prior relations between Claimant, RTB-BOR and other parties. It was extended for the purpose of the Agreements and was to expire on 30 September 2001.
 - ii. A bank guarantee for an amount of US\$ 4.5 million (the "Second Guarantee") was issued by Jugobanka in favor of Claimant. It was to expire on 31 December 2004.
29. Performance of the Agreements did not proceed as planned. It is agreed by both Parties that RTB-BOR was not able to fulfill all of its contractual obligations.
30. As a result, by letters dated 1 October 2001, 11 October 2001 and 1 November 2001, Claimant requested that RTB-BOR extend the First Guarantee. RTB-BOR did not extend the First Guarantee, which lapsed.

31. By letter dated 22 November 2001, RTB-BOR informed Claimant that “*at the moment, [RTB-BOR] is not able to return all debts including debt towards Messrs Mytilineos S.A.*” and suggested that continued cooperation between the Claimant and RTB-BOR would allow RTB-BOR to “*pay regular interest rates and in minimum scopes reduce main debt*”.
32. Claimant replied on 28 November 2001, stating that it was “*ready to continue the cooperation with RTB BOR, but this cooperation must be based on mutual respect and fulfilment of contractual obligations, which are clear and simple*”.
33. By letter dated 13 February 2002, Claimant informed RTB-BOR that it considered it in “*serious default*” of its obligations under the Agreements, as a result of its failure to extend the First Guarantee.
34. Jugobanka, then renamed Borska Banka a.d., which still held the Second Guarantee, eventually went into bankruptcy.
35. By letter dated 28 May 2002, Respondents informed Claimant of “*a few key viewpoints which are of the general character but can also be related to your Company*”. These points were related to the status and privatization of RTB-BOR. Claimant was invited to send a letter of intention to the Agency for Privatization of the Republic of Serbia, if it was interested in the privatization of “*a certain RTB Company*”.
36. By letter dated 17 July 2002, Respondents once again informed Claimant they would like to “*stress out several points of the general character which may be related to your Company*”. These points, as in the previous letter, were related to the status and privatization of RTB-BOR.
37. On 20 January 2004, Claimant brought a request for temporary measures and a motion for preliminary injunction before the Belgrade Commercial Court, requesting the Court to order RTB-BOR not to alienate its shares of the Majdanpek Copper Factory; and the Agency for Privatization of the Republic of Serbia not to hold an auction on 27 January 2004 for the sale of those shares. Claimant also requested that, should this auction be held, the Agency for Privatization of the Republic of Serbia keep on its account the purchase price of RTB-BOR’s shares of the Majdanpek Copper Factory.

38. On 13 February 2004, the Belgrade Commercial Court denied Claimant's requests.
39. On 2 April 2004, RTB-BOR informed Claimant that "[...] *the directors of RTB BOR will decide about continuation of our cooperation and you will be informed as soon as possible*".
40. On 26 October 2004, the Agency for Privatization of the Republic of Serbia announced the initiation of the restructuring and privatization procedure of RTB-BOR, inviting creditors to declare their claims within 30 days.

IV. GENERAL CLAIMS AND DEFENSES OF THE PARTIES

A. Respondents' Submissions in Support of their Plea Contesting the Tribunal's Jurisdiction

41. Respondents submit that jurisdiction only extends to breaches of obligations arising under the BIT, and that investment disputes in general, or disputes arising out of commercial activity or business transactions alone cannot amount to breaches of BIT obligations.¹ Respondents submit that the claims advanced by Claimant relate to commercial risks assumed under the Agreements, which are not the subject of protections given under the BIT.²
42. Respondents advance three principal arguments contesting jurisdiction: that Claimant has not established a *prima facie* case that obligations owed under the BIT were breached, that cooperation between Claimant and RTB-BOR under the Agreements does not constitute an "investment" or "investments" for the purposes of the BIT and that Claimant is required to exhaust contractual remedies under municipal law prior to commencing arbitration under the BIT. Respondents also submit that no claim can be brought against Second Respondent who is not a contracting party to the BIT.
43. Respondents' first principal argument is that Claimant has not established a *prima facie* case that there has been a breach of Articles 2 and 4 of the BIT as asserted by Claimant.³ Respondents submit that Claimant must show conduct that is contrary to

¹ R-I (PCJ), paras. 14 – 20.

² R-I (PCJ), paras. 18 – 20.

³ R-I (PCJ), paras. 21 – 22; R-II (ROJ), paras. 19 – 30; R-IV (PHB), paras. 13 – 14.

the relevant BIT standard and that “...if facts are plainly incapable of supporting a finding of breach of the BIT, part or all of the claim might be struck”.⁴

44. Respondents argue that Claimant’s allegations that Respondents directed RTB-BOR not to perform the Agreements, failed to exert pressure on RTB-BOR to honor its obligations and deprived Claimant of the First and Second Bank Guarantees are not substantiated by evidence.⁵ Respondents also argue that the level of connection Claimant asserts existed between Respondents and RTB-BOR cannot be sustained on the facts.⁶
45. Respondents also argue that there can be no breach of the BIT by Respondents for the non-performance by RTB-BOR of its contractual obligations.⁷ Respondents submit that at all relevant times RTB-BOR was a socially-owned enterprise under the Law on Enterprises of the Federal Republic of Yugoslavia⁸ and as such a commercial enterprise independent of Respondents and that Claimant would have been aware of this fact at the time of the conclusion of the Agreements.⁹
46. Respondents argue that acts of company management, such as appointment of the RTB-BOR board of directors by Second Respondent and other measures taken by it, cannot be regarded as sovereign acts and cannot give rise to breaches of BIT obligations accordingly.¹⁰
47. Respondents argue that privatization cannot be characterized as nationalization under Article 4 of the BIT, which Claimant argues Respondents breached by privatizing RTB-BOR, thereby expropriating aspects of Claimant’s investment.¹¹ Respondents submit that the key feature of nationalization, the taking of private property by a State, is not present and that Claimant had no ownership in the entity being privatized.

⁴ R-I (PCJ), para. 21.1, citing *United Parcel Service of America Inc v. Government of Canada*, UNCITRAL Award on Jurisdiction, 22 November 2002, paras. 33 – 37.

⁵ R-I (PCJ), para. 22; regarding the Bank Guarantees, para. 28.

⁶ R-I (PCJ), para. 28; R-II (ROJ) para. 21; R-IV (PHB) para. 14.

⁷ R-I (PCJ), para. 23; R-II (ROJ) para. 31.

⁸ R-I (PCJ), para. 23.

⁹ R-I (PCJ), para. 24.

¹⁰ R-I (PCJ), para. 26.

¹¹ R-I (PCJ), paras. 29 – 31.

48. Respondents argue that any claim by Claimant that it suffered loss as a result of privatization is premature as the applicable restructuring procedure remains ongoing and Claimant's claims against RTB-BOR were reported to the Agency for Privatization as part of the process and could be compensated.¹² Respondents submit that there was no obligation on First Respondent to secure preferential treatment to Claimant in this process under the BIT.¹³
49. Respondents also dispute Claimant's case that Respondents breached the BIT by initiating bankruptcy proceedings in respect of a bank providing a guarantee to Claimant can be sustained.¹⁴ They equally dispute Claimant's allegation that measures taken by Respondents in response to RTB-BOR's financial difficulties were taken in breach of the BIT can be sustained.¹⁵
50. Respondents' second principal argument is that Claimant's commercial cooperation with RTB-BOR, formalized in the Agreements, does not constitute an "investment" within the scope of the definition in Article 1 of the BIT¹⁶, which extends the protections under the BIT to "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the latter's legislation*".¹⁷ Respondents submit that this is a more restrictive definition than definitions typically found in bilateral investment treaties¹⁸ as the action of investing the assets referred to in Article 1 of the BIT must have taken place in order for them to qualify as investments.
51. Respondents submit that the requirement for compliance with host State legislation is broader than Claimant's interpretation, which is that the investment need only be not illegal for "*in accordance with the latter's legislation*" to be satisfied.¹⁹ Respondents argue the protections the BIT affords extend only to those investments that have complied with host State legislation applicable to foreign investments, in this case

¹² R-I (PCJ), paras. 29.2 – 31.2; R-II (ROJ), para. 30.

¹³ R-I (PCJ), para. 32.

¹⁴ R-II (ROJ), para. 26.

¹⁵ R-II (ROJ), para. 28.

¹⁶ R-I (PCJ), paras. 34 – 35.

¹⁷ Excerpt from the full text of Article 1 of the BIT.

¹⁸ R-II (ROJ), para. 4.2; R-IV (PHB), para. 3.

¹⁹ R-IV (PHB), para. 3.

including the requirement for approval of the investment.²⁰ Respondents do not accept that some forms of investment from overseas into domestic enterprises could at that time have fallen outside of the applicable host State legislation.²¹ Respondents submit that, to fall within the BIT definition in Article 1, Claimant's assets would also need to be considered as investments according to international standards.²²

52. Respondents argue that Claimant's assets were not invested in accordance with the Yugoslav Law on Foreign Investments 1994 (as amended in 1996) (the "FIL"), which they submit was the applicable domestic statute.²³ Respondents submit that the Agreements were in any event "*regular commercial/trading contracts*" rather than investment contracts, which they argue is apparent from a range of features of the Agreements.²⁴
53. Respondents submit that the Agreements did not comply with a number of formalities found in Article 17 FIL, a requirement for registration in accordance with Article 26 FIL and a special procedure for federal government approval of investment contracts under Article 22 FIL. Respondents also refer to the treatment of contracts not meeting these requirements as null and void under Article 28 FIL.²⁵
54. Respondents also argue that the Claimant and Respondents never intended transactions taking place under the Agreements to give rise to "investments" benefiting from the protections set out under the BIT.²⁶ Respondents submit that the Agreements cannot be characterized as investment contracts whether taken alone or together²⁷ and question whether Claimant's involvement with RTB-BOR was significant or beneficial for Serbia and Montenegro in any event.²⁸

²⁰ R-I (PCJ), para. 35; R-II (ROJ), paras. 5 – 10.

²¹ R-IV (PHB), para. 4.

²² R-I (PCJ), para. 35.

²³ R-I (PCJ), para. 37; R-II (ROJ), para. 6.3.

²⁴ These are listed at R-I (PCJ), para. 41 *et seq.*

²⁵ R-I (PCJ), paras. 37.8 and 38; as to the requirements of host State law generally, see R-IV (PHB), paras. 4 – 8.

²⁶ R-I (PCJ), para. 42; regarding correspondence between Claimant and Second Respondent, see R-II (ROJ), para. 18.

²⁷ R-I (PCJ), paras. 41 and 42 – 49; R-II (ROJ), paras. 12.1 – 12.4 and 17.

²⁸ R-II (ROJ), para. 17.

55. Respondents submit the contribution made by Claimant under the General Cooperation Agreement was not considered by the parties to be Claimant's investment and that the Working Capital Agreement can be characterized as a "*pure commercial loan/credit agreement*" on its terms.²⁹ Respondents submit that the Sale of Copper Agreement and the Sale of Zinc Agreement should be considered as sales contracts, as should the Spare Parts Agreement, which also contains terms relating to trade credit.³⁰ Respondents regard the Copper Concentrates Agreement as a contract for the supply of services, which was also not intended as an investment contract.³¹
56. Respondents submit that no investment was made by Claimant under the Agreement for the Modernization of Metallurgical Capacities in RTB-BOR, and Claimant simply agreed to act as a seller, commission agent and creditor under that Agreement.³² Respondents also emphasize that the terms of the Agreement for the Modernization of Metallurgical Capacities in RTB-BOR were never carried out, being "*the core arrangement in the complex business operation*".³³
57. Respondents also argue that a loan provided under the Agreements cannot be characterized as an investment, in view of international standards,³⁴ nor can the bank guarantees given to Claimant as security.³⁵ It is also submitted that machinery intended for supply under the Agreements cannot be characterized as an investment as it was not delivered and title was retained.³⁶
58. Respondents argue that the transactions under the Agreements cannot be characterized as investments under Article 1 of the BIT according to international standards in any event. Respondents argue awards concerning the definition of "investment" for the purposes of Article 25 of the ICSID Convention are not authoritative in the interpretation of the BIT.³⁷ They argue that providing loans or credit is not sufficient to amount to an investment and that to constitute an

²⁹ R-I (PCJ), para. 43.

³⁰ R-I (PCJ), para. 46.

³¹ R-I (PCJ), para. 47.

³² R-I (PCJ), para. 48.

³³ R-I (PCJ), paras. 48.3 and 49; R-II (ROJ), para. 12.4.

³⁴ R-II (ROJ), para. 13; distinguishing also certain ICSID awards, see R-II (ROJ), paras. 13.1 – 13.6.

³⁵ R-II (ROJ), para. 15.

³⁶ R-II (ROJ), para. 16.

³⁷ R-IV (PHB), para. 9, see also para. 16.

investment, a participation in the profit and loss of an enterprise, typically by way of equity ownership, should be present.³⁸

59. Respondents submit that the definition of “investment” in Article 1 of the BIT does not extend to Claimant’s claims for money under the Agreements. It is submitted that claims to money can only be investments under Article 1 of the BIT where they are associated with an investment made in accordance with host State legislation.³⁹ Respondents argue that any interpretation of Article 1 that includes all money claims under a contract within its scope would require the host State to guarantee all contractual claims under commercial contracts, which cannot have been the intention of the contracting parties to the BIT.⁴⁰
60. Respondents’ third principal argument is that Claimant is obliged to exhaust its rights under the Agreements and under municipal law before commencing arbitration under the BIT and that the claim is inadmissible as Claimant has not done so.⁴¹ Respondents refer to Claimant’s conduct in refraining from calling in the First and Second Bank Guarantees or bringing its claims under the Agreements.⁴²
61. Respondents submit that Claimant is estopped from bringing proceedings against Respondents while proceedings Claimant and RTB-BOR are party to concerning the insolvency of Borska Banka remain pending. It is submitted that there is a principle of international law requiring claimants to exhaust remedies available locally before referring claims to international tribunals and argued that the availability of recourse to the courts in Serbia and Montenegro render the claim inadmissible accordingly.⁴³
62. Finally, Respondents submit that Second Respondent is not a proper respondent in these proceedings as it is not a party to the agreement to arbitrate in Article 9 of the BIT.⁴⁴ Respondents submit that, as a general rule of international law, parties not signing arbitration agreements cannot be party to arbitral proceedings under them.⁴⁵

³⁸ R-I (PCJ), paras. 50 – 54.

³⁹ R-I (PCJ), paras. 55 – 56.

⁴⁰ R-I (PCJ), para. 57; R-II (ROJ), paras. 7.1 – 7.3 and 14; on the interpretation of Article 1(1)(c) of the BIT generally, see R-IV (PHB), para. 10.

⁴¹ R-I (PCJ), paras. 59 – 64; R-II (ROJ), para. 32.

⁴² R-I (PCJ), para. 61.

⁴³ R-I (PCJ), paras. 62 – 64.

⁴⁴ R-II (ROJ), paras. 33 – 38.

⁴⁵ R-I (PCJ), para. 66.

Respondents also submit that, notwithstanding Second Respondent's constitutional competences, First Respondent remains the party responsible for implementation of the BIT as it retains competence for ratification and enforcement of international treaties in this field.⁴⁶

63. Respondents refer to the availability of arbitration under the ICSID Convention⁴⁷ as an alternative to *ad hoc* arbitration under Article 9 of the BIT and submit that Second Respondent, which has not been designated a "constituent subdivision" under Article 25 of the ICSID Convention, cannot be subject to the jurisdiction of this Tribunal as the parties to the Agreement would have intended both ICSID and *ad hoc* tribunals to have jurisdiction of a similar scope.⁴⁸ Respondents submit that recourse is available against First Respondent in the courts of either of its federal parts and as such an effective legal remedy is available to Claimant for breaches of obligations owed to it under the BIT.⁴⁹
64. The Tribunal is therefore requested by Respondents to decline jurisdiction over the claims advanced by Claimant, in view of the foregoing.

B. Claimant's Submissions

65. Claimant asserts that the Tribunal has jurisdiction under Article 9(3) of the BIT. Claimant submits that it qualifies as an "investor" under Article 1(3)(b) of the BIT and that its Agreements with RTB-BOR give rise to "investments" under Article 1 of the BIT.⁵⁰
66. First, Claimant argues that it has made an investment in the territory of Respondents within the scope of the definition in Article 1 of the BIT. Claimant argues that the term "investment" is given a broad definition in Article 1 of the BIT using wording that is typical of many contemporary bilateral investment treaties.⁵¹

⁴⁶ R-II (ROJ), para. 35.

⁴⁷ Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 UNTS 159; 4 ILM 532 (1965).

⁴⁸ R-I (PCJ), paras. 67 – 68.

⁴⁹ R-II (ROJ), para. 36.

⁵⁰ C-APCJ, p. 3.

⁵¹ C-APCJ, p. 5; C-DOJ, pp. 2 – 3; C-PHB, p. 2.

67. Claimant submits that the ordinary meaning of the phrase “*every kind of asset*” in Article 1(1) of the BIT gives the definition an extensive scope, as does an interpretation of Article 1 in the light of the object and purpose of the BIT, which, Claimant argues, was to secure protection for the widest possible class of business activities.⁵² Claimant argues that the breadth of the definition is bolstered by the inclusion of an indicative list of items in Article 1(a) – (e) of the BIT.
68. Claimant submits that Respondents’ interpretation of the requirement in Article 1 of the BIT for investments to be made in accordance with host State legislation would operate to exclude investments from protections under the BIT simply on the basis of errors and administrative defects, which would be inconsistent with the object and purpose of the BIT.⁵³
69. Claimant cites the findings of arbitral tribunals constituted under the ICSID Convention as a source of reference for its view that where such requirements appear in investment treaties they should be interpreted so as to exclude only investments that should not be protected as they would be illegal under host State legislation.⁵⁴ Claimant argues this remains the case in circumstances where host State legislation requires registration and approval of foreign investments.⁵⁵ Claimant submits that the Agreements were in compliance with host State legislation in any event.⁵⁶
70. Claimant submits that features of the “*strategic alliance*” embodied in the Agreements have the nature of investments as the Agreements and associated First and Second Bank Guarantees are contracts with “*significant economic value*”.⁵⁷ Claimant refers to its claims to money under the Agreements, which it submits fall within the scope of Article 1(1)(c) of the BIT, and its retention of ownership of

⁵² C-APCJ, p. 5.

⁵³ C-APCJ, p. 6; C-DOJ, p. 3; C-PHB, pp. 3 and 21 – 24, Claimant assesses expert evidence regarding requirements of host State law at pp. 24 – 26.

⁵⁴ C-APCJ, p. 6; C-DOJ, pp. 3 – 9; Claimant cites, in particular, *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, Decision on Jurisdiction, Case No. ARB/00/4, 23 July 2001, *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, Case No. ARB/02/18 29 April 2004, *SGS Société Générale de Surveillance S.A. v. Republic of Pakistan*, Decision on Jurisdiction, Case No. ARB/01/13 6 August 2003, and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, Case No. ARB/02/6, 29 January 2004.

⁵⁵ C-DOJ, p. 8.

⁵⁶ C-DOJ, pp. 9 – 10.

⁵⁷ C-APCJ, p. 7.

machinery supplied to RTB-BOR, which it submits constitutes a right *in rem* over movables under Article 1(1)(a) of the BIT.⁵⁸

71. Claimant also argues that a number of other features distinguish the Agreements from general commercial trading agreements, such as a greater level of assumed risk, the duration of the Agreements and significance to Respondents' economy.⁵⁹
72. Claimant submits that its involvement with RTB-BOR under the Agreements also constitutes an investment according to international standards. Claimant argues that certain awards rendered under the ICSID Convention and under the North Atlantic Free Trade Agreement, 1992 ("NAFTA"), in which the meaning of "investment" has been considered, offer guidance as to the types of asset considered investments according to international standards.⁶⁰
73. Claimant refers to a series of ICSID and NAFTA awards and refers to the following forms of participation that have been found to constitute investments: financial instruments such as promissory notes, service-related investments, contracts for the provision of construction works and trade-related investments.⁶¹ Claimant refers in particular to certain criteria cited as features of investments in the award in *Salini v. Morocco*⁶² under the ICSID Convention.
74. Claimant argues that the arrangements made under the Agreements and the features of the economic cooperation between Claimant and RTB-BOR would constitute investments according to international standards,⁶³ and submits that these cases offer guidance. Claimant also submits that claims in respect of those of the Agreements that were not fully realized including claims, in certain circumstances, for project expenses are also recoverable.⁶⁴

⁵⁸ C-APCJ, p. 7.

⁵⁹ C-APCJ, pp. 7 – 8.

⁶⁰ C-APCJ, p. 8.

⁶¹ C-APCJ, pp. 9 – 13.

⁶² C-APCJ, p. 12, citing *Salini v. Morocco*.

⁶³ C-DOJ, pp. 10 – 15.

⁶⁴ C-APCJ, p. 13.

75. Claimant submits that Respondents have acknowledged Claimant's participation under the Agreements as an investment in any event.⁶⁵ Claimant reviews correspondence between Respondents and Claimant and argues the position of Respondents in communications assumed, and in some instances expressly acknowledged, Claimant's involvement to be an investment. Claimant also refers to correspondence to argue the existence of close management involvement by Respondents in RTB-BOR.⁶⁶ Claimant also argues that its involvement with RTB-BOR under the Agreements played a significant economic and political role in Respondents' territory.⁶⁷
76. In any event, Claimant submits it is entitled, under Article 3 of the BIT, to treatment that is no less favorable than that afforded to investors from third States by Respondents. Claimant submits that a BIT between The Netherlands and First Respondent contains a more favorable definition of "investment", which is not qualified by a requirement for investments to be made in accordance with host State legislation. Claimant submits that Article 3 of the BIT entitles it to benefit from protections afforded to the broader category of investments applicable in respect of Dutch investors.⁶⁸
77. Secondly, Claimant argues that the dispute concerns Respondents' own violations of obligations owed to Claimant under the BIT and that it has adequately established a *prima facie* case as to the breaches alleged.⁶⁹ Claimant submits that the applicable test for determining whether a *prima facie* case has been made is "*whether the factual allegations of Claimant are capable of constituting violation [sic] of Respondents' obligations under the BIT.*"⁷⁰
78. Claimant argues that Respondents control RTB-BOR and have admitted this fact in writing,⁷¹ that as a socially owned enterprise RTB-BOR is controlled by the State,⁷²

⁶⁵ C-APCJ, p. 14; C-DOJ, pp. 14 – 15.

⁶⁶ C-APCJ, pp. 15 – 17.

⁶⁷ C-APCJ, p. 16; as to the characteristics of Claimant's cooperation with RTB-BOR and its significance for Respondents, see C-PHB, pp. 3 – 5.

⁶⁸ C-DOJ, pp. 27 – 28. C-PHB, p. 6.

⁶⁹ C-APCJ, pp. 17 – 24.

⁷⁰ C-APCJ, p. 17; for further submission on the applicable standard see C-DOJ, pp. 15 – 17.

⁷¹ C-APCJ, p. 18, at para. (a); regarding the degree of connection alleged between RTB-BOR and Respondents generally, see also C-DOJ, pp. 19 – 21.

that Respondents fund and ultimately own the assets used by RTB-BOR,⁷³ that the acts of RTB-BOR's management are acts of the Respondents⁷⁴ and that Respondents were therefore responsible for the intentional non-extension of the First Bank Guarantee and the collapse of Jugobanka Bor, causing forfeiture of the Second Bank Guarantee.⁷⁵ Claimant also argues that the restructuring and privatization of RTB-BOR amounted to expropriation⁷⁶ and that these acts and omissions by the Respondents amounted to breaches of obligations owed to Claimant under the BIT.⁷⁷

79. Claimant argues that the process of privatization amounted to the taking of property and as such to expropriation under the BIT. Claimant submits that the Agency for Privatization, a State entity, is responsible for the process of privatization in view of its role in the process⁷⁸ and that the State is in control of the process of privatization and therefore in effect the subject of privatization proceedings.⁷⁹ Claimant submits that enforcement measures are not effectively available against the subject of a privatization process in Respondents' jurisdiction, leaving limited prospects for debt recovery.⁸⁰
80. Claimant also submits that, by initiating bankruptcy proceedings in respect of Jugobanka Bor, Respondents prevented Claimant from realizing its security.⁸¹ Claimant submits that these allegations are sufficient grounds on a *prima facie* basis for the Tribunal to accept jurisdiction over the dispute.⁸²
81. Thirdly, Claimant argues that it is under no further obligation to exhaust rights and remedies under the Agreements or under host State municipal law prior to bringing

⁷² C-APCJ, p. 18, at para. (b); as to the influence of Respondents on socially-owned enterprises generally, see C-PHB, pp. 14 – 17.

⁷³ C-APCJ, p. 18, at para. (c).

⁷⁴ C-APCJ, p. 18, at para. (d).

⁷⁵ C-APCJ, pp. 18 – 19, at para. (e); C-DOJ, p. 18.

⁷⁶ C-APCJ, p. 19, at para. (f).

⁷⁷ C-APCJ, p. 19, at para. (g).

⁷⁸ C-APCJ, pp. 20 – 21.

⁷⁹ C-PHB, pp. 18 – 21.

⁸⁰ C-APCJ, pp. 21 – 22; C-DOJ, p. 19.

⁸¹ C-APCJ, p. 23; C-DOJ, p. 18.

⁸² C-APCJ, p. 23.

its claims under the BIT.⁸³ Claimant asserts that it has met all requirements of Article 9 of the BIT, having served notice under that Article and having subsequently attempted to reach amicable settlement. Claimant argues that Article 9 of the BIT does not provide any other condition for submission of a dispute to arbitration according to its terms.

82. Claimant argues that, absent an express requirement to do so, local remedies need not be exhausted prior to commencement of investment arbitration. Claimants refer to a number of ICSID awards where this position has been successfully argued.⁸⁴ In addition, Claimant denies that it is estopped from bringing a claim under the BIT on account of the fact that proceedings remain pending in Serbia against RTB-BOR, as those proceedings, it submits, are in respect of breaches of obligations under the Agreements and not claims for breaches of BIT obligations as advanced in the present proceedings.⁸⁵ Claimant also argues that Respondents are themselves estopped from raising this ground of objection to the Tribunal's jurisdiction on the basis of representations Claimant alleges demonstrate Respondents' recognition of the availability of recourse under the BIT.⁸⁶ Claimant also invokes Article 3 of the BIT to avail itself of what it argues is more favorable treatment with respect to any such requirement under the Austria-Serbia and Montenegro bilateral investment treaty, which expressly excludes any requirement to exhaust domestic remedies.⁸⁷
83. Finally, Claimant argues that the Tribunal has jurisdiction over claims brought against Second Respondent, which it submits is a proper party to these proceedings by reason of its status as a subdivision of First Respondent who was a signatory to the BIT.⁸⁸ Claimant submits that Second Respondent has international legal personality for purposes that include, in certain circumstances, the conclusion of international agreements⁸⁹ and capacity to be party to international proceedings. Claimant submits that at the time of its signature and ratification, the BIT became an

⁸³ C-APCJ, pp. 24 – 26; C-DOJ, pp. 21 – 26.

⁸⁴ C-APCJ, p. 25; C-DOJ, pp. 23 – 24; C-PHB, pp. 6 – 7.

⁸⁵ C-APCJ, p. 25.

⁸⁶ C-DOJ, pp. 25 – 26.

⁸⁷ C-PHB, p. 7.

⁸⁸ C-APCJ, pp. 26 – 32; for the basis on which Claimant submits Second Respondent is subject to the jurisdiction of the Tribunal generally, see also C-DOJ, pp. 26 – 27; see also the submissions made in C-PHB, pp. 7 – 14.

⁸⁹ As set out under the Constitutional Charter of Serbia and Montenegro, see C-APCJ, p. 27.

integral part of a domestic legal system of both First and Second Respondent; this includes Article 9(3) of the BIT, the agreement to arbitrate disputes arising out of it.⁹⁰

84. Claimant submits that Second Respondent is liable for effective implementation of the BIT on its territory and for the financial cost of implementation, that its laws regulate foreign investment on its territory and that it can be liable for breaches of the BIT accordingly.⁹¹ Claimant submits there would be no effective means of enforcement against Second Respondent without recourse to arbitration under the BIT in view of the scope of the jurisdiction of the courts of Second Respondent in the constitutional law of Serbia and Montenegro and that Second Respondent cannot be bound by provisions of the BIT selectively and must therefore be bound by Article 9.⁹²
85. Claimant also argues in its Post-Hearing Brief, dated 7 June 2006, that Second Respondent was then due to become legal successor to First Respondent with full international legal personality following the public referendum under Article 60 of the Constitutional Charter of First Respondent that had then recently taken place.⁹³
86. Accordingly, Claimant asserts that this Tribunal has jurisdiction over this dispute.

V. ANALYSIS OF ISSUES FOR DECISION

87. The jurisdiction of the Tribunal is challenged on a number of grounds. A detailed summary of the Parties' submissions as to the jurisdiction of the Tribunal is set out above in Part IV of this award. For the purposes of further consideration the Parties' arguments may be grouped in five major categories.
88. Firstly, the question arises whether the activities of Claimant do or do not constitute an "investment" under the BIT and therefore fall within or outside the material scope of application of the BIT. It must also be considered whether these activities constitute an "investment" in the usual practice of investment arbitration to be within the Tribunal's jurisdiction.

⁹⁰ C-PHB, pp. 7 – 9 and 11 – 12.

⁹¹ C-APCJ, p. 27; C-PHB, pp. 9 and 12 – 13.

⁹² C-APCJ, pp. 29 – 32.

⁹³ C-PHB, pp. 13 – 14.

89. Secondly, the issue must be addressed whether an activity that may qualify as an investment but which was not approved by the host State's authorities, contrary to its legislation, was covered by the BIT and could give rise to investment arbitration under it.
90. Thirdly, the *ratione personae* jurisdiction of the Tribunal has to be verified. The fact that neither of the two Respondents was a party to the agreements entered into by Claimant and RTB-BOR, a private entity existing under the laws of the host State, has to be assessed in this context. Equally, the fact that the Second Respondent, Serbia, has never ratified or acceded to the BIT must be analyzed with regard to the question whether it can be made a party to arbitration proceedings provided for under this Treaty.
91. Fourthly, Respondents' argument that Claimant failed to establish a *prima facie* case of its allegations must be addressed.
92. Finally, Respondents' assertion that the claims should be considered inadmissible because local remedies have not been exhausted will be analyzed.
93. In the following, the Tribunal will address each of these questions concerning its jurisdiction in turn.
- A. Are Claimant's business operations protected by the BIT as an "investment"?
94. The seven agreements concluded with RTB-BOR in 1998 set out the core of Claimant's business activities in Serbia and Montenegro. It is this set of contracts between private parties that Claimant considers to constitute its "investment" for the purposes of the BIT, while Respondents assert that the Contracts are merely commercial contracts between private parties that are not to be regarded as "investments" for the purposes of the BIT.
95. The Parties exchanged views on the fact that not one of the seven agreements is expressly referred to as "investment" agreement. Respondents argued that this demonstrated *prima facie* that the contracts were never intended to be considered investments, while Claimant was of the view that the titles of the seven agreements were irrelevant and that in fact some of the agreements did contain express language referring to "investments".

96. In the view of the Tribunal, the definitions contained in various investment treaties as well as decisions in recent investment arbitrations amply demonstrate that the description of transactions and activities by private parties as investments is an important criterion but not a conclusive one for the purposes of their characterization as “investments” in the sense of the applicable investment treaty.⁹⁴ The provisions of these treaties, and the BIT in the present case, are decisive for the qualification as an “investment.” The express characterization of certain business activities as “investments” by the parties may be an indication of their intentions but cannot absolve the Tribunal from scrutinizing whether such activities are covered by the definition of “investment” under the BIT.
97. The Tribunal notes that in the case of direct contractual relations between a private investor and a host State the characterization of a transaction as an “investment” carries particular weight for the purpose of establishing whether an “investment” took place. However, the situation where consent to arbitration is based on a contract is markedly different from treaty-based “*arbitration without privity*” as in the present situation. In the latter case of treaty arbitration, a host State has no direct control over what kind of disputes may be submitted to arbitration. In treaty-based investment arbitration the consent to jurisdiction, including *ratione materiae*, can only be found in the applicable treaty.
98. For the purpose of interpreting the BIT, the Tribunal will be guided by the customary rules of treaty interpretation as codified⁹⁵ in the 1969 Vienna Convention on the Law of Treaties.⁹⁶ According to Article 31(1) of the Vienna Convention “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Additionally, Article 31(2) thereof provides that, for the purpose of the interpretation of a treaty, the context shall comprise, among others, its preamble and annexes. Thus, a treaty must be interpreted autonomously, i.e. each notion used by the treaty must be given the content that better serves its purposes and implementation.
99. According to its Preamble, the BIT purports “*to intensify th[e] economic cooperation to the mutual benefit of both countries on a long term basis*”. Both Countries

⁹⁴ Cf. Christoph Schreuer, *The ICSID Convention: A Commentary* (2001), p. 125.

⁹⁵ Cf. *Libya v. Chad*, ICJ Reports 4 (1994), at p. 19, para. 41; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para. 75.

⁹⁶ Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679 (1969); ratified by Greece on 30 October 1974, and by Serbia and Montenegro on 12 March 2001.

indicated “*as their objective to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party*”. It was also expressly recognized that “*the promotion and protection of investments, on the basis of this Agreement, will stimulate the initiative in this field and thereby significantly contribute to the development of economic relations between the Contracting Parties*”.

100. While examining identical preamble wording in the Philippines-Switzerland BIT, the Tribunal in *SGS v. Philippines* stated that “[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”⁹⁷ The Tribunal in *Tokios v. Ukraine* similarly found the same wording in the Preamble of the Ukraine-Lithuania BIT “*as indicative of the treaty’s broad scope of investment protection.*”⁹⁸
101. Despite sometimes tautological definitions of “investment” in some BITs (according to which “investment” is defined as “every kind of investment”⁹⁹), investments are very frequently defined as “assets” for which specific demonstrative examples are usually provided.¹⁰⁰ In arbitral practice shares, contracts, concessions, loans, and so on, have been qualified as investments regardless of whether they had been specifically designated as investments.
102. The BIT contains a broad definition of investment. Article 1 of the BIT defines “investment” as “*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party.*” In its non-exhaustive list of examples, it includes “*claims to money or any other claim under contract having an economic value.*”¹⁰¹

⁹⁷ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ARB/02/6, Decision on Jurisdiction, 29 January 2004; 8 *ICSID Rep.* 518 (2005), para. 116.

⁹⁸ *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 *ICSID Review—Foreign Investment Law Journal* 205 (2005), para. 31.

⁹⁹ Cf. Article I (d) Treaty Between the Government of the United States of America and the Government of the Republic of Panama Concerning the Treatment and Protection of Investments, 27 October 1982, available at http://www.unctad.org/sections/dite/ia/docs/bits/us_panamama_1982.pdf.

¹⁰⁰ Dolzer/Stevens, *Bilateral Investment Treaties* (1995), p. 27.

¹⁰¹ Article 1 (1)(c) BIT.

103. Such a definition, usually referred to as a “broad asset-based definition of investment,”¹⁰² follows a well-established pattern pursued by many other BITs.¹⁰³ It combines a broad definition (“*every kind of asset*”) with an illustrative list of assets categories that fall within the definition of investment.
104. This type of definition clearly distinguishes the present BIT from other more narrow approaches, containing either an “exhaustive list” of covered activities/assets or a list of activities/assets that are not included in the definition of “investment” or even a combination of both. Article 1139 NAFTA¹⁰⁴ is an example of such a combined approach. It first lists a number of activities under the heading “investment means” and then states what “investment does not mean”, including, claims to money arising from purely commercial sales and services contracts or from short term loan agreements.
105. In the most recent BITs to which the US is a party, which generally include a “broad asset-based definition of investment,” the notion of investment is limited by means of explanatory notes which specify that any covered asset must be accompanied by a certain entrepreneurial commitment of capital, profit seeking and risk assumption in order to qualify as an investment.¹⁰⁵ The 2005 US-Uruguay BIT further clarified that the definition of “investment” shall not include claims to payment that are immediately due and result from the sale of goods or services.¹⁰⁶
106. The fact that some investment treaties narrow the notion of what constitutes an investment reinforces the impression that a broad investment definition such as the one contained in Article 1 of the Greece-Serbia and Montenegro BIT may cover

¹⁰² UNCTAD Series on issues in international investment agreements, *Scope and Definition* (1999), p. 18. See also Noah Rubins, The Notion of “Investment” in International Investment Arbitration, in *Horn* (ed.), *Arbitrating Foreign Investment Disputes* (2004), p. 283, at p. 291.

¹⁰³ Cf. UNCTAD, *International Investment Agreements: Key Issues*, vol. I, p. 119 (2004); Dolzer/Stevens, *Bilateral Investment Treaties* (1995), p. 229.

¹⁰⁴ North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, 17 December 1992, 32 ILM 289 (1993).

¹⁰⁵ Article 15.1.13 United States-Singapore Free Trade Agreement, available at http://www.mti.gov.sg/public/PDF/CMT/FTA_USSFTA_Agreement_Exchange_Letter_CIL.pdf, provides: “Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.”

¹⁰⁶ Section A, Article 1, footnote 2, Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005, available at http://www.unctad.org/sections/dite/ia/docs/bits/US_Uruguay.pdf.

assets and activities that go beyond what is traditionally included in the notion of foreign direct and indirect investment. According to a recent UNCTAD study a BIT stating that “*investment includes ‘every kind of asset’ suggest[s] that the term embraces everything of economic value, virtually without limitation.*”¹⁰⁷

107. In *Bayindir v. Pakistan* the tribunal found that a definition of investment corresponding to the one in Article 1(1) of the present BIT “is very broad” and cited a doctrinal thesis according to which “*the reference to ‘every kind of asset’ is [p]ossibly the broadest’ among similar general definitions contained in BIT’s.*”¹⁰⁸ Equally, the Tribunal in *Fedax v. Venezuela* found that the identical definition of investment in the Netherlands-Venezuela BIT “*evidences that the Contracting Parties to the Agreement intended a very broad meaning for the term ‘investment’.*”¹⁰⁹ The Tribunal also observed that this broad approach of investment is not at all an exceptional situation; it rather reflects “*the standard policy of major economic groupings such as the European Communities.*”¹¹⁰
108. It results that the definition of “*investment*” in the Treaty was deliberately very broad so as to cover the widest possible economic activities and to encourage economic cooperation between the two countries, as expressly stated in the BIT’s Preamble.
109. Indeed, it has been pointed out that language including “claims to money or any other claim under contract having an economic/a financial value” suggests that “*investment*” may embrace contractual rights for the performance of services.¹¹¹ Read literally there is also no reason why claims arising from pure commercial activities, such as sales contracts, should be excluded from such a broad definition of investment.
110. Respondents claim, however, that it would be contrary to the object and purpose of investment law in general and of BITs in particular if investment dispute settlement were to be used to arbitrate purely commercial disputes. They refer to an underlying notion that investment disputes should be settled by investment arbitration which

¹⁰⁷ UNCTAD, *International Investment Agreements: Key Issues*, vol. I (2004), p. 119.

¹⁰⁸ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 113.

¹⁰⁹ *Fedax N.V. v. Republic of Venezuela*, Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, 5 ICSID Rep. 186 (2002), para. 32.

¹¹⁰ *Ibid.*, para. 34.

¹¹¹ UNCTAD, *International Investment Agreements: Key Issues*, vol. I (2004), p. 120.

should not be open to disputes that do not concern investments. To support this argument they put forward a number of interrelated considerations, the two most important of which may be summarized as follows:

- a) The notion of investment disputes as developed by ICSID tribunals demonstrates that not all disputes are investment disputes.
- b) The applicable BIT though including a broad asset-based definition of investments still requires that these assets must be “invested.”

(a) *Are the agreements an “investment” under international law as defined in the jurisprudence of investment tribunals?*

111. Respondents dispute that the claims put forward by Claimant can be characterized as “investments”. In this context, Respondents repeatedly refer to the more restrictive notion of “investment” found in various cases arising under the ICSID Convention.¹¹²
112. It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an “investment” under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention.¹¹³ This requirement is set out in Article 25(1) of the Convention which confines the jurisdiction of ICSID arbitration tribunals to “*legal dispute[s] arising directly out of an investment*” without defining “investment.”
113. It is indeed not very easy to precisely define the concept of “investment” which is seen as an objective jurisdictional requirement under the ICSID Convention, and separate and additional to the consent of the parties to arbitrate.¹¹⁴ ICSID tribunals have in fact accepted a broad range of economic activities under the notion of investment.¹¹⁵

¹¹² R-II (ROJ), paras. 13 *et seq.*

¹¹³ Cf. *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, 14 *ICSID Review—Foreign Investment Law Journal* 251 (1999), para. 68: “A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.”

¹¹⁴ See in general Schreuer, *The ICSID Convention: A Commentary* (2001), pp. 138 ff.

¹¹⁵ According to Schreuer, *The ICSID Convention: A Commentary* (2001), p. 138: “They include the building and operation of hotels, the production of fibres and textiles, the mining of minerals, the

114. ICSID tribunals have to satisfy themselves that a Claimant has made an “investment” under both the applicable BIT (or other instrument containing consent) and the ICSID Convention.¹¹⁶ This double jurisdictional requirement for ICSID cases was confirmed in *Salini v. Morocco*, where the tribunal held that

“its jurisdiction depends upon the existence of an investment within the meaning of the bilateral Treaty as well as that of the Convention.”¹¹⁷

115. The *Salini* tribunal first found that a construction agreement clearly fell within the scope of the applicable BIT which included “rights to any contractual benefit having an economic value” in its definition of investment. Then, with more difficulty, it had to determine whether such an agreement also constituted an investment for the purposes of ICSID jurisdiction.¹¹⁸ For this, it relied on various criteria such as, a contribution, a certain duration, participation in the risks of the operation, and that

construction of a hospital ward, the exploration, exploitation and distribution of petroleum products, the manufacture of plastic bottles, the construction and operation of a fertilizer factory, the construction of housing units, the operation of a cotton mill, aluminium smelter, forestry, the conversion, equipping and operation of fishing vessels, the production of weapons, tourism resort projects, maritime transport of minerals, a synthetic fuels project, shrimp farming, banking, agricultural activities, the construction of a cable TV system and the provision of loans.” Among the so-called non-traditional forms of investment have been included “profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing, arrangements and agreements for the transfer of know-how and technology.” Lopina, *The International Centre for Settlement of Investment Disputes 4 Ohio State Journal on Dispute Resolution* (1988) 107, 115 ff. Examples from early ICSID practice include the construction of a chemical plant on a turn-key basis coupled with a management contract providing technical assistance for the operation of the plant as in *Klöckner Industrie Anlagen GmbH v. Cameroon and Societe Camerounaise des Engrais (SOCAME)*, Case ARB/81/2, a management contract for the operation of a cotton mill as in *SEDITEX v. Madagascar*, Case CONC/82/1, a contract for the conversion of vessels into fishing vessels and the training of crews as in *Atlantic Triton Company Ltd v. Guinea*, Case ARB/84/1, or technical and licensing agreements for the manufacturing of weapons as in *Colt Industries Operating Corp, Firearms Div v. Republic of Korea*, Case ARB/84/2. More recently financial instruments (*Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4), road constructions (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13; *Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4) and pre-shipment inspection arrangements (*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6) have been regarded as investments under Article 25 of the ICSID Convention.

¹¹⁶ The UNCTAD Course on Dispute Settlement speaks of “two distinct requirements *ratione materiae*”: “the transaction out of which the dispute arises must be an investment under the ICSID Convention. In addition, it must be an investment as defined by the applicable investment treaty.” UNCTAD, *Dispute Settlement, ICSID 2.5 Requirements ratione materiae*, 16 (2003) UNCTAD/EDM/Misc.232/Add.4.

¹¹⁷ *Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction 2001, 42 ILM 609 (2003), para. 44.

¹¹⁸ *Ibid.*, paras. 50 ff.

the operation should contribute to the development of the host State, criteria which had been developed by legal commentators.¹¹⁹

116. This *ratione materiae* test was aptly summarized by the ICSID tribunal in *Joy Mining v. Egypt*:

“[...] the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development.”¹²⁰

117. However, this latter *ratione materiae* test for the existence of an investment in the sense of Article of the 25 ICSID Convention is one specific to the ICSID Convention and does not apply in the context of *ad hoc* arbitration provided for in BITs as an alternative to ICSID.¹²¹

118. In the present *ad hoc* arbitration under the UNCITRAL Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those under the BIT.

119. Interestingly, none of the Parties – not even Claimant – had argued that this would be the correct approach. Instead, even Claimant tried to persuade the Tribunal that the Agreements constituted an investment in accordance with the jurisprudence on Article 25 of the ICSID Convention.¹²² Thus, the Tribunal feels compelled to make some remarks on its jurisdiction *ratione materiae* if such jurisdiction would be based not solely on the definition of investment under the applicable BIT.

120. Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, it seems clear that the combined effect of these agreements amounts to an investment.

¹¹⁹ Christoph Schreuer, *The ICSID Convention: A Commentary* (2001), p. 140; Emmanuel Gaillard, C.I.R.D.I. – Chronique des sentences arbitrales, JDI (1999) pp. 273, at p. 278.

¹²⁰ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, 44 ILM 73 (2005), para. 53.

¹²¹ See also Noah Rubins, The Notion of “Investment” in International Investment Arbitration, in Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), pp. 283, at p. 290.

¹²² C-DOJ, pp. 12 *et seq.*

121. As the ICSID tribunal in *CSOB v. Slovakia* succinctly stated:
- “A dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.”¹²³
122. Similarly, the ICSID tribunal in *Joy Mining* held that “a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole [...]”¹²⁴
123. A holistic view of Claimant’s business activities in Serbia and Montenegro is also called for in view of Article 1 of the Framework Agreement which expressly states that the strategic alliance intended by Claimant and RTB-BOR “is being put in practice by entering into the present agreement” together with the other six of the Agreements “which were negotiated as a package and are interconnected.”
124. Taken together the Agreements not only provided for sales, services and loans transactions between two commercial partners but they also provided for the establishment of a long-term business relationship which included the provision of credit, spare parts and machinery to the local partner of Mytilineos in Serbia and Montenegro, RTB-BOR, for the purpose of modernizing the latter’s production facility. The planned modernization would have entailed a significant contribution to Serbia and Montenegro’s development. During the intended seven year duration of all of the Agreements Claimant expected various returns and profits. This engagement, which was made with a view to eventual equity participation after privatization, was substantial in monetary terms and also not without risks.
125. Therefore, the combined effect of the Agreements is clearly more than an ordinary commercial transaction. As a result, the Tribunal finds, by a majority, that the business engagement of Claimant in RTB-BOR constituted an investment.

¹²³ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Decision on Jurisdiction, 24 May 1999, 14 *ICSID Review—Foreign Investment Law Journal* 251 (1999).

¹²⁴ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, 44 *ILM* 73 (2005), para. 54.

(b) *Is the broad asset-based definition of investments in the applicable BIT limited by the requirement that these assets must be “invested”?*

126. Article 1(1) of the BIT defines “investment” as “every kind of asset *invested* by an investor” (emphasis added). It has been suggested by Respondents that the broad range of potential assets (listed in a demonstrative fashion) that potentially qualify as investments is limited by the additional requirement that any such asset must be “invested” in order to constitute an investment covered by the BIT.¹²⁵
127. Indeed, the fact that some BITs do not contain such additional language, but merely state that “investment” means “every kind of asset”¹²⁶ could be interpreted as implying a limitation to the otherwise broad definition in Article 1(1) of the BIT. It also seems to be the Respondents’ argument that such language adds the requirement that any assets covered by Article 1(1) of the BIT have to be invested in the sense of an activity, of entering the economy of the host State or contributing to its economy.
128. According to Respondents any assets specifically mentioned in Article 1(1)(a) – (e) of the BIT do not constitute investments in themselves, but must be “invested” in order to qualify as “investments”. In their view, the Contracting Parties of the BIT must be considered as having “intended to protect only claims to money and other claims under contract which are related to or associated with an investment.”¹²⁷
129. In the view of the Tribunal, Respondents’ interpretation would, however, unduly restrict and unpredictably limit the meaning of an otherwise clear and straightforward investment definition. The Tribunal finds that the core of the definition lies in the characterization of “every kind of asset” as an “investment.” The examples of assets added in an illustrative fashion to this definition in Article 1(1)(a) – (e) of the BIT and the verb “invested” do not add to it. Rather, the verb “invested” appears necessary for the further qualification that the investments must be made “in accordance with the [host State’s] legislation.”

¹²⁵ R-I (PCJ), para. 56.3.

¹²⁶ Noah Rubins, *The Notion of “Investment” in International Investment Arbitration*, in Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), pp. 283, at p. 292.

¹²⁷ R-I (PCJ), para. 57.

130. In this respect, the Tribunal shares the view of the *ad hoc* tribunal in the *Saluka* case,¹²⁸ which also operated under the UNCITRAL Rules. It found that the verb “invested” did not add any further substantive conditions to an investment definition contained in the Netherlands-Czech Republic BIT which is almost identical to the one in the case at hand.¹²⁹ The *Saluka* tribunal rejected Respondent’s argument that a mere share purchase without any “economic process” could constitute an investment. The tribunal found that its

“...jurisdiction is governed by Article 1 of the Treaty, and nothing in that Article has the effect of importing into the definition of “investment” the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the wellbeing of a company operating within it. Although the *chapeau* of Article 2 refers to “every kind of asset *invested*”, the use of that term in that place does not require, in addition to the very broad terms in which “investments” are defined in the Article, the satisfaction of a requirement based on the meaning of “investing” as an economic process: the *chapeau* needs to contain a verb which is apt for the various specific kinds of investments which are listed, and since all of them are being defined as various kinds of investment it is in the context appropriate to use the verb “invested” without thereby adding further substantive conditions.”¹³⁰

131. The Tribunal finds that in a similar way Article 1(1) of the BIT requires the verb “to invest” in order to add a subject who is making the investment and the territorial requirement of where the investment has to be made (“*invested by an investor of one Contracting Party in the territory of the other Contracting Party*”) in a grammatically satisfactory way. Apart from that, the verb “invest” does not add to or diminish in any way the definition of “investment” as “any kind of asset.”
132. Respondents’ interpretation of Article 1(1) of the BIT as requiring that any assets mentioned therein must be additionally “invested” in order to qualify as an “investment” is also not convincing from a systematic point of view. Respondents argue that claims to money as such do not qualify as investments. Rather, claims to money should become “investments” only if they were “invested”, for instance by being transformed into shares, being invested into the capital of a company or

¹²⁸ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Tribunal administered by the PCA, Partial Award of 17 March 2006, available at <http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf>.

¹²⁹ The introductory part (“chapeau”) of Article 1(a) Netherlands-Czech Republic BIT provides: “The term “investments” shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively:”

¹³⁰ *Saluka v. Czech Republic*, para. 211.

through debt-to-equity swaps.¹³¹ From the point of view of the syntax of this provision, such a requirement for assets to be “invested” cannot be limited to Article 1(1)(c) of the BIT relating to “claims to money.” Instead, such a requirement must equally relate to Article 1(1)(a)-(b) and (d)-(e) of the BIT. This would mean that “movable and immovable property” or “shares in and stock of a company” would also not qualify as investments as such, but have to be “invested.” According to Respondents’ argument, shares in a company acquired by a foreign investor would thus become an investment only if “invested”, for example transferred into other shares. Thus, any initial acquisition of shares, property, rights under concessions, etc. would not qualify as an “investment” under the BIT. Such an interpretation cannot be accepted by the Tribunal. It would significantly change the meaning of Article 1(1) of the BIT by shifting the definition from a fairly clear demonstrative list of assets to a non-defined and tautological requirement for assets to be “invested” that would remove even well-established forms of investment from the scope of the BIT term “investment.”

133. Even if, for the sake of the argument, one would accept Respondents’ assertion that assets have to be “invested” in order to constitute an “investment” under the BIT, one may doubt whether this requirement would add a truly restrictive meaning to the broad investment definition of the BIT. As has been held in the *Tokios Tokelès* case “[t]he ordinary meaning of ‘invest’ is to ‘expend (money, effort) in something from which a return or profit is expected’ [...]”¹³² With regard to a corresponding investment definition in the applicable Ukraine-Lithuania BIT, according to which “every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter” constituted an “investment”, the *Tokios Tokelès* tribunal found that “an investment under the BIT is read in ordinary meaning as ‘every kind of asset’ for which ‘an investor of one Contracting Party’ caused money or effort to be expended and from which a return or profit is expected in the territory of the other Contracting Party.”¹³³
134. The Tribunal’s finding is further supported by comparison with other BITs which make it quite clear that monetary or financial claims as such do not qualify as investments but need to be associated with or related to an investment in order to be

¹³¹ R-I (PCJ), para. 56.3.

¹³² *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004; 20 *ICSID Review—Foreign Investment Law Journal* 205 (2005), para. 75.

¹³³ *Ibid.*

covered by the applicable investment definition. Examples can be found in investment definitions which include “a claim to money or a claim to performance having economic value, *and associated with an investment*” (emphasis added).¹³⁴ In these cases, it is clear that loans or payment claims arising from sales contracts as such do not qualify as “investments”. Where such restrictive language is absent, as in the Greece-Serbia and Montenegro BIT, it would be improper for the Tribunal to read it into the text of the BIT.

135. Therefore, the Tribunal concludes, by a majority, that Article 1(1) of the BIT defines “investment” as “every kind of asset” being illustrated by a demonstrative list of potential assets. These assets constituting investments are not further limited by a requirement to be “invested.”

136. Thus, Claimant’s contractual rights, qualifying as assets, constitute an investment under the BIT.

B. What is the jurisdictional relevance of the requirement that investments must be made “in accordance with the legislation” of the host State?

137. Respondents argue that the BIT requires investments to be made in accordance with the host State’s legislation, which includes approval. Since such approval was not procured by Mytilineos its “investment” is not protected under the BIT and does not give rise to treaty arbitration.¹³⁵

138. Article 1(1) of the BIT provides:

“ ‘Investment’ means every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party, *in accordance with the latter’s legislation* and in particular, though not exclusively, includes [...]” (emphasis added).

139. Article 12 of the BIT provides:

“This agreement shall apply to investments made by investors of either Contracting Party in the territory of the other Contracting Party *consistent with*

¹³⁴ Article I(4)(iii) Treaty Between the United States and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, 22 July 1985, available at http://www.unctad.org/sections/dite/ia/docs/bits/us_marocco.pdf.

¹³⁵ R-I (PCJ), para. 35; R-II (ROJ), paras. 5 – 10.

the latter's legislation, prior to as well as after the date of its entry into force" (emphasis added).

140. Thus, the BIT itself does not require registration of investments; rather, it covers investments made "in accordance with/consistent with the legislation of the host State."
141. According to Respondents, the laws of Serbia and Montenegro required registration of investments. Since Claimant's "investment" had not been registered it was not protected under the BIT: "The transaction itself has to be screened as investment and registered as such in order to qualify as investment protected by the Treaty, because this is the requirement of Yugoslav law, which the Contracting Parties have expressly incorporated into their Treaty."¹³⁶
142. Respondent relies on *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*¹³⁷ where an *ad hoc* tribunal applying the ICSID Additional Facility Arbitration Rules found that it had no jurisdiction because it held that the investment in question had not been timely approved by the host State and was thus not protected under the applicable investment agreement.¹³⁸
143. However, the *Yaung Chi Oo* case can be distinguished from the present case. It was decided on the basis of the ASEAN Investment Agreement which contained an explicit approval requirement. Its Article II provides:

"This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and *which are specifically approved in writing and registered* by the host country and upon such conditions as it deems fit for the purposes of this Agreement."¹³⁹

¹³⁶ R-II (ROJ), para. 6.1.

¹³⁷ *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, ASEAN Case No ARB/01/1 31 March 2003, 42 ILM 540 (2003).

¹³⁸ *Yaung Chi Oo v. Myanmar*, para. 62.

¹³⁹ Article II of the Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments Manila, 15 December 1987, available at <http://www.aseansec.org/12816.htm>.

144. The ASEAN *ad hoc* tribunal in *Yaung Chi Oo* found that under this provision there was an

“express requirement of approval in writing and registration of a foreign investment if it is to be covered by the Agreement. Such a requirement is not universal in investment protection agreements. [...] In this respect Article II goes beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.”¹⁴⁰

145. A similar approval requirement was applicable in the *Gruslin* case¹⁴¹ where an ICSID tribunal found that it had no jurisdiction over a BIT claim brought by a Belgian national who had indirectly (through a Luxembourg mutual fund) invested in Malaysian securities listed on the Kuala Lumpur Stock Exchange. The denial of jurisdiction resulted from the tribunal’s finding that the portfolio investment – covered by the applicable BIT’s broad definition of investments including “shares and other types of holdings” – was not approved in accordance with the approval proviso in the applicable Belgo/Luxembourg Economic Union-Malaysia BIT. The BIT qualified its investment definition in the following terms: “provided that such assets when invested: - (i) in Malaysia, are invested in a project classified as ‘approved project’ by the appropriate Ministry in Malaysia, in accordance with the legislation and administrative practice, based thereon.”¹⁴² The *Gruslin* tribunal rejected Claimant’s contention that his securities acquisitions were lawful and in compliance with the law of Malaysia and should thus be regarded as approved activity. Instead, it held that “[w]hat is required is something constituting regulatory approval of a ‘project’, as such, and not merely the approval at some time of the general business activities of a corporation.”¹⁴³

146. It is important, however, that the specific approval requirements in the *Yaung Chi Oo* case and in the *Gruslin* case are different from the broader “in accordance with legislation” standard found in many other BITs including the one applicable to the present dispute. The present BIT does not require any approval on the part of host States. Thus, the two above-cited cases must be distinguished and cannot be relied upon by Respondent to demand registration or approval in order for the Claimant’s investment to be protected under the BIT.

¹⁴⁰ *Yaung Chi Oo v. Myanmar*, para. 58.

¹⁴¹ *Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award of 27 November 2000.

¹⁴² Article 1 (3)(i) Belgo/Luxembourg Economic Union-Malaysia BIT, cited in *Gruslin v. Malaysia*, para. 9.2.

¹⁴³ *Gruslin v. Malaysia*, para. 25.5.

147. Two other ICSID cases, also relied upon in the Parties' pleadings, are more pertinent in the present context because they relate to BIT provisions corresponding to Article 1(1) of the Greece-Serbia and Montenegro BIT. In the jurisdictional decisions of both the *Salini v. Morocco* and the *Tokios Tokelès v. Ukraine* cases, ICSID tribunals had to address investment definitions in BITs which covered assets invested "in accordance with the laws and regulations" of the host State.

148. The purpose of such provisions, as explained by the Tribunal in *Salini v. Morocco*, is the following:

"This provision refers to the validity of the investment and not to its definition. More specifically it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."¹⁴⁴

149. The *Salini* tribunal thus rejected the argument of Morocco that the reference in the BIT to national law and regulations implied that its law should define the notion of investment, and that under Moroccan law the transaction in question was to be considered a contract for services and not an investment protected under the BIT. The tribunal, however, found that the service contract for the construction of a highway constituted a "contractual benefit having an economic value" as well as a "right of an economic nature conferred [...] by contract" which did not infringe the laws and regulations of the host State.¹⁴⁵ Thus, the tribunal found that the contract in question was an investment within the meaning of the applicable BIT.

150. This interpretation was also followed in the *Tokios Tokelès* case.¹⁴⁶ In that case the applicable BIT contained an investment definition that was almost identical to the one in the present case.¹⁴⁷ The tribunal found that the BIT requirement "that investments be made in compliance with the laws and regulations of the host State is a common requirement in modern BITs."¹⁴⁸ It further explicitly endorsed the *Salini*

¹⁴⁴ *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, Decision on Jurisdiction, Case No. ARB/00/4, 23 July 2001, 42 ILM 609 (2003), para. 46. This interpretation has recently been endorsed by the tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 109.

¹⁴⁵ *Salini v. Morocco*, para. 46.

¹⁴⁶ *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Review—Foreign Investment Law Journal 205 (2005).

¹⁴⁷ *Tokios Tokelès v. Ukraine*, para. 74: "Article 1(1) of the BIT defines "investment" as "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter"

¹⁴⁸ *Tokios Tokelès v. Ukraine*, para. 84.

tribunal's interpretation that the purpose of such provisions was "*to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.*"¹⁴⁹

151. In the *Tokios Tokelès* case, the Respondent State had argued that the registered name under which Claimant had conducted its business as well as some documents relating to the business registration, had been irregular under Ukrainian law. The tribunal rejected this claim and found that Claimant's activity was covered by the definition of investment under the BIT since those investment activities in the publishing business were not illegal under the law of the host State. The tribunal further suggested that minor registration irregularities are harmless errors as long as the investment was not "*illegal per se.*"¹⁵⁰
152. The Tribunal considers the *Salini* test to constitute the proper jurisdictional yardstick for determining whether an investment has been made "in accordance with the law" of a host State. It will thus be guided in its assessment by scrutinizing whether the investment had been vitiated by an illegality.
153. It has not been argued by Respondents, nor is there any indication that any of the business transactions of Mytilineos, in particular concerning any of the Agreements, contravened the legal rules in force in Serbia and Montenegro or were illegal.
154. In the present case, even Respondents did not contend that Claimant's activities were illegal. In fact they expressly stated that "Respondents do not contend that the Agreements were not in compliance with the laws either – they only say that the Agreements were not registered as investment agreements, most certainly because the parties did not consider them as framing investments at all, but only as regulating long-term commercial transactions."¹⁵¹
155. Nevertheless, Respondents argue that "some aspects of the Agreements, and especially of the General Cooperation Agreement (preferential treatment of Mytilineos in eventual privatization of RTB-BOR, debt-to-equity swap), were at the

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, para. 86: "Even if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty."

¹⁵¹ R-IV (PHB), para. 8.1.

time of conclusion of the Agreements, as of today, directly contrary to Serbian/Yugoslav legislation.”¹⁵²

156. This view, however, is not supported by Article 3 of the General Cooperation Agreement providing that, in case of Privatization of RTB-BOR Mytilineos (i) will be given priority within the possibilities offered by the Ownership Transformation Act and (ii) shall have the right to convert outstanding claims against BOR to shares according to the Ownership Transformation Act and the program of privatization.
157. The Tribunal thus concludes, by a majority, that for the purposes of the BIT the investment has been made in accordance with the laws of Serbia and Montenegro and is thus protected under the BIT.

C. Jurisdiction *ratione personae*

158. The Tribunal has taken note that in June 2006, well after the filing of Claimant’s Statement of Claim in April 2005, Montenegro, a constituent unit of the State Union of Serbia and Montenegro, declared its independence. While the Tribunal has not been requested to rule on any ensuing State succession issues, it takes note that it appears uncontroversial that the Republic of Serbia will continue the legal identity of the State Union of Serbia and Montenegro on the international level.
159. For purposes of jurisdiction, however, the Tribunal will follow the well-established principle that jurisdiction is to be determined in light of the situation as it exists on the date the judicial proceedings are instituted. This principle has been recently confirmed by the ICJ in the *Arrest Warrant* case in which the Court held

“The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction.”¹⁵³

¹⁵² R-IV (PHB), para. 8.2.

¹⁵³ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2002, ICJ Reports (2002), p. 1, para. 26.

160. The principle has also been followed in investment arbitration. A number of tribunals have held that the decisive date for the participation in the Convention of the host State and of the investor's State of nationality was the date of the institution of arbitration proceedings.¹⁵⁴

161. With particular regard to the nationality requirement under Article 25 of the ICSID Convention the *Vivendi II* tribunal confirmed the rule expressed in the *Arrest Warrant* case and held that

“[t]he consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (other than, in a case like this, an ad hoc Committee's Decision to annul the prior jurisdictional finding) cannot withdraw the Tribunal's jurisdiction over the dispute.”¹⁵⁵

162. The Tribunal finds that the same rule also applies with regard to possible changes in the personality of respondents in investment cases. Though changes in the “identity” of States occur less frequently than changes of the nationality of natural or legal persons, there is no reason why the two should not be treated in the same way.

163. The Tribunal will therefore determine its jurisdiction *ratione personae* over the two Respondents on the basis of their existence on the date the arbitration proceedings were instituted on 8 April 2005.

(a) *Are Respondents who are not parties to any of the “seven agreements” the proper parties to this arbitration?*

164. While Respondents do not contest that Claimant is a national of a Contracting Party of the BIT, they contest Claimant's assumption that this Tribunal has jurisdiction over the latter's claims. Rather, they consider these claims to be merely contractual disputes between private parties in Serbia and Montenegro. According to their Plea Contesting Jurisdiction, the Tribunal's jurisdiction “is limited only to claims alleging a violation of the Treaty itself, and does not extend to investment disputes in general, or even less to disputes arising out [of] or in connection with any commercial activity

¹⁵⁴ See *Holiday Inns v. Morocco*, Lalive, The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) - Some Legal Problems, 51 *British Year Book of International Law* (1980), 142-146; *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 403; *LETCO v. Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 351.

¹⁵⁵ *Compañía de Aguas del Aconquija S.A. and Universal v. Argentine Republic (Vivendi II)*, Decision on Jurisdiction, 14 November 2005, para. 63.

or business transaction of persons of one Contracting Party's nationality in the territory of the other Contracting Party."¹⁵⁶ According to Respondents, the claims brought before this Tribunal are essentially claims for contractual defaults by RTB-BOR which is an entity distinct from both the First and the Second Respondent.

165. Claimant, on the other hand, alleges that acts by RTB-BOR may be attributed to Respondents on the basis of their control and funding of the company. Claimant further contends that Respondents' laws leading to the restructuring and privatization of RTB-BOR constituted an indirect expropriation, and that various other acts to its detriment constituted violations of other BIT obligations.¹⁵⁷ In Claimant's view "[t]he social program which resulted in the admission of Respondents' strategy not to have RTB BOT [sic] settle its debts to Claimant, the ongoing privatization of RTB BOR along with the machinery owned by Claimant are indicia of 'property taking'."¹⁵⁸
166. With regard to the expropriation claim concerning the lapse of the bank guarantees, Claimant alleges: "Respondents deprived Claimant of the bank guarantees by causing their lapse. This occurred by (a) the deliberate failure of Respondents, acting through RTB BOR, to extend the term of validity of the first bank guarantees, despite Claimant's repeated requests the bankruptcy, and (b) the bankruptcy of Jugobanka which caused the lapse of the Second Guarantee."¹⁵⁹
167. It is clear that this Tribunal does not have jurisdiction over mere contract claims between Mytilineos and RTB-BOR, such as the latter's default on payment obligations. The jurisdiction of this Tribunal is limited to treaty claims. Mytilineos does, however, allege BIT violations on the part of Respondents.
168. While acknowledging that RTB-BOR and Respondents are different parties, Claimant asserts that the acts of RTB-BOR may be attributable to Respondents. Claimant argues, *inter alia*, that RTB-BOR as a socially-owned entity may not be State-owned, but that the State might be the ultimate owner; that there is a *de facto* influence over or control of RTB-BOR; that Serbia appoints members of the RTB-BOR board of directors, and so on.

¹⁵⁶ R-I (PCJ), para. 14.

¹⁵⁷ C-APCJ, pp. 18 – 19.

¹⁵⁸ C-APCJ, p. 19.

¹⁵⁹ C-DOJ, p. 18.

169. While actual attribution to Serbia and Montenegro still has to be proven, it is clear that Serbia and Montenegro, as the treaty partner of Greece, is the correct respondent with regard to alleged BIT violations. The Tribunal thus unanimously finds that it has jurisdiction *ratione personae* over the First Respondent, Serbia and Montenegro.

(b) *Is Second Respondent who is not a party to the BIT a proper party to this arbitration?*

170. According to Respondents' brief, the Second Respondent, Serbia, is not a party to the BIT.¹⁶⁰ In their view, any consent to arbitration contained in this treaty does not cover Serbia. The consent only binds the Federal Republic of Yugoslavia (Serbia and Montenegro). Thus, Serbia cannot be a party to the arbitration.

171. Claimant contends that Serbia, as a constituent subdivision of Serbia and Montenegro, is bound by treaties entered into by the State Union which, according to the federal constitution, even take precedence over the law of Serbia. Because Serbia is bound by the BIT in its entirety, Claimant argues, it is also bound by the arbitration clause of Article 9.¹⁶¹

172. In the Tribunal's view the jurisdictional provisions are fairly clear with regard to the issue of who may be a party to arbitration. While Article 8 of the BIT provides for inter-State arbitration in cases of "disputes between the Contracting Parties", Article 9 provides for, as indicated in its title, "*Settlement of Disputes between an investor and a Contracting Party*." Possible parties to such mixed arbitration are, on the one hand, investors of one Contracting Party and, on the other hand, "the other Contracting Party." The "Contracting Parties" of the BIT are the Hellenic Republic and the Federal Republic of Yugoslavia as is evidenced by the agreement's title and also by the signatures of the two government officials who clearly signed "for the Government of the Hellenic Republic" and "for the Governement [sic] of the Federal Republic of Yugoslavia." Since by the treaty's plain wording Serbia, as a constituent part of the Federal Republic of Yugoslavia (Serbia and Montenegro), is not a Contracting Party, it cannot be made the subject of arbitration proceedings under the BIT.

173. This finding is confirmed by the practice of international investment arbitration. Claims against sub-State entities or constituent parts of a State party to an investment

¹⁶⁰ R-I (PCJ), paras. 65 *et seq.*

¹⁶¹ C-APCJ, p. 31.

agreement are only exceptionally permissible. One such possibility is provided for in the ICSID Convention which contemplates claims against “constituent subdivisions or agencies of a Contracting State” under the condition that such entities are “designated to the Centre by that State.”¹⁶² Such a possibility is not, however, provided for in the applicable BIT. Since the present arbitration is brought under the UNCITRAL Rules and not under the ICSID Convention, the latter’s exceptional possibility of instituting proceedings directly against designated constituent subdivisions or agencies is not available.

174. As a result, the Tribunal unanimously finds that it does not have jurisdiction over claims brought against Serbia.

175. This finding is without prejudice to the fact that Serbia and Montenegro may be held internationally responsible for acts of its constituent unit Serbia. According to general principles of the law of State responsibility, acts of Serbia may be attributed to Serbia and Montenegro. Article 4(1) of the ILC Articles on State Responsibility¹⁶³ provides:

“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”

176. In its commentary to this provision the ILC clarifies that the “*principle in article 4 applies equally to organs of the central government and to those of regional or local units.*”¹⁶⁴ According to the ILC this principle of attribution of acts of constituent parts of a State to the State is a principle of customary international law applied in international arbitral practice¹⁶⁵ as well as by the ICJ.¹⁶⁶

¹⁶² Article 25(1) and Article 25(3) of the ICSID Convention.

¹⁶³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

¹⁶⁴ Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.2, p. 88.

¹⁶⁵ *Pellat Case, France/Mexico Claims Commission, UNRIAA*, vol. V, p. 534 (1929), at p. 536.

¹⁶⁶ *LaGrand (Germany v. United States of America)*, Provisional Measures, ICJ Reports 1999, p. 9, at p. 16, para. 28. See also the judgment of 27 June 2001, para. 81.

177. Also investment tribunals have applied this rule. In *Metalclad* Mexico was held to be internationally responsible for acts of its States.¹⁶⁷ Similarly, in *Vivendi* an ICSID tribunal held:

“[u]nder international law, and for purposes of jurisdiction of this Tribunal, it is well established that actions of a political subdivision of federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government.”¹⁶⁸

178. Since these rules of attribution can only lead to the international responsibility of the First Respondent, Serbia and Montenegro, they cannot be relied upon in order to establish the Tribunal’s jurisdiction over the Second Respondent, Serbia.

D. Does the need for a *prima facie* case constitute an obstacle to the jurisdiction of the Tribunal?

179. For jurisdictional purposes in a BIT investment arbitration, treaty claims have to be alleged by the claimant and the allegations, if proven to be true must be capable of constituting violations of the BIT. This jurisdictional requirement can be found in the general jurisprudence of international courts and tribunals. It has particular relevance in the context of investment arbitration where treaty claims have to be separated from contract claims.

180. Since Respondents argued that Claimant failed to state valid *prima facie* claims in its Statement of Claim,¹⁶⁹ the Tribunal has to address this jurisdictional challenge. Before doing so it will describe the jurisdictional test it will apply in accordance with international practice.

181. In *Amco Asia v. Indonesia* an ICSID tribunal held that:

“[...] it must look firstly and only at the claim itself as presented to ICSID and the Tribunal in the Claimants’ Request for Arbitration. [...] the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that *prima facie* the claim, as stated by the

¹⁶⁷ *Metalclad Corp. v. United Mexican States*, ARB (AF)/97/1, Award, 30 August 2000, 16 *ICSID Review—Foreign Investment Law Journal* 168, 195 (2001), para. 73.

¹⁶⁸ *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*, Case No. ARB/97/3, Award of 21 November 2000, para. 49.

¹⁶⁹ R-I (PCJ), paras. 21 – 22; R-II (ROJ), paras. 19 – 30; R-IV (PHB), paras. 13 – 14.

Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.”¹⁷⁰

182. This so-called *prima facie* test has been used by various international tribunals including investment tribunals. Recently, it has been forcefully restated in *Salini v. Jordan*:

“[...] in considering issues of jurisdiction, courts and tribunals do not go into the merits of the case without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.”¹⁷¹

183. The need for a *prima facie* case alleging BIT violations has also been reaffirmed in the *Plama* case in which the tribunal held that for jurisdictional purposes “*the claimant must show that the alleged facts on which it relied were capable of falling within the provisions of the treaty.*”¹⁷²

184. Thus, it follows that if the facts as pleaded are plainly incapable of supporting a finding of breach of treaty, all or part of the claim might fall outside of the jurisdiction of the tribunal.¹⁷³ The *United Parcel Service* tribunal relied on the *Oil Platforms* case in which the ICJ adopted the following jurisdictional test:

“[The Court] must ascertain whether the violations of the Treaty [...] pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one the Court has jurisdiction *ratione materiae* to entertain [...]”¹⁷⁴

¹⁷⁰ *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 377, para. 38.

¹⁷¹ *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 19 November 2004, 44 ILM 569 (2005), para. 151; See also *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, 44 ILM 73 (2005), para. 29; similarly *Impregilio S.p.A. v. Islamic Republic of Pakistan*, ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 254.

¹⁷² *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, 44 ILM 721 (2005), para. 119.

¹⁷³ *United Parcel Service of America Inc v. Government of Canada*, UNCITRAL Award on Jurisdiction, 22 November 2002, at paras. 33-37.

¹⁷⁴ *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports (1996), 803, para. 16.

185. Based on this precedent, the *United Parcel Service* tribunal considered the following two questions crucial for a jurisdictional *prima facie* test:
- “Do the facts alleged by [Claimant] fall within those provisions [conferring jurisdiction]; are the facts capable, once proved, of constituting breaches of the obligations they state?”¹⁷⁵
186. In the recent *Bayindir* decision on jurisdiction, the test set forth in *Salini* and *Impregilo* was followed and the tribunal considered that it “*should be satisfied that, if the facts or the contentions alleged by Bayindir are ultimately proven true, they would be capable of constituting a violation of the BIT.*”¹⁷⁶
187. On this basis, the Tribunal will not ascertain whether the facts alleged by Claimant are true. This is a task reserved for determination of the merits of the case. Instead, it must satisfy itself that the alleged facts, if true, could constitute violations of the BIT. In other words, the Tribunal “*must not make findings on the merits of those claims, which have yet to be argued, but rather must satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant.*”¹⁷⁷
188. In its Statement of Claim Claimant alleged violations of Articles 2 (“*Promotion and Protection of Investments*”) and 4 (“*Expropriation*”) of the BIT. According to Claimant “Respondent breached its Treaty obligations by directing RTB BOR not to perform the Agreements with the Claimant.”¹⁷⁸ Claimant further argues that RTB-BOR should be considered an “instrumentality” or “*alter ego*” of Respondents, so that its non-performance of contractual obligations should be attributed to Respondents. It is further argued that this behavior constituted a breach of the fair and equitable treatment requirement as well as the full protection and security standard, and amounted to unjustifiable and discriminatory measures prohibited by Article 2(2) of the BIT.
189. Additionally, Claimant asserts that Respondents breached their BIT obligations under Article 2 and 4 “by depriving Claimant of the bank guarantees issued by

¹⁷⁵ *United Parcel Service of America Inc v Government of Canada*, para. 37.

¹⁷⁶ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, Case No. ARB/03/29, 14 November 2005, para. 194.

¹⁷⁷ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ARB/03/3, Decision on Jurisdiction, April 22, 2005, para. 237.

¹⁷⁸ C-Statement of Claim, p. 7.

Jugobanka.”¹⁷⁹ This deprivation allegedly occurred as a result of the failure by Respondent, acting through RTB-BOR, to extend the First Guarantee in 2001 and as a consequence of the lapse of the Second Guarantee in 2004 resulting from the “[government-]ordered and orchestrated bankruptcy of Jugobanka by virtue of an official decree.”¹⁸⁰

190. Respondents allege that the true nature of the dispute is one about the non-fulfillment of contractual obligations between Claimant and a private party in Serbia and Montenegro.¹⁸¹
191. Claimant does not appear to dispute that RTB-BOR is an entity under the laws of Serbia and Montenegro and is legally distinct from both Respondents and that its claims against RTB-BOR are contractual ones. However, Claimant has chosen to pursue treaty claims arising under the BIT for which it must show that there was a violation of the BIT attributable to Respondents. For that purpose, it is irrelevant whether there was (also) a breach of contractual obligations owed to Claimant or not.
192. According to well established rules of State responsibility, acts of private parties may under certain circumstances be attributed to States and may ultimately trigger their international responsibility. Direction and control, as alleged by Claimant, may lead to such attribution and it will be for the merits phase of the arbitration proceedings to decide whether there is sufficient ground to prove this.
193. Further, if such an attribution can be established, it is not automatically excluded that the behavior complained of may infringe the fair and equitable treatment obligation as well as the other treatment standards under Article 2 of the BIT and the expropriation prohibition under Article 4 of the BIT.
194. The Tribunal is of the opinion that the dispute does not merely concern the existence of contractual relations between Claimant and RTB-BOR and the determination of the outstanding contractual liability. Such allegation might indeed fail to state a *prima facie* BIT claim.¹⁸² In the present case, however, Claimant has alleged treaty

¹⁷⁹ C-Statement of Claim, p. 8.

¹⁸⁰ C-Statement of Claim, p. 9.

¹⁸¹ R-I (PCJ), p. 10.

¹⁸² Cf. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ARB/02/6, Decision on Jurisdiction, 29 January 2004; 8 *ICSID Rep.* 518 (2005), para. 159.

violations which, if ultimately proven correct, may lead to Respondents' international responsibility.

195. Though the Tribunal notes that Claimant's submissions concerning alleged BIT violations on the part of Respondents are not in all respects clear, it does not believe that it must rule out that the alleged facts, if established, may constitute breaches of the BIT from the outset.¹⁸³

196. The Tribunal thus, by majority, holds that Claimant has not failed to state a *prima facie* case.

E. Is the principle of the exhaustion of local remedies a bar to the jurisdiction of this Tribunal?

197. As a further jurisdictional objection, Respondents argue that, before referring the case to an international arbitral tribunal, local remedies should be exhausted first. In their plea contesting jurisdiction Respondents invoked the "principle in international law that local remedies should be exhausted first (the "exhaustion of local remedies rule"), before referring the case to international courts or tribunals."¹⁸⁴

198. Respondents refer to the 1989 judgment of the International Court of Justice in the *Elettronica Sicula S.p.A* case ("*ELSI*" case)¹⁸⁵ which confirmed that the customary international law principle of exhaustion of local remedies could not be considered dispensed with unless such "dispensation" had been made explicitly. According to Respondents this "non-dispensation" rule found in the *ELSI* case with regard to the Friendship, Commerce and Navigation Treaty between Italy and the United States (the "FCN Treaty") would also apply with regard to the present BIT.¹⁸⁶

199. Claimant asserts that by international standards as evidenced in recent ICSID cases this "*ELSI* presumption" has effectively been reversed. According to Claimant,

¹⁸³ Cf. *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 19 November 2004, 44 ILM 569 (2005), para. 166.

¹⁸⁴ R-I (PCJ), para. 62.

¹⁸⁵ *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), ICJ Report (1989) p.15.

¹⁸⁶ R-II (ROJ), para. 32.1.

tribunals have held that unless the exhaustion of local remedies was specifically required it was in effect tacitly dispensed with.¹⁸⁷

200. The Tribunal considers that the so-called “non-dispensation” rule found in the *ELSI* case is indeed relevant for purposes of dispute settlement in international economic law in general¹⁸⁸ as well as investment law in particular. This relevance manifests itself in the discussion of the rule’s meaning and its impact on investment arbitration in a number of awards and decisions.
201. In the *ELSI* case, the International Court of Justice stated that it was unable to
- “[...] accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”¹⁸⁹
202. At issue in the *ELSI* case was whether the United States could exercise diplomatic protection by instituting proceedings before the ICJ without the prior exhaustion of local remedies by the company on behalf of which the United States was willing to intervene. The ICJ denied this possibility. In particular, the Court found that the FCN Treaty between Italy and the United States did not dispense with the exhaustion of local remedies requirement. However, the Court found that the local remedies rule had in fact been complied with.¹⁹⁰
203. Although the ICJ’s holding expressly relates to the FCN Treaty, ICSID and other investment tribunals have also considered its impact on modern BITs which, in many respects, can be regarded as successor agreements to the older FCN treaties.
204. Indeed, in a number of recent ICSID awards tribunals have held that their jurisdiction does not depend upon the exhaustion of local remedies unless expressly required as a condition of the consent to jurisdiction under Article 26 of the ICSID Convention.
205. This view was clearly expressed in *Lanco International Inc. v. Argentina*, where the tribunal held that:

¹⁸⁷ C-APCJ, p. 25.

¹⁸⁸ R.S.J. Martha, *World Trade Disputes and the Exhaustion of Local Remedies Rule*, 30 *Journal of World Trade* 107 (1996).

¹⁸⁹ *ELSI* Case, ICJ Report (1989) p. 15, at p. 31, para. 50.

¹⁹⁰ *ELSI* Case, ICJ Report (1989) p. 15, at p. 36, para. 63.

“[a] State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause.”¹⁹¹

206. The *Lanco* approach was specifically cited and endorsed in the *Generation Ukraine* case.¹⁹² However, this reversal of the *ELSI* presumption is a specific result of the wording of the ICSID Convention. Article 26 provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

207. This was made very explicit by the tribunal in the *AES* award which stated:

“Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be expressly required as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.”¹⁹³

208. The tribunal in *Generation Ukraine* also emphasized the role of Article 26 of the ICSID Convention in this context:

“The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State’s domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent.”¹⁹⁴

¹⁹¹ *Lanco International Inc. v Argentina*, ICSID Case No. ARB/97/6, Award on Jurisdiction, 8 December 1998; 40 ILM 457 (2001), para. 39.

¹⁹² *Generation Ukraine, Inc. v. Ukraine*, ARB/00/9, Award, 16 September 2003; 44 ILM 404 (2005), para. 13.5: “The United States and Ukraine have elected to omit any requirement that an investor must first exhaust local remedies before submitting a dispute to ICSID arbitration in the BIT.”

¹⁹³ *AES Corporation v. The Argentine Republic*, ARB/02/17, Decision on Jurisdiction, April 26, 2005, para. 69.

¹⁹⁴ *Generation Ukraine, Inc. v. Ukraine*, ARB/00/9, Award, 16 September 2003; 44 ILM 404 (2005), para. 13.4.

209. It is less clear, however, whether the dispensation with the exhaustion of the local remedies rule can be equally taken for granted outside the context of the ICSID Convention.
210. Tribunals in BIT arbitrations operating outside the ICSID framework, such as *ad hoc* tribunals under the UNCITRAL Arbitration Rules, have not yet expressed themselves on this matter as clearly and explicitly as ICSID tribunals. Nevertheless, their views are generally interpreted as permitting direct arbitration without any prior exhaustion of local remedies.¹⁹⁵
211. There was some discussion of the local remedies rule in the NAFTA case of *Loewen v. United States*.¹⁹⁶ In its decision on jurisdiction the tribunal, operating on the basis of the ICSID Additional Facility rather than the ICSID Convention, was faced with the jurisdictional challenge of a non-exhaustion of local remedies. It found that the “*procedural*” local remedies rule and a substantive rule of finality, according to which a State would not incur responsibility for lower court judgments, were “*no different*” because both intended to “*ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.*”¹⁹⁷ It decided to refer back to this issue in its decision on the merits.
212. In the final award the *Loewen* tribunal did not entertain any jurisdictional challenge to the claim brought against the United States. Rather, it found that there was a substantive obligation incumbent upon claimants to challenge lower court judgments in order to invoke the international responsibility of the forum State for a denial of justice. According to the tribunal “[...] *a court decision which can be challenged through the judicial process does not amount to a denial of justice at the international level [...]*.”¹⁹⁸

¹⁹⁵ Schreuer, *Calvos’ Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 *The Law and Practice of International Courts and Tribunals* (2005), pp. 1, at p. 2, relying on *Loewen* and *Yaung Chi Oo*. See also Rubins/Kinsella, *International Investment, Political Risk and Dispute Resolution* (2005), p. 272, who consider that “[i]t is generally accepted that modern investment treaties have largely done away with the local remedies requirement of customary international law.”

¹⁹⁶ *The Loewen Group, Inc. and Raymond L. Loewen v USA*, Case No ARB(AF)/98/3, ICSID Additional Facility Decision on Jurisdiction, 5 January 2001, 7 ICSID Rep. 421 (2005).

¹⁹⁷ *Loewen*, Decision on Jurisdiction 2001, para. 71.

¹⁹⁸ *Loewen Group, Inc and Raymond L. Loewen v USA*, Case No ARB(AF)/98/3, ICSID Additional Facility Award, 26 June 2003, 42 ILM 811 (2003), para. 153.

213. Neither the decision on jurisdiction nor the award explicitly addressed the procedural issue whether a NAFTA claim may be brought without the prior exhaustion of local remedies. The fact that the tribunal addressed it as a substantive rule on the merits indicates, however, that the exhaustion of local remedies was not considered to be a jurisdictional requirement.
214. Since the *Loewen* tribunal expressly endorsed the *ELSI* presumption¹⁹⁹ its rulings must have relied, at least implicitly, on a waiver of the exhaustion of local remedies requirement. This could be seen in Article 1121 NAFTA which provides that a claim may only be brought if:
- “[...] the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [...]”²⁰⁰
215. This reading of NAFTA provisions as dispensing with the local remedies rule is confirmed by another NAFTA award. In *Waste Management* the tribunal held that “[i]t is true that in a general sense the exhaustion of local remedies is a procedural prerequisite for the bringing of an international claim, one which is dispensed with by NAFTA Chapter 11.”²⁰¹ Referring in particular to Article 1121, the tribunal found that “Chapter 11 of NAFTA does not require that a party should exhaust local remedies before bringing an international claim: rather it requires a waiver of remaining remedies.”²⁰²
216. Though it was not explicitly asked to decide on the validity of the local remedies rule in the light of *ELSI*, the tribunal in *Yaung Chi Oo v. Myanmar* effectively abandoned the *ELSI* requirement that a dispensation of the local remedies rule must be express. The applicable investment treaty, the 1987 ASEAN Investment Agreement,²⁰³ did not expressly address the requirement of exhausting local remedies. Rather, it provided

¹⁹⁹ *Loewen*, Decision on Jurisdiction 2001, para. 73; *Loewen*, Award 2003, para. 160.

²⁰⁰ Article 1121(1)(b) NAFTA.

²⁰¹ *Waste Management, Inc. v. United Mexican States* (No. 2), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 ILM 967 (2004), para. 116.

²⁰² *Waste Management*, Award 2004, para. 133.

²⁰³ Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments (the ASEAN Investment Agreement), Manila, 15 December 1987, available at <http://www.aseansec.org/12816.htm>.

in its Article X for a choice between various international arbitration proceedings after a six-month waiting period.²⁰⁴

217. In the section of its award dealing with jurisdictional issues the *Yaung Chi Oo* tribunal held:

“The 1987 [ASEAN] Agreement nowhere provides that a Claimant must exhaust domestic remedies, whether against the host State or any specific entity within the host State, before proceedings are commenced under Article X. Conceivably the existence of a local remedy in Myanmar might be relevant to the question whether there had been a breach of Article IV of the 1987 Agreement. But that is a matter going to the substance of the claim and not the Tribunal’s jurisdiction.”²⁰⁵

218. Thus, in *Yaung Chi Oo* an investment agreement providing private investors with direct access to arbitration against a host State has been interpreted to tacitly dispense with the requirement to exhaust local remedies.

219. In the *CME*, Final Award the local remedies rule was also considered inapplicable even though it had not been expressly dispensed with in the applicable BIT. This case is particularly relevant because it was an *ad hoc* arbitration under the UNCITRAL Rules on the basis of a BIT which was silent on the question of exhaustion of local remedies. Without explicitly addressing the *ELSI* presumption, the tribunal rejected an “injection” into the applicable BIT of a requirement to exhaust local remedies.²⁰⁶ In effect, the tribunal exercised its jurisdiction without requiring the exhaustion of local remedies.

220. In the opinion of the Tribunal, this interpretation must also be adopted with regard to the Greece-Serbia and Montenegro BIT. In fact, this result is reinforced by the

²⁰⁴ Article X ASEAN Investment Agreement provides: “1. Any legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties shall, as far as possible, be settled amicably between the parties to the dispute.

2. If such a dispute cannot thus be settled within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration and such election shall be binding on the other party. The dispute may be brought before the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purposes of conducting the arbitration.”

²⁰⁵ *Yaung Chi Oo v. Myanmar*, 2003, para. 40.

²⁰⁶ *CME Czech Republic B.V. v. Czech Republic*, Final Award, 14 March 2003, para. 412.

specific wording of the BIT, which contains a fork-in-the-road clause in Article 9(2) providing that:

“if such disputes [i.e. disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former] cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.”

221. To assume that the BIT had not tacitly dispensed with the requirement to exhaust local remedies would imply that an investor, before making his or her choice between domestic courts and international arbitration, would have to exhaust domestic remedies. This would in effect render the “domestic courts” alternative of the fork-in-the-road clause meaningless and thus such an assumption cannot be made. On the contrary, a fork-in-the-road clause obliges an investor to choose whether to pursue remedies before domestic or international *fora*. Once the choice is made in favor of domestic remedies, international arbitration is no longer available. Thus, one cannot require the exhaustion of local remedies as a precondition for access to international arbitration. Instead, the initiation of local proceedings forfeits access to international arbitration.
222. The result that BITs granting private investors direct access to international arbitration do not require local remedies to be exhausted is also confirmed by underlying policy reasons. A requirement for the exhaustion of local remedies as a general precondition to mixed investment arbitration would seriously undermine the effectiveness of this form of dispute settlement.
223. This consideration is also reflected in the 1989 resolution of the *Institut de droit international* on “Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises”. It found that:

“[t]he requirement of exhaustion of local remedies as a condition of implementation of an obligation to arbitrate is not admissible unless the arbitration agreement provides otherwise.”²⁰⁷

²⁰⁷ Article 8 Institut de droit international Resolution on “Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises” Santiago de Compostela – 1989, 63 AnnIDI (1990), p. 324, at p. 330.

224. This result is in line with a fundamental difference between the type of treaty at issue in the *ELSI* case, giving rise to the above-cited presumption in favor of requiring the exhaustion of local remedies, and modern BITs. While treaties of friendship, commerce and navigation provide for inter-State dispute settlement as means of last resort dependant on the espousal of private party claims by the home State, BITs provide for direct access to dispute settlement.
225. The Tribunal decides unanimously that the BIT does not require previous exhaustion of local remedies. Thus, any alleged non-exhaustion cannot deprive the Tribunal of its jurisdiction over the present dispute.

VI. DECISIONS

226. FOR THE FOREGOING REASONS, the Tribunal, after having met for deliberations in Zurich, renders the following decisions:

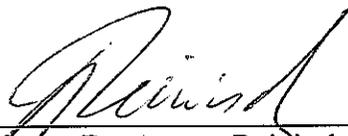
The Arbitral Tribunal:

- (1) DETERMINES, by a majority, that the business activities of Claimant constitute an investment under the BIT;
- (2) FURTHER DETERMINES, by a majority, that the broad “investment” definition of Article 1(1) of the BIT referring to “every kind of asset” is not limited by an additional requirement that such assets be “invested”;
- (3) FURTHER DETERMINES, by a majority, that for the purposes of the BIT Claimant’s investment has been made in accordance with the law of Serbia and Montenegro and is thus protected under the BIT;
- (4) FURTHER DETERMINES unanimously that it has jurisdiction *ratione personae* over the First Respondent;
- (5) FURTHER DETERMINES unanimously that it does not have jurisdiction *ratione personae* over claims brought against the Second Respondent;
- (6) FURTHER DETERMINES, by a majority, that Claimant has not failed to state a *prima facie* case;
- (7) FURTHER DETERMINES unanimously that the BIT does not require the exhaustion of local remedies before the institution of arbitral proceedings under Article 9 of the BIT. Thus, any alleged non-exhaustion cannot deprive the Tribunal of its jurisdiction over the present dispute;

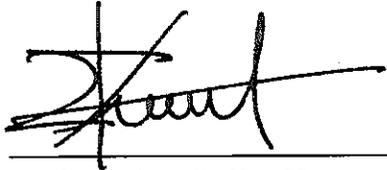
The Arbitral Tribunal therefore:

- (1) DECIDES that the dispute between Claimant and First Respondent is within its jurisdiction;
- (2) FURTHER DECIDES that any claim for arbitration costs, legal fees and other expenses in connection with the issue of jurisdiction shall be addressed in the Award on the Merits.

Done in Zurich, Switzerland, being the place of arbitration, on 8 September 2006.



Professor Dr. August Reinisch
Presiding Arbitrator



Professor Dr. Stelios Koussoulis
Arbitrator

Professor Dr. Dobrosav Mitrović
Arbitrator

Reason for absence of signature (Article 32(4) of the UNCITRAL Arbitration Rules):

In a letter to the Presiding Arbitrator dated 6 September 2006, Professor Mitrović indicated that he would not sign this Partial Award as he did not agree with the majority on the jurisdiction of the Arbitral Tribunal. Professor Mitrović participated in all aspects of the deliberation process.

ANNEX I

List of Agreements between the Claimant and RTB-BOR dated 19 February 1998

1. General Cooperation Agreement
2. Working Capital Agreement
3. Sale of Copper Agreement
4. Spare Parts Agreement
5. Sale of Zinc Agreement
6. Copper Concentrates Agreement
7. Agreement for the Modernisation of the Metallurgical Capacities in RTB-BOR

ANNEX II

Agreement between the Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments

ΑΡΘΡΟ 13

Θέση σε ισχύ - Δάρκεια - Λήξη

1. Η παρούσα Συμφωνία τίθεται σε ισχύ τριάντα ημέρες από την ημερομηνία κατά την οποία τα Συμβαλλόμενα Μέρη αντήλλαξαν έγγραφες ανακοινώσεις, με τις οποίες πληροφορούν ότι ολοκληρώθηκαν οι αντίστοιχες συνταγματικές τους διαδικασίες.

2. Η παρούσα Συμφωνία συνάπτεται για μία περίοδο δεκα ετών και, εν συνεχεία, ανανεώνεται αυτόματα για δεκαετείς διαδοχικές περιόδους, εκτός εάν το ένα από τα Συμβαλλόμενα Μέρη ανακοινώσει εγγράφως στο άλλο Συμβαλλόμενο Μέρος, τουλάχιστον δώδεκα μήνες πριν από την ημερομηνία λήξεώς της, την απόφασή του να καταγγείλει την παρούσα Συμφωνία.

3. Όσον αφορά επενδύσεις που πραγματοποιήθηκαν πριν από την ημερομηνία καταγγελίας της παρούσας Συμφωνίας, τα προηγούμενα άρθρα εξακολουθούν να ισχύουν για μία περαιτέρω δεκαετία από την ημερομηνία αυτή.

Έγινε εις διπλούν, στην Αθήνα την 25η Ιουνίου 1997 στην ελληνική, σερβική και αγγλική γλώσσα και όλα τα κείμενα είναι εξίσου αυθεντικά.

Σε περίπτωση ερμηνευτικών διαφορών, υπερισχύει το αγγλικό κείμενο.

ΓΙΑ ΤΗΝ ΚΥΒΕΡΝΗΣΗ
ΤΗΣ ΕΛΛΗΝΙΚΗΣ
ΔΗΜΟΚΡΑΤΙΑΣ

(υπογραφή)

Χρήστος Γάχτας
Υφυπουργός
Εθνικής Οικονομίας

ΓΙΑ ΤΗΝ ΟΜΟΣΠΟΝΔΙΑΚΗ
ΚΥΒΕΡΝΗΣΗ ΤΗΣ
ΟΜΟΣΠΟΝΔΙΑΚΗΣ
ΔΗΜΟΚΡΑΤΙΑΣ
ΤΗΣ ΓΙΟΥΓΚΟΣΛΑΒΙΑΣ

(υπογραφή)

Božidar Gazivoda
Ομοσπονδιακός Υπουργός
Οικονομικών

AGREEMENT

**BETWEEN THE GOVERNMENT OF THE HELLENIC REPUBLIC AND THE
FEDERAL GOVERNMENT OF THE FEDERAL REPUBLIC OF YUGOSLAVIA
ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS**

The Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia,

Hereinafter referred to as the "Contracting Parties",

DESIRING to intensify their economic cooperation to the mutual benefit of both countries on a long term basis,

HAVING as their objective to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party,

RECOGNIZING that the promotion and protection of investments, on the basis of this Agreement, will stimulate the initiative in this field and thereby significantly contribute to the development of economic relations between the Contracting Parties,

HAVE AGREED AS FOLLOWS:

ARTICLE 1**Definitions**

For the purposes of this Agreement:

1. "Investment" means every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the latter's legislation and in particular, though not exclusively, includes:

- a) movable and immovable property and any rights in rem such as servitudes, usufructus, mortgages, liens or pledges;
- b) shares in and stock of a company, debentures as well as other kinds of securities of a company and any other form of participation in a company;
- c) claims to money or any other claim under contract having an economic value;
- d) intellectual and industrial property rights, patents, trade marks, technical processes, know-how, goodwill and any other similar rights;
- e) concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

A possible change in the form in which the investments have been made does not affect their character as investments.

2. "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties, fees, including patent and licence fees.

3. "Investor" means:

- a) a natural person having the nationality of one Contracting Party in accordance with its law and making investments in the territory of the other Contracting Party;
- b) a legal entity incorporated, constituted or otherwise duly organised in accordance with the legislation of one Contracting Party, having its headquarters or its effective economic activity in the territory of that same Contracting Party and making investments in the territory of the other Contracting Party.

4. "Territory" means in respect of either Contracting Party, the territory under its sovereignty including the territorial sea, as well as marine and submarine areas over which that Contracting Party exercises, in conformity with international law, sovereign rights or jurisdiction.

ARTICLE 2**Promotion and Protection of Investments**

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its legislation.

2. Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other

Contracting Party, is not in any way impaired by unjustifiable or discriminatory measures.

3. Returns from the investments and, in cases of reinvestment, the income ensuing therefrom, enjoy the same protection as the initial investments.

4. Each Contracting Party shall, in its territory, respect, in good faith, all obligations concerning a particular investor of the other Contracting Party, undertaken within its legal framework.

ARTICLE 3

National Treatment and Most - Favoured - Nation Treatment

1. Each Contracting Party shall accord to investments, made in its territory by investors of the other Contracting Party, treatment not less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable.

2. Each Contracting Party shall accord to investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments in its territory, treatment not less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable.

3. The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

a) its participation in any existing or future free trade zone, customs union, economic union, regional economic integration agreement or similar international agreement, or

b) any international agreement or arrangement relating wholly or mainly to taxation.

ARTICLE 4

Expropriation

1. Investments by investors of either Contracting Party in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to any other measure having equivalent effect to expropriation or nationalization (hereinafter referred to as "expropriation"), except in the public interest, under due process of law, on a non discriminatory basis and against payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment affected immediately before the actual measure was taken or became public knowledge, whichever is the earlier, it shall include interest from the date of expropriation until the date of payment at a normal commercial rate and shall be freely transferable in a freely convertible currency.

2. The investor affected shall have the right, under the legislation of the Contracting Party making the expropriation, to a prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article.

ARTICLE 5

Compensation for Losses

1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or civil disturbance in the territory of the other Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution,

indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State, whichever is more favourable. Resulting payments shall be made without delay and shall be freely transferable.

2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who, in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:

- a) requisitioning of their investment or part thereof by the latter's authorities or executive forces, or
- b) destruction of their investment or part thereof by the latter's authorities or executive forces, which was not caused in combat action or required by the necessity of the situation,

shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective. Resulting payments shall be made without delay and shall be freely transferable.

ARTICLE 6

Transfers

1. Each Contracting Party shall guarantee, in respect of investments of investors of the other Contracting Party, the unrestricted transfer of the investment and its returns, after fulfilment of any financial obligation pertaining to the investment.

The transfers shall be effected without delay, in a freely convertible currency, at the prevailing rate of exchange on the date of transfer.

2. Such transfers shall include in particular, though not exclusively:

- a) capital and additional amounts to maintain or increase the investment;
- b) returns;
- c) funds in repayment of loans;
- d) proceeds of sale or liquidation of the whole or any part of the investment;
- e) compensation under Articles 4 and 5.

ARTICLE 7

Subrogation

1. If one Contracting Party or its designated Agency makes a payment to its own investors under a guarantee given in respect of an investment in the territory of the other Contracting Party, the other Contracting Party shall recognise:

- a) the assignement to the first Contracting Party or its designated Agency by law or by legal transaction, of any rights and claims of the indemnified investor, and
- b) that the first Contracting Party is entitled to exercise such rights and enforce such claims by virtue of subrogation and shall assume the same obligations pertaining to the investment.

2. The rights or claims so subrogated shall not exceed the original rights or claims of the investor.

3. Subrogation of the rights and obligations of the indemnified investor shall also apply to the transfers effected in accordance with Article 6 of this Agreement.

ARTICLE 8

Settlement of Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled by negotiations, through diplomatic channels.

2. If the dispute cannot thus be settled within six months from the beginning of the negotiations, it shall, upon request of either Contracting Party be submitted to an arbitration tribunal.

3. The arbitration tribunal shall be constituted ad hoc as follows: Each Contracting Party shall appoint one arbitrator and these two arbitrators shall agree upon a national of a third State as chairman. The arbitrators shall be appointed within three months, the chairman within five months from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitration tribunal.

4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the Court is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President or if he too is a national of either Contracting Party or is otherwise prevented from discharging the said function, the Member of the Court next in seniority, who is not a national of either Contracting Party, shall be invited to make the necessary appointments.

5. The arbitration tribunal shall decide on the basis of respect of the law, including particularly this Agreement and other relevant agreements between the Contracting Parties, as well as the generally acknowledged rules and principles of international law.

6. Unless the Contracting Parties decide otherwise, the tribunal shall determine its own procedure. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Contracting Parties.

7. Each Contracting Party shall bear the cost of the arbitrator appointed by itself and of its representation. The cost of the Chairman shall be born in equal parts by the Contracting Parties.

ARTICLE 9

Settlement of Disputes between an Investor and a Contracting Party

1. Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.

2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.

Each Contracting Party hereby consents to the submission of such dispute to international arbitration.

3. Where the dispute is referred to international arbitration the investor concerned may submit the dispute either to:

a) the International Centre for the Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington D.C. on 18 March 1965, for arbitration or conciliation, or

b) an ad hoc arbitral tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L.).

4. The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law. The awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law.

ARTICLE 10

Application of other Rules

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a rule, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such a rule shall, to the extent that it is more favourable, prevail over this Agreement.

ARTICLE 11

Consultations

Representatives of the Contracting Parties shall, whenever necessary, hold consultations on any matter affecting the implementation of this Agreement. These consultations shall be held on the proposal of one of the Contracting Parties at a place and at a time to be agreed upon through diplomatic channels.

ARTICLE 12

Application of the Agreement

This Agreement shall apply to investments made by investors of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation, prior to as well as after the date of its entry into force. However, the provisions of this Agreement shall be applicable from the date of its entry into force.

ARTICLE 13

Entry into Force - Duration - Termination

1. This Agreement shall enter into force thirty days after the date on which the Contracting Parties have exchanged written notifications informing each other that their respective constitutional procedures have been completed.

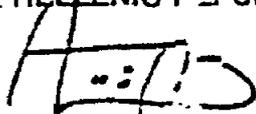
2. This Agreement is concluded for a period of ten years and shall thereafter be automatically extended for successive periods of ten years, unless either Contracting Party notifies in writing, at least twelve months prior to its date of expiry, to the other Contracting Party, its decision to terminate this Agreement.

3. In respect of investments made prior to the date of termination of this Agreement, the foregoing Articles shall continue to be effective for a further period of ten years from that date.

Done in duplicate at *Athens*, on *25. June. 1997*
in the Greek, Serbian and English languages, all texts being equally authentic.

In case of divergence the English text shall prevail.

FOR THE GOVERNMENT OF
THE HELLENIC REPUBLIC



Christos Pantas
Deputy Minister
for National Economy

FOR THE FEDERAL GOVERNEMENT OF
THE FEDERAL REPUBLIC OF YUGOSLAVIA



Bozidar Gazivoda
Federal Minister
for Finance

Άρθρο δεύτερο

Η ισχύς του παρόντος νόμου αρχίζει από τη δημοσίευσή του στην Εφημερίδα της Κυβερνήσεως και της Συμφωνίας που κυρώνεται από την πλήρωση των προϋποθέσεων του άρθρου 13 παρ. 1 αυτής.

Παραγγέλλομε τη δημοσίευση του παρόντος στην Εφημερίδα της Κυβερνήσεως και την εκτέλεσή του ως νόμου του Κράτους.

Αθήνα, 18 Φεβρουαρίου 1998

Ο ΠΡΟΕΔΡΟΣ ΤΗΣ ΔΗΜΟΚΡΑΤΙΑΣ
ΚΩΝΣΤΑΝΤΙΝΟΣ ΣΤΕΦΑΝΟΠΟΥΛΟΣ

ΟΙ ΥΠΟΥΡΓΟΙ

ΕΞΩΤΕΡΙΚΩΝ
ΘΕΟΔ. ΠΑΓΚΑΛΟΣ

ΕΘΝ. ΟΙΚΟΝΟΜΙΑΣ ΚΑΙ ΟΙΚΟΝΟΜΙΚΩΝ
ΓΙΑΝ. ΠΑΠΑΝΤΩΝΙΟΥ

ΑΝΑΠΤΥΞΗΣ
ΒΑΣ. ΠΑΠΑΝΔΡΕΟΥ

Θεωρήθηκε και τέθηκε η Μεγάλη Σφραγίδα του Κράτους.

Αθήνα, 18 Φεβρουαρίου 1998

Ο ΕΠΙ ΤΗΣ ΔΙΚΑΙΟΣΥΝΗΣ ΥΠΟΥΡΓΟΣ
ΕΥΑΓ. ΠΑΝΝΟΠΟΥΛΟΣ