INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

MNSS B.V. and Recupero Credito Acciaio N.V.

v.

Montenegro

(ICSID Case No. ARB(AF)/12/8)

AWARD

Andrés Rigo Sureda, President of the Tribunal

Emmanuel Gaillard, Arbitrator

Brigitte Stern, Arbitrator

Geraldine R. Fischer, Secretary of the Tribunal

Date of Dispatch: 4 May 2016

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Representation of the Parties

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I. INTRODUCTION

1. The Claimants are MNSS B. V. ("**MNSS**"), a private company constituted under the laws of the Netherlands, and Recupero Credito Acciaio N.V. ("**RCA**") a private company constituted under the laws of Curaçao (collectively "**Claimants**").

2. The Respondent is the Republic of Montenegro ("**Respondent**," "**Government**," "**GoM**" or "**Montenegro**").

3. As described by the Claimants, "MNSS is a holding company indirectly owned and controlled by Ethemba Capital No. 5 L.P., a limited liability partnership managed by Ethemba Capital Limited, a private equity fund manager."[1] About 98 percent of MNSS is owned by three investment partnerships managed by Ethemba Capital. RCA is "wholly owned by the Abarth Private Foundation, a private foundation established under the laws of Curaçao … the beneficiaries of which are three investment partnerships managed by Ethemba Capital."[2]

4. The Claimants initiated two arbitration proceedings under the Additional Facility for breaches of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia, dated 29 January 2002 ("**BIT**"), and for breaches of the Montenegrin Foreign Investment Law 2000, as amended in 2007 and 2010 ("**MFI Law 2000**") and the Montenegrin Foreign Investment Law 2011 ("**MFI Law 2011**") (collectively "**2000 and 2011 MFI Laws**"). The Parties agreed to consolidate the two proceedings and their agreement was adopted by the Tribunal and reflected in Procedural Order No. 1 at paragraph 19.2.

II. BACKGROUND TO THE DISPUTE

5. MNSS made investments in Zeljezara Niksic AD Niksic ("**ZN**") in the form of equity and loans starting on 28 February 2008, and RCA alleges to have

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[1] Memorial, para. 20.
[2] *Id*., para. 30.

made investments in the form of loans to ZN, a matter disputed by the Respondent. According to the Claimants, the Respondent subjected their investments to discriminatory, unreasonable, unlawful and irregular acts and omissions that directly or cumulatively had the effect of unlawfully expropriating them and violating other standards of protection to which they consider to be entitled.

III. PROCEDURAL HISTORY

A. Claimants' Applications for Approval of Access to the Additional Facility and Request for Arbitration

6. On 7 November 2011, the Claimants requested approval of access to the Additional Facility of the International Centre for Settlement of Investment Disputes ("**Additional Facility**" or "**AF**") pursuant to Article 9(2)(b) of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia ("**BIT**")[3] and Articles 2(a) and 4(2) of the Additional Facility Rules. On 5 December 2011, the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**") notified the Parties that, pursuant to Article 4(5) and in accordance with Article 4(2) of the Additional Facility Rules ("**AF Rules**"), she had approved access to the Additional Facility and recorded the approval in the Secretariat's Register.

7. On 12 June 2012, the Claimants submitted a second application for approval of access to the ICSID Additional Facility based on Article 30(2) of the MFI Law 2011. On 29 June 2012, the ICSID Secretariat received a letter from Montenegro regarding the Claimants' second application to which the Claimants responded on 9 July 2012. On 27 July 2012, the Secretary-General of ICSID notified the Parties that, pursuant to Article 4(5) and in accordance with Article 4(2) of the Additional Facility Rules, she had approved access to the Additional Facility and recorded the approval in the Secretariat's Register.

[3] BIT (Legal Authority CLA-504).

8. On 9 November 2012, the Claimants filed a Request for Arbitration together with Exhibits C-001 to C-020 ("**RFA**" or "**Request**").

9. On 6 December 2012, the Secretary-General of ICSID notified the Parties that, pursuant to Article 4 of the ICSID Arbitration (Additional Facility) Rules, she had registered the Request. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Article 5(e) of the ICSID Arbitration (Additional Facility) Rules. The Secretary-General also reminded the Parties that the registration of the Request was without prejudice to the powers and functions of the Tribunal with regard to competence and merits.

B. Tribunal

10. By letters of 28 January 2013, the Parties notified the Secretariat of their agreement that the Arbitral Tribunal would comprise one arbitrator nominated by each Party and the President would be appointed by the co-arbitrators through a list process.

11. On 1 February 2013, the Secretariat notified the Parties that Professor Christoph Schreuer, an Austrian national, accepted his appointment by the Respondent as arbitrator.

12. On 5 February 2013, the Secretariat informed the Parties that Professor Emmanuel Gaillard, a French national, accepted his appointment by the Claimants as arbitrator.

13. On 27 March 2013, the Party-appointed arbitrators appointed Dr. Andrés Rigo Sureda as President of the Tribunal.

14. On 29 March 2013, the Secretary-General notified the Parties that Dr. Andrés Rigo Sureda, Professor Emmanuel Gaillard and Professor Christoph Schreuer had accepted their appointments and, pursuant to Article 13(1) of the ICSID Arbitration (Additional Facility) Rules, the Tribunal was deemed to have been constituted on that date. Ms. Geraldine R. Fischer, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

15. On 23 February 2015, Professor Christoph Schreuer resigned as arbitrator in this proceeding. The next day, the Parties were sent Professor Schreuer's

resignation, and they were notified that Dr. Andrés Rigo Sureda and Professor Emmanuel Gaillard had considered the reasons for his resignation and consented to it. The Parties were also informed that the proceeding would remain suspended until the vacancy was filled.

16. On 3 April 2015, the Respondent appointed Professor Brigitte Stern, a French national, as arbitrator.

17. On 7 April 2015, the Secretary of the Tribunal informed the Parties that Professor Stern had accepted her appointment by the Respondent as arbitrator in accordance with Article 17(1) of the ICSID Arbitration (Additional Facility) Rules. Consequently, pursuant to Article 18 of the ICSID Arbitration (Additional Facility) Rules, the proceeding resumed as of that day.

C. First Session and Written Procedure

18. The Tribunal held a first session with the Parties by telephone conference on 17 May 2013. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed, *inter alia*, that: the applicable Arbitration Rules would be the ICSID Arbitration (Additional Facility) Rules in force as of April 2006, the procedural language would be English and the place of arbitration would be Paris, France. The Parties also agreed to consolidate the two proceedings relating to the claims arising under the BIT and the 2011 MFI Law into a single arbitration. The Parties' agreements were embodied in the Tribunal's Procedural Order No. 1, which was issued on 23 May 2013.

19. On 20 September 2013, the Claimants filed their Memorial ("**Memorial**"), accompanied by the following documents:

- Witness Statement of Mr. Mark Jacobson dated 18 September 2013;
- Witness Statement of Mr. Alan Jacobson dated 18 September 2013;
- Witness Statement of Mr. Leslaw Kwasik dated 18 September 2013;
- Witness Statement of Mr. Daniel Brol dated 19 September 2013;
- Volumes 1-7 that contained chronologically ordered contemporaneous correspondence and documents;

- Volumes 8 and 9 that contained reference materials;
- Volumes 10-12 that contained legal authorities; and
- Volumes 1A and 1B that contained additional correspondence, documents, reference materials and legal authorities.[4]

20. On 31 October 2013, the Claimants submitted a corrected Memorial, corrected Witness Statements of Mr. Mark Jacobson, Mr. Alan Jacobson, Mr. Daniel Brol and Mr. Leslaw Kwasik and a corrected consolidated index to the exhibits.
21. On 5 December 2013, following exchanges between the Parties, the Claimants submitted the Parties' joint document production table pursuant to Procedural Order No. 1.
22. On 11 December 2013, the Tribunal issued Procedural Order No. 2 ordering the production of certain documents.
23. On 20 January 2014, the Respondent filed a Counter-Memorial, which included a Request for Bifurcation ("**Counter-Memorial**"), accompanied by the following documents:
    - Witness Statement of Ms. Mira Todorovic Symeonides dated 20 January 2014;
    - Witness Statement of Mr. Branko Vujovic dated 20 January 2014;
    - Exhibits R-002 to R-057; and
    - Legal Authorities RLA-001 to RLA-140.[5]
24. On 4 February 2014, the Tribunal issued Procedural Order No. 3 ordering the Respondent to produce certain documents.
25. On 20 February 2014, the Claimants filed a submission objecting to the bifurcation of the proceedings that was accompanied by exhibits in Volume 13.
26. On 27 February 2014, the Tribunal issued Procedural Order No. 4 rejecting the Respondent's request for bifurcation.

[4] Memorial, paras. 14-17. The exhibits accompanying the Claimants' Memorial also included the exhibits to the Claimants' RFA.
[5] Counter-Memorial, para. 3.

27. By letter of 10 June 2014, the Respondent stated that it refused to pay the Centre's request for additional funds and expressed its willingness to pay the monies if the Claimants were to provide security for any future claim that the Respondent may have for reimbursement.

28. On 20 June 2014, the Claimants filed a Reply on the Merits, together with a Counter-Memorial on Jurisdiction and a Memorial on *quantum* ("**Reply**"), accompanied by the following documents:
    - Second Witness Statement of Mr. Mark Jacobson dated 20 June 2014;
    - Second Witness Statement of Mr. Leslaw Kwasik dated 20 June 2014;
    - Second Witness Statement of Mr. Daniel Brol dated 20 June 2014;
    - Montenegrin Law Expert Report of Professor Vladimir Pavic and Dr. Milos Zivkovic dated 16 June 2014;
    - Brattle Group Expert Report entitled "Damages to MNSS B.V. and Recupero Credito Acciaio N.V." dated 20 June 2014;
    - Volumes 14-17 that contained chronologically ordered contemporaneous correspondence and documents;
    - Volumes 18 and 19 that contained legal authorities;
    - Volumes 20-22 that contained the legal authorities referenced by the Montenegrin Legal Expert Report; and
    - Volume 2A that contained additional correspondence, documents, reference materials and legal authorities.

29. By letter of 24 June 2014, the Claimants asked the Tribunal "to issue an order that the Respondent pay its share of the advance costs, without prejudice to the Tribunal's decision on the allocation of the costs of the arbitration," and rejected the Respondent's proposal that the Claimants provide security.

30. On 18 July 2014, the Tribunal issued Procedural Order No. 5 noting that Claimants had contributed both their share of the requested advances and the Respondent's share of the first advance. The Tribunal then "recall[ed]

that it has the power to order security for costs, but finds that, under the circumstances, there are no compelling reasons for such security." The Tribunal further reminded the Respondent of its obligation to pay its portion of the finances for the case in accordance with Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations.

31. On 15 September 2014, the Tribunal issued Procedural Order No. 6 amending the schedule for the proceedings.

32. On 27 September 2014, the Respondent filed a request for the Tribunal to order the production of documents.

33. On 13 October 2014, the Claimants filed their observations on the Respondent's document production request.

34. On 20 October 2014, the Respondent filed its observations on the Claimants' objections to the Respondent's document production request.

35. On 23 October 2014, pursuant to Section 14 of Procedural Order No. 1, the Tribunal issued its decisions on the Respondent's Request for the Production of Documents of 27 September 2014.

36. On 20 November 2014, the Respondent filed a Rejoinder on the Merits, together with a Reply on Jurisdiction ("**Rejoinder**"), accompanied by the following documents:
    - Second Witness Statement of Mr. Branko Vujovic dated 20 November 2014;
    - Montenegrin Law Expert Report of Professor Dragan Radonjić and Assistant Professor Vladimir Savković dated 20 November 2014 with Exhibits LEX-0001 to LEX-0051;
    - Expert Report of Mr. Brent C. Kaczmarek dated 20 November 2014 with Appendices A-H and Exhibits NAV-001 to NAV-135;
    - Exhibits R-058 to R-126; and
    - Legal Authorities RLA-141 to RLA-232.

37. On 20 February 2015, the Claimants filed their Rejoinder on Jurisdiction ("**Rejoinder on Jurisdiction**"), accompanied by the following documents:

- Third Witness Statement of Mr. Mark Jacobson dated 18 February 2015;
- Second Montenegrin Law Expert Report of Professor Vladimir Pavić and Dr. Miloš Živković dated 20 February 2014;
- Volume 23 that contained chronologically ordered contemporaneous correspondence and documents;
- Volume 24 that contained legal authorities; and
- Volume 25 that contained the legal authorities referenced by the Second Montenegrin Legal Expert Report.

D. Hearing on Jurisdiction and Merits

38. On 6 May 2015, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.

39. On 9 May 2015, the Tribunal issued Procedural Order No. 7 concerning directions for the upcoming Hearing on Jurisdiction and Merits ("**Hearing**"). In this Procedural Order, the Tribunal noted that it had no objection to the Claimants' request that a Dutch Embassy official attend the Hearing provided that the Respondent agreed to the official's participation.

40. The Hearing took place in Paris, France, from 1 to 10 June 2015. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the Hearing were:

For the Claimants:

Mr. Toby Landau QC	Essex Court Chambers
Professor Dan Sarooshi	Essex Court Chambers
Mr. Tim Hardy	CMS Cameron McKenna LLP
Mr. Csaba Kovacs	CMS Cameron McKenna LLP
Ms. Aimee Cook	CMS Cameron McKenna LLP
Ms. Jennifer Stoddart	CMS Cameron McKenna LLP
Mr. Duncan Weston	CMS Cameron McKenna LLP
Ms. Jessica Foley	CMS Cameron McKenna LLP
Mr. Goran Martinovic	Harrisons Solicitors

Mr. Mark Jacobson (also a witness)	Authorized representative of MNSS B.V. and Recupero Credito Acciaio, former Chairman and Director of Zeljezara Niksic a.d.
Mr. Daniel Brol (also a witness)	Authorized representative of MNSS B.V. and Recupero Credito Acciaio, former executive officer and Director of Zeljezara Niksic a.d.

For the Respondent:

Dr. Christoph Lindinger	Schönherr
Ms. Anne-Karin Grill	Schönherr
Mr. Leon Kopecký	Schönherr
Mr. Michael Stimakovits	Schönherr
Mr. Florian Stefan	Schönherr
Mr. David Pawlak	David A. Pawlak LLC
Mr. Slaven Moravčević	Moravčević Vojnović & Partners
Ms. Jelena Bezarević Pajić	Moravčević Vojnović & Partners
Ms. Tanja Šumar	Moravčević Vojnović & Partners
Mr. Igor Lukšić	Minister of Foreign Affairs and European Integration of Montenegro
Mr. Vladimir Kavarić	Minister of Economy of Montenegro
Mr. Dragan Kujović	Acting Director, Directorate for Industry and Entrepreneurship at the Ministry of Economy of Montenegro
Mr. Goran Nikolić	Officer, Directorate for Industry and Entrepreneurship at the Ministry of Economy of Montenegro
Ms. Svetlana Stijepovic	Translator, Ministry of Economy of Montenegro

41. The following persons were examined:

On behalf of the Claimants:

***Witnesses*:**	
Mr. Mark Jacobson	Authorized representative of MNSS B.V. and Recupero Credito Acciaio, former Chairman and Director of Zeljezara Niksic a.d.
Mr. Daniel Brol	Authorized representative of MNSS B.V. and Recupero Credito Acciaio, former executive officer and Director of Zeljezara Niksic a.d.
Mr. Alan Jacobson	Former interim executive officer and Director of Zeljezara Niksic a.d.
Mr. Leslaw Kwasik	Former Chief Executive Officer of Zeljezara Niksic a.d.
Experts:	
Mr. Carlos Lapuerta	The Brattle Group
Mr. Richard Caldwell	The Brattle Group
Dr. Miloš Živković	University of Belgrade
Professor Vladimir Pavić	University of Belgrade

On behalf of the Respondent:

***Witness*:**	
Mr. Branko Vujovic	Director of the Insurance Supervision Agency of Montenegro
***Experts*:**	
Professor Dragan Radonjić	University of Montenegro
Assistant Professor Vladimir Savković	University of Montenegro
Mr. Brent C. Kaczmarek	Navigant Consulting, Inc.

42. On 10 June 2015, Mr. Casper Holl, the Economic Counsellor at the Embassy of the Kingdom of the Netherlands in Paris, attended the Hearing as agreed by the Parties.

E. Post-Hearing Phase

43. On 16 June 2015, the Respondent requested that the Tribunal issue an order to exclude certain documents, and the Claimants responded to the Respondent's request on 23 June 2015. The Tribunal issued its decision on this matter on 26 June 2015.

44. On 9 July 2015, the Parties filed simultaneous Post-Hearing Briefs. On 31 July 2015, the Claimants submitted a Corrected Post-Hearing Brief.

45. The proceeding was closed on 28 March 2016.

IV. FACTUAL BACKGROUND

46. ZN is an electric arc furnace steel mill, the only one in Montenegro. ZN is one of the largest manufacturing companies in Montenegro. It started as a State-owned entity, and there were thereafter several successive privatizations of ZN. For purposes of the dispute before the Tribunal, the first relevant privatization occurred in 2006. MN Specialty Steel Ltd. ("**MN**") was the successful bidder for 66.7008 percent of the share capital of ZN. On 8 November 2006, MN signed the Agreement for the Sale and Purchase of 66.7008 percent of the shares in ZN ("**Privatization Agreemen**t" or "**PA**")[6] with the Government of Montenegro, the Republic of Montenegro, the Fund for Development of the Republic of Montenegro, the Republic Fund for Pension and Disability Insurance and the Bureau for Employment (collectively, "**Sellers**"). Pursuant to this Agreement, MN undertook a series of investment obligations: it agreed, in particular, that "during a 5-year period from the closing of the Privatization Agreement it would invest in ZN's capital investment programme an aggregate amount of not less than €114 million, with the following minimum annual spending: €14 million in 2007 ("**First Investment Period**"); €20 million in 2008 ("**Second Investment Period**"); €40 million in 2009 ("**Third Investment Period**"); €20 million in 2010

[6] Privatization Agreement (Exhibit C-002).

("**Fourth Investment Period**"); and €20 million in 2011("**Fifth Investment Period**").[7]

47. As explained by the Claimants,

> "[f]ollowing the 2006 privatisation, ZN's ability to improve on current production levels and to introduce operating improvements was constrained by a deficiency in working capital funding, this deficiency being exacerbated as production volumes were increased. In late 2007 these challenges had led to a position where ZN was struggling to meet some of its liabilities as they fell due … MN was left with little option but to agree to a sale of its interest in ZN to one of the Claimants (MNSS) ...."[8]

48. On 8 February 2008, MNSS bought MN's shares in ZN under a Share Purchase Agreement ("**SPA**") for an aggregate consideration of "€16,651,799 of which €2,023,597 was attributed to the ZN shares, and €14,628,202 to the assigned MN assets ...."[9] The SPA consideration was satisfied, *inter alia*, "through a cash payment of €7,050,000 from MNSS to MN, the assumption by MNSS of MN's long-term loan obligation to Prva Banka in an amount of ca. €1.9 million, and the issuance of a 19% shareholding of MNSS by MN."[10]

49. A few days earlier, the Government had passed a resolution approving the amendment of the Privatization Agreement in relation to the timing and amounts of required Capital Expenditure ("**CAPEX**") to be invested and providing for future changes in certain circumstances. MN assigned its rights under the Privatization Agreement to MNSS on 28 February 2008 by way of an Assignment Agreement ("**Assignment Agreement**") between the Sellers and MNSS. The Sellers, including the Government, consented to the assignment.

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[7] Memorial, para. 147. Emphasis in the original.
[8] Memorial, para. 164
[9] *Id.*, para. 179.
[10] Claimants' Post-Hearing Brief, para. 50.

50. In addition to the equity investment, MNSS made five loans to ZN during the period from 26 September 2008 to 26 January 2011. The first loan of €50 million was granted by MNSS to ZN and documented in a loan agreement dated 26 September 2008 ("**First Loan**"). This loan was made for working capital and CAPEX purposes and carried no interest on the amounts drawn for CAPEX purposes.

51. The second loan was part of the undertakings of MNSS to the Government under the Refinancing Protocol of 9 July 2009 ("**Refinancing Protocol**"). It was in the amount of €10 million, to be used for general corporate purposes of ZN, and was interest-bearing and repayable on 31 December 2013. The loan agreement was dated 22 July 2009 ("**Second Loan**"). On the same date and as part of this refinancing, BlueBay Multi-Strategy Investments ("**BlueBay**") made a €3.5 million short-term loan to ZN with a maturity date of 31 October 2009 guaranteed by the Government ("**BlueBay Loan**"). By the maturity date, ZN could pay only €2 million and BlueBay agreed to extend the maturity date to 30 November 2009.

52. On 25 November 2009, the Government and MNSS signed the "Protocol on Mutual Obligations in Relation to Regulating Regular Payments of Salaries and Financing Arrangements for Zeljezara Niksic a.d" ("**Salaries and Financing Protocol**"). The parties agreed that if, within ten days, MNSS could not pay the Government for the guarantee of the BlueBay Loan, MNSS would transfer to the Government 25 percent of its shareholding in ZN. Eventually, BlueBay called on the Government guarantee and the Government paid the remainder of the BlueBay Loan on 16 December 2009. On 11 January 2010, by way of an Agreement to Transfer Shares, MNSS transferred shares in ZN to the Government representing about 16 percent of the issued share capital in consideration for the Government's repayment of the BlueBay Loan.

53. The third loan was made by MNSS on 22 December 2009 to a Dutch subsidiary of ZN wholly owned by ZN and guaranteed by ZN to pay for working capital of ZN. The loan was in the amount of €3 million bearing

interest of 5 percent per annum and repayable on 31 December 2012 ("**Third Loan**").

54. The fourth loan in the amount of €200,000 was made on 26 January 2011 by MNSS to ZN to pay for the electricity bills. In fact, MNSS claims that €257,198.15 was disbursed but not formally documented in an amendment to the loan agreement. The loan carried interest of 5 percent per annum and was to be repaid in three tranches (the "**Fourth Loan**").

55. The fifth loan in the amount of €550,000 was made by MNSS to Novi Celik D.O.O., a wholly-owned subsidiary of ZN, on 26 January 2011. It was also guaranteed by ZN and carried interest of 5 percent per annum to be repaid in three tranches ("**Fifth Loan**"). The purpose of this loan was to pay salaries since ZN's Montenegrin bank accounts had been blocked by court order. ZN withdrew a total of €415,000.

56. On 30 October 2009, MNSS assigned to RCA its outstanding loan claims against ZN under the First Loan. The loan assignment was concluded between MNSS and RCA ("**RCA Assignment**") and on the same day, MNSS informed ZN. The maturity date of the First Loan was extended twice. First, from 31 December 2012 to 31 December 2014 pursuant to an agreement between RCA and ZN dated 19 March 2010 as part of a refinancing plan of ZN approved by the Government. Second, from 31 December 2014 to 30 June 2015, as part of the conditions of a loan from Crédit Suisse to ZN as part of the restructuring plan described further below ("**Crédit Suisse Loan**"). The agreement for the First Loan was amended for this purpose on 28 June 2010.

57. MN and ZN had used Prva Banka prior to the Assignment Agreement. MNSS continued to bank with this institution for fulfillment of its obligations under the Privatization Agreement and for other purposes as detailed elsewhere in the Award.[11]

58. Prva Banka suffered a liquidity crisis starting in 2007, which grew more serious as the financial crisis of 2008 unfolded.

[11] *See*, *e.g. infra* paras. 290 *et seq.*

59. Prva Banka delayed honoring MNSS payment orders from July 2008 to October 2009 notwithstanding attempts to remedy the situation in November 2008 and June 2009.

60. On 19 June 2009, Prva Banka, MNSS and ZN signed a Prva Banka Refinancing Protocol ("**Prva Banka Refinancing Protocol**") whereby "Prva Banka would pay €2.5 million to ZN's creditor (CVS) from MNSS' CAPEX account by 23 June 2009, but that in return Prva Banka was entitled to apply the balance of the funds in ZN's account (following the transfer of those funds from MNSS' investment account to ZN's account) towards the full repayment of ZN's loans with Prva Banka."[12]

61. On 6 July 2009, the Respondent and MNSS signed the Refinancing Protocol ("**Refinancing Protocol**") and an amendment to the Privatization Agreement. The Respondent agreed to provide a guarantee for a €25 million loan to ZN by a commercial bank, including the guarantee of a €3.5 million short-term loan, and to reduce MNSS' investment obligations for 2009 and 2010. MNSS agreed to grant a loan facility of €10 million to ZN conditional on ZN obtaining such loan from a commercial bank.

62. On 22 July 2009, ZN concluded a short-term loan of €3.5 million with BlueBay Multi-Strategy Investments ("**BlueBay Loan**") guaranteed by the Respondent. On 9 December 2009, ZN defaulted on the BlueBay Loan and on that date the Respondent paid the €1.6 million outstanding.

63. MNSS had agreed under the Salaries and Financing Protocol with the Respondent to reimburse the Respondent if BlueBay would call the guarantee or transfer 25 percent of its ZN shares.

64. On 11 January 2010, MNSS transferred 25 percent of its shares to the Respondent.

65. On 4 March 2010, the Respondent approved a restructuring plan of ZN ("**Restructuring Plan**").

[12] Memorial, para. 471.

66. On 14 May 2010 and as part of the Restructuring Plan, the Respondent guaranteed the Crédit Suisse Loan to ZN in an amount of €26.3 million[13] that was deposited in Erste Bank. Contemporaneously, the Respondent entered into the Protocol on Oversight with ZN that required representatives of ZN, MNSS and the Respondent to sign payment instructions.

67. From 27 September to 4 October 2010, workers of ZN occupied ZN's management building. Workers again occupied ZN's management building on 13 December 2010 and physically assaulted the Chief Executive.

68. In the course of December 2010, MNSS made several proposals and presentations to the Respondent related to the capital requirements of ZN and to amendments to the Privation Agreement. On 16 December 2010, the Respondent informed MNSS that it was prepared to accept a reduction of the labor force to 700 employees provided that MNSS would make the agreed minimum investments of €20 million in 2011. MNSS was prepared to invest only €2 million in CAPEX.

69. On 20 December 2010, the Respondent made a loan to the Union.[14]

70. On 21 December 2010, the Respondent informed MNNS that it was in breach of the Privatization Agreement because it failed to provide the performance bond for the fifth investment period and to pay the workers' salaries for several months.

71. In February 2011, MNSS proposed to raise new finance by issuing convertible loans to new investors. The Respondent did not approve this proposal.

72. On 1 March 2011, ZN's workers went on strike.

73. On 15 March 2011, the Union filed a bankruptcy petition of ZN with the Podgorica Commercial Court.

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[13] The additional €1.3 million was for the payment by ZN of redundancies in Livnica, a company unrelated to ZN. This was part of the conditions of the Respondent to agree to an extension of the deadline for the installation of new equipment requested by MNSS. *See* Memorial, paras. 506-507.

[14] The term "Union" refers collectively to both unions involved with the workers of ZN, as this term is used in the pleadings of the Claimants.

74. On 17 and 31 March 2011, the Respondent provided financial aid to the Union.

75. On 15 April 2011, the Podgorica Commercial Court placed ZN into bankruptcy.

76. On 30 April 2012, the assets of ZN were sold to Toscelik.

V. OBJECTIONS TO JURISDICTION

A. Summary of the Parties' Arguments

1) Respondent's Counter-Memorial

77. In its Counter-Memorial, the Respondent raises six objections to the jurisdiction of the Tribunal. First, the Tribunal has no jurisdiction because of the express waiver of jurisdiction contained in Clause 11 of the Privatization Agreement ("***ratione voluntatis* objection**"). Second, the Tribunal has no jurisdiction because the Respondent has not consented to the Additional Facility Arbitration in the 2000 and 2011 MFI Laws ("***ratione voluntatis* objection**"). Third, the Claimants' Dutch nationality has been fabricated when the present dispute had already arisen ("***ratione personae* objection**"). Fourth, MNSS' shares of ZN, MNSS' loans to ZN and RCA's assigned loan from MNSS do not qualify as investments ("***ratione materiae* objection**"). Fifth, the alleged investments were not in accordance with host State law ("***ratione materiae* objection**"). Sixth, Claimants failed to exhaust local remedies ("**non-exhaustion of local remedies objection**").

a. <u>Explicit Waiver of ICSID AF Arbitration</u>

78. The Respondent argues that, under Clause 11 of the Privatization Agreement (See the text of Clause 11 in paragraph 149, below), the investor has waived its right to access Additional Facility Arbitration with respect to all claims which have been brought before this Tribunal, and that the investor undertook not to assert claims whether based on contract or on treaty in any other forum but the contractually agreed forum. The Respondent explains that the purpose of Clause 11 was to avoid parallel proceedings and "claim

splitting." According to the Respondent, even if the Tribunal should conclude that Clause 11 covers only contract claims, the Claimants' claims are essentially based on contract. According to the Respondent, the effect of Clause 11 is to waive the jurisdiction of an arbitral tribunal under the BIT and the substantive protection of the BIT itself.

79. The Respondent explains that, under Clause 11.1, the "asserted claims" may have their basis in treaty and contract. The Respondent contends that this clause refers to substantive obligations of the State under international law, and that it foresees that "compliance with the PA could not result in a violation of obligations under international law and hence in international liability."[15] Clause 11.1 does not differentiate between the substantive bases of claims. According to the Respondent, Clause 11.1 shows that the parties fully understood and considered:

> "a. that the present was to be an investment contract concluded between a foreign investor and various state actors ...;
>
> b. that their relation could as such give rise to claims under international law;
>
> c. and, in particular, that the foreign investor might at some point bring claims on the basis of the applicable BIT or else under international law against Montenegro."[16]

80. The Respondent explains further:

> "were Clause 11.1 to refer only to contract claims which could be brought against the GoM in its capacity as a Seller under the PA – *i.e*. to claims having their substantive basis in the PA itself – there would be no reason to single out the GoM as a defendant. Rather, this formulation again underlines that the covered claims also include treaty claims against the host State Montenegro and were not limited to contractual claims arising out of the PA."[17]

[15] Counter-Memorial, para. 71.
[16] *Id.*, para. 72.
[17] *Id.*, para. 78.

81. The Respondent finds that the waiver of the right to access other *fora* is explicit, direct, in favor of the Respondent as party to the Privatization Agreement and an inherent precondition for the approval of the investment by the Respondent. The Respondent argues that Clause 11.1 and Clause 11.2.1 – the forum selection clause – must be read as a whole in order to determine their scope: "Just as the *waiver* clause clearly also encompasses claims brought under the BIT, any such claims would equally be covered by the *dispute resolution* clause."[18] The Respondent further argues that the right to allegedly assert claims under the 2000 and 2011 MFI Laws would also be covered by the waiver of Clause 11 given the intention of the parties to concentrate all proceedings in the contractual forum.

82. The Respondent emphasizes that Clause 11 was freely negotiated and agreed between the parties, and that in the Assignment Agreement MNSS agreed that the terms of the Privatization Agreement would, unless modified, continue in full force and effect, including the arbitration clause. No effort was made by MNSS to modify Clause 11 at the time it was negotiated and the Refinancing Protocol of 6 July 2009 confirmed the terms of the Privatization Agreement. The Respondent draws the attention of the Tribunal to the fact that Clause 11 is part of a commercial agreement where the Respondent agreed to take on the debts of ZN and redundancy costs; the waiver should be considered as part of the overall deal.

83. The Respondent also discusses the relationship of Clause 11 with the BIT. First, the Respondent recalls that the BIT was signed on 29 January 2002 and entered into force on 1 March 2004, before the parties entered into the Privatization Agreement. Thus, the Respondent argues that Clause 11 is the *lex posterior* and operates as the *lex specialis* as compared to the generic offer in the BIT.

84. Second, according to the Respondent, Clause 11 does not operate as a waiver but as a joint advance selection of the single international arbitration forum that should have jurisdiction over investment disputes between the

[18] *Id*., para. 95. Emphasis in the original.

parties. The Respondent submits that, since the investor may choose one of the *fora* beforehand, it can agree with the host State on a different but equivalent arbitration clause.

85. Third, the Respondent observes that the BIT does not prohibit a waiver of jurisdiction agreed in a subsequent contract and there is no public interest against a concentration of proceedings. In fact, Clause 11 fulfills the same function as the dispute resolution provision in the BIT: it provides an international neutral venue for final resolution of disputes between the parties related to the investment.

86. The Respondent also argues that the Tribunal has no jurisdiction in respect of contract claims "even if and to the extent that such claims should be held to *also* amount to treaty claims, either because they would have been thus elevated by Article 3(4) of the BIT [19] or because the facts which are essentially a breach of contract would also amount to a violation of substantive BIT standards ...."[20] Furthermore, according to the Respondent, "if the Tribunal should find that some of the purported acts and omissions of Respondent did not have their essential basis in contract, any claims inferable from such acts could not be self-standing. Rather, there would be a significant overlap between the Claimants' causes of action based on contract and those, if any, exclusively based on treaty or investment law."[21]

b. <u>No Consent to Arbitration</u>

87. The Respondent denies that the 2000 and 2011 MFI Laws contain a unilateral offer to arbitrate. First, the Respondent points out that the Claimants submit an inaccurate English translation of Article 39(2) of MFI Law 2000 and of Article 30(2) of MFI Law 2011 (See the texts of the Articles, with the different translations in paragraphs 166-167, below). The Respondent contends that the purely grammatical interpretation of these

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[19] BIT Article 3(4) reads: "Each Contracting Party shall observe any legal obligation it may have entered into with regard to investments of investors of the other Contracting Party." BIT (Legal Authority CLA-504).
[20] Counter-Memorial, para. 181. Emphasis in the original.
[21] *Id.*, para. 184.

articles by the Claimants renders the first paragraph redundant and leads to absurd results in respect of the third paragraph. This paragraph is identical to paragraph 2, except that it refers to investment contracts between private parties. If paragraph 2 contains an offer to arbitrate as argued by the Claimants in the case of investment contracts with the Government, then so does paragraph 3, but this result cannot be correct, as no unilateral consent of a private party could be established by virtue of national legislation such as the 2000 and 2011 MFI Laws.

88. The Respondent argues that the interpretation proffered by the Claimants results in a non-constitutional situation, given that in 2000 an offer to arbitrate by Montenegro would have violated the Federal Yugoslav Constitution against the clear and declared intention of the historical legislator. The Respondent points out the contrast of the alleged consent under the 2000 and 2011 MFI Laws with the clear and unequivocal consent of Montenegro expressed in Article 9 of the BIT.[22] In addition, the Respondent observes

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[22] BIT Article 9 reads:

> "1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, if possible, be settled amicably.
>
> 2. If the dispute referred to in paragraph 1 of this Article cannot be settled within three months from the date on which either party to the dispute requested in writing an amicable settlement, the investor shall be entitled to submit the dispute, at his choice, for settlement to:
>
> > a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965;
> >
> > b) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings (Additional Facility Rules), if one of the Contracting Parties is not a Contracting State to the Convention as mentioned in paragraph a) of this Article;

that neither of these articles contains the contingent consent to ICSID arbitration required under Article 4(2) of the Additional Facility.[23]

89. As regards the RCA claim, the Respondent submits that even in the Claimants' own case, Article 39(2) and Article 30(2) do not provide a jurisdictional basis for this Tribunal, because RCA is not a contracting party to the Privatization Agreement and the Government is not a party to any of the loan agreements that the Claimants allege to be part of their investment.

c. Lack of Jurisdiction *Ratione Personae*

90. The Respondent asserts that the Claimants are shell companies without any genuine business activity and are ultimately UK-held. The Respondent observes that there is no BIT in place between the UK and Montenegro. The Respondent alleges that the Dutch nationality has been fabricated after the present dispute had already arisen. The Respondent explains: "MNSS B.V.'s entry in ZN in February 2008 came at a time when the present controversy had already arisen (or was at least foreseeable). By interposing the Dutch shell company, the effectively British investors attempted to obtain the

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> c) a sole arbitrator or an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);
>
> d) the Court of Arbitration of the International Chamber of Commerce (ICC).
>
> 3. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international conciliation or arbitration in accordance with the provisions of this Article.

BIT, Article 9 (Legal Authority CLA-504).

[23] BIT Article 4(2) reads:

> "In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted."

BIT, Article 4(2) (Legal Authority CLA-504).

protection of a BIT for a previously unprotected investment. This was effected in an instant of inacceptable fabrication of nationality ….”[24] Referring to this transaction, the Respondent claims that it was presented as a mere restructuring of the corporate set-up at the occasion of raising new funds and that it was reassured that “the new corporate seat (in Amsterdam) was for internal business reasons only and that nothing would change in the relationship with the Respondent.”[25]

91. The Respondent observes that the Claimants do not mention that “MNSS (the English SPV) actually received shares in MNSS B.V. (the interposed Dutch SPV) in partial consideration for the direct shareholding in ZN (the Consideration Shares). In economical terms, however, there was no transfer of the investment, but merely one more British investor joining in.”[26]

92. The Respondent asserts that, before 28 February 2008, there was a situation in which the two sides held opposing views on whether the investor had performed its obligations under the Privatization Agreement, as evidenced by the Respondent’s confirmation in the Assignment Agreement that it has no dispute with MN or MNSS. This implies that there was a dispute extant that made it necessary to formulate a settlement. MN had not been able to make a success of the company, MN already had a relationship with Prva Banka and had concerns about it, but MNSS continued the relationship. ZN management had been faced with “a considerable mass of employment disputes.”[27]

93. The Respondent claims that, “[w]hen MNSS B.V. took over the immediate shareholding of ZN, it at the same time ‘took over’ and continued MNSS Limited’s dispute. The subject matter of the dispute presently before this Tribunal does not differ from the dispute as already in place at the time of corporate restructuring.”[28] According to the Respondent, this is not an

[24] Counter-Memorial, para. 329.
[25] *Id.*, para. 348.
[26] *Id.*, para. 352.
[27] *Id.*, para. 361.
[28] *Id.*, para. 362.

incident of prospective nationality planning, but abusive forum shopping when the Claimants' investment was deteriorating and the dispute was at least looming. The Respondent asserts that because of this abuse of rights the jurisdiction of the Tribunal is excluded both under the BIT and under the 2000 and 2011 MFI Laws.

d. Lack of Jurisdiction *Ratione Materiae*

94. The Respondent claims that none of the investments qualify as such under the Additional Facility or under the BIT. According to the Respondent, MNSS has not made a contribution to ZN or Montenegro when it acquired the shares in ZN. MNSS provided MN, the former direct shareholder, with shares in MNSS and hence indirect shareholding in ZN. Furthermore, according to the Respondent, under the Privatization Agreement, the investor could not fulfill its investment obligations by advancing loans.

95. The Respondent argues that the concept of investment under the AF is an autonomous concept. Hence, the investments of the Claimants have to meet the test for an investment under the AF and under the BIT. The Respondent explains that the Claimants have obtained approval of access to the AF under Article 2(a) of the AF Rules, which constitutes an exception *ratione personae* to ICSID jurisdiction, corroborated by Article 4(2). The requirement *ratione materiae* under Article 25(1) of the ICSID Convention continues to apply. The Respondent subscribes to the *Salini* test for purposes of defining an investment under the Convention.

96. As to the definition of investment under the BIT, the Respondent argues that this term has an inherent meaning that flows from the object and purpose of the BIT and goes beyond the words used in the definition in Article 1. The Respondent recalls that the preamble of the BIT refers to the agreement of the Parties that "the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties ...." Based on this statement, the Respondent argues that a contribution or commitment of funds is a prerequisite of an

investment under the BIT. The Respondent finds support for this argument in several articles of the BIT, in particular Article 5(1) of the BIT that refers to "capital and additional amounts to maintain or increase investments." According to the Respondent, this confirms that the term investment comprises "a contribution to the host State development, at least a contribution to the host State economy."[29]

97. The Respondent also refers to the definition of investment under the 2000 and 2011 MFI Laws and emphasizes the need for an investment to consist of a contribution and for the investment to make a contribution to the economic development of Montenegro whether through certain types of contracts or by investing in or setting up a company. The Respondent denies that MNSS has made an investment in Montenegro because MNSS has not made any contribution of resources to the country. Furthermore, the Respondent differentiates between the object of the investment – the acquisition of the shares – and the manner of investing as such. This distinction is significant because MNSS has not injected any fresh capital into ZN, and the consideration for its shareholding in ZN was owed to a British entity. According to the Respondent, the only contractual investment obligation of MNSS in respect of the Respondent was set forth in Clause 8.1.1 of the Privatization Agreement and MNSS failed to honor it because the loans advanced by MNSS do not qualify as protected investments.

98. According to the Respondent, the obligation to invest and the actual manner of the investment as regulated in the Privatization Agreement are central to determine its consent to arbitration. The Respondent submits that mere loans to ZN would not fulfill MNSS' contractual obligation and explains:

> "A loan is inherently repayable (even if not necessarily interest-bearing). This implies that the funds needed for such loan repayment need to be generated in the course of the business operation of the funded company. As such, financing on the basis of loans is financing on the basis of assets of the company (a

[29] *Id.*, para. 419.

> capital increase or else a shareholder's contribution, however, would be a way of financing without using the assets of the financed company)."[30]

99. As to the assignment to RCA, the Respondent points out that it was made without the knowledge and consent of the Government, in violation of the Privatization Agreement and in the sole interest of the investor. According to the Respondent, even if the initial loan qualified as an investment, RCA could not acquire legal standing as a protected investor by way of the loan assignment; RCA is not a party to the Privatization Agreement, it is not a party to the Assignment Agreement and the loan assignment is not an investment under Article 25(1) of the ICSID Convention or under the BIT or the 2000 and 2011 MFI Laws.

100. The Respondent argues that the loan assignment to RCA was a mere commercial transaction and not an investment: "RCA did not … carry out any economic activity in the host State Montenegro. RCA did not inject any funds into ZN or else transfer funds into Montenegro. The loan assignment and holding of the receivable by RCA did not contribute to the flow of capital or technology into Montenegro."[31] Furthermore, ZN had not been paying interest on the loan, which shows that RCA apparently did not commit resources with a view to generate profits.

e. Investment not in Accordance with Host State Law

101. The Respondent affirms that it is a general principle of investment protection law that investments need to be made and conducted in compliance with the law of the host State and, if this is not the case, investments will not enjoy investment protection under a BIT. The Respondent finds this principle reflected in Article 2 of the BIT that provides that investment promotion and protection shall be within the framework of the host State's laws and regulations, and in the Preamble where it is stated that the object of

[30] *Id.*, para. 489.
[31] *Id.*, para. 561.

investment protection is to stimulate the flow of capital and technology, and economic development. According to the Respondent: "If a foreign investor does not abide by the host State law, its investment will mostly not contribute to the development of the host State."[32] The Respondent adds that the 2000 MFI Law, which protects only legal investments, has to be taken into account as background for the understanding of the BIT.

102. The Respondent alleges that MN and MNSS acquired their stake in ZN on the basis of deceitful representations. They had manifested to the Government that they were willing and able to modernize ZN, while in fact they could not or did not want to invest the contractually-agreed amounts in ZN. The Respondent explains that MNSS' ability and willingness to invest in ZN and modernize the company was a decisive factor for the Government to consent to the assignment of the shares and the Privatization Agreement to MNSS against the background of ZN's deteriorating financial position.

103. As regards the RCA Assignment, the Respondent claims that it was tainted by illegality because it was made without the Government's consent, and in violation of the Privatization Agreement, applicable corporate law and general principles of proper corporate governance.

104. The Respondent also alleges breaches of domestic legislation in the areas of social security, employment, investment and environment, which would have entitled the Government to terminate the investment agreement.

f. <u>No Exhaustion of Local Remedies</u>

105. According to the Respondent, the Claimants need to show that "they have already brought the essence of the claims presently before this Tribunal before the competent courts or tribunals of Montenegro and pursued these claims as far as permitted under Montenegrin law ...."[33] The Respondent alleges that the Claimants have not shown that they have made use of

[32] *Id.*, para. 596.
[33] *Id.*, para. 701.

available remedies. The Respondent explains that local remedies would have included

> "appeals to the bankruptcy judge against the decisions of the bankruptcy administrator, to the higher court instances against decisions of the bankruptcy judge, the exhaustion of court instances in respect of the acts and omissions of Prva Banka … recourse to the contractual arbitration forum for alleged breaches of the Privatisation Agreement or other contracts by government representatives and, respectively, recourse to the administrative courts for ministerial or governmental decisions taken *ius imperii*."[34]

2) Claimants' Reply

a. <u>Explicit Waiver of ICSID AF Arbitration</u>

106. In their Reply, the Claimants argue that RCA is not a party to the Assignment Agreement and, therefore, it is not bound by the PA, and that the Assignment Agreement does not automatically extend the limitations in the PA to RCA. The Claimants further argue that the first sentence of the second paragraph of Clause 11.1 is of no legal consequence since it merely states that the Buyer acknowledges that the PA itself is consistent with the Respondent's obligations under international law. As to the second sentence of that paragraph, the Claimants contend that it is not possible for a private party to deem a breach of international law by a State as not having taken place. According to the Claimants, "Clause 11.1 … does not preclude the Buyer's right to bring a claim where the cause of action relates to alleged breaches of the BIT or customary international law and does not concern conduct under or pursuant to the contract."[35] The Claimants argue that to construe Clause 11.1 as a waiver of Additional Facility Arbitration in respect of non-contractual treaty claims would breach the promise of the Respondent under the BIT: "it would be inappropriate for the Tribunal to refuse to uphold the

[34] *Id.*, para. 705.
[35] Reply, para. 184.

Respondent's promise given to the Netherlands under the governing BIT, by giving priority to a purported commitment made by a foreign investor in relation to a contract."[36]

107. The Claimants find support for their position in the fact that Clause 11.1 itself did not explicitly stipulate exclusivity. The Claimants also find support in Montenegrin law, which is applicable to the Privatization Agreement. According to the Claimants, Clause 11.1 cannot be an exclusive jurisdiction clause because it relates only to claims "arising out" and not "arising out or in connection with" the Privatization Agreement. The Claimants dispute that the basis of their claims be essentially contractual; the mere existence of the Privatization Agreement does not mean that all claims of MNSS are automatically contractual claims. Similarly, the Privatization Agreement does not preclude breaches of Montenegrin tort law under the 2000 and 2011 MFI Laws.

108. The Claimants argue that MNSS cannot waive its rights under the BIT since these are rights of the Netherlands as the BIT Contracting Party. The Claimants also dispute the allegation of the Respondent that the offer to arbitrate was no longer extant because of the subsequent agreement in Clause 11.1. According to the Claimants, a later agreement between the Respondent and a private party cannot affect the existence of the Respondent's consent to AF arbitration in the BIT since the parties to the BIT undertake their rights and obligations in respect of each other under public international law. The Claimants point out that, in any case, Clause 11 is not *lex posterior* because the Privatization Agreement is dated 8 November 2006 and the BIT was assumed by Montenegro on 18 January 2007; even if it were *lex posterior*, under Montenegrin law the concept of *lex posterior* or *lex specialis* applies only to statutes and not to contractual provisions.

109. The Claimants also contend that a waiver of ICSID jurisdiction must be expressly envisaged in order to have effect. Furthermore, since the alleged waiver in Clause 11.1 relates only to the Privatization Agreement, it follows

[36] *Id.*, para. 188.

that it does not include a waiver under the 2000 and 2011 MFI Laws. The Claimants explain that for a waiver to be effective under Montenegrin law, it must meet three pre-conditions: (i) the right must exist solely in the interest of the right-holder; (ii) the waiver must not violate public policy; and (iii) the waiver must be interpreted strictly. According to the Claimants, these conditions are applied more stringently when the waiver relates to future claims and the alleged waiver does not meet them.

b. Consent under the 2000 and 2011 MFI Laws

110. First of all, the Claimants dispute that there is an issue of translation. In fact, the translation provided by the Claimants uses the same wording ("shall be resolved") "as the official translation available at the website of the Montenegrin government ...."[37]

111. The Claimants also dispute the interpretation given by the Respondent to Article 39(2) of MFI Law 2000 and Article 30(2) of MFI Law 2011. According to the Claimants, the *in dubious mitis* principle relied on by the Respondent is not applicable to statute interpretation; rather, the *contra proferentem* principle would be more appropriate. Furthermore, the interpretation defended by the Respondent would deprive the second and third paragraphs of the said provisions of any practical meaning.

c. Jurisdiction *Ratione Personae*

112. The Claimants address the two arguments of the Respondent questioning their status as investors. First, the Claimants dispute that they are shell companies and argue that they meet the requirement to be investors under the BIT; namely, to be incorporated under the law of the Netherlands in the case of MNSS and Curaçao in the case of RCA. The Claimants criticize the attempt of the Respondent to introduce a requirement of some form of effective link between the Claimants and their State of incorporation. The Claimants point out that there is no basis in the BIT for such additional

[37] *Id*., para. 239, quotation of the Montenegrin Law Experts' Opinion.

requirement and no basis in international law for conflating the issue of nationality of individuals with that of the nationality of corporations.

113. As to the date when the dispute arose, the Claimants argue that the Respondent cannot rely on the fact that there may have been a dispute with MN to claim that the dispute with MNSS had arisen before MNSS had acquired its equity stake in ZN. The Claimants explain that a dispute must necessarily be a dispute between the Parties of this arbitration. The Claimants assert that the test for determining the critical date when a dispute can be said to have arisen is an objective test. The Claimants point out that, in the instant case, all of the acts that later gave rise to the dispute occurred after February 2008, but that does not preclude the Tribunal from reviewing the Respondent's acts and omissions that occurred before that date. The Claimants clarify that the controversy arises out of breaches by Respondent of the BIT and not breaches of the Privatization Agreement, as argued by the Respondent. The Claimants assert that the interposition of a Dutch company between British investors and the investment in order to secure protection under the BIT is perfectly legitimate and Montenegro has acknowledged that it was aware of the restructuring.

d. Jurisdiction *Ratione Materiae*

114. According to the Claimants, the only concept relevant to the jurisdiction of this Tribunal is that found in the BIT and the 2000 and 2011 MFI Laws. The Claimants dispute that Article 25 of the ICSID Convention applies and refer to the following provision in Article 3 of the Additional Facility Rules: "[s]ince the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them."[38] The Claimants contend that in any case their investment meets the *Salini* test for purposes of defining a protected investment under the ICSID Convention.

[38] *Id*., para. 301.

115. According to the Claimants, the definition of "investment" in the BIT is very broad, particularly in relation to the "claims to money." Furthermore, in Article 5 of the BIT, the parties have agreed "to guarantee the free transfer of payments related to an '*investment*,' including the transfer of '*interest*' (Article 5(b)) and '*funds in repayment of loans*' (Article 5(c)). The content of this provision only serves to reinforce further the position that the definition of '*investment*' and the meaning of '*claims to money*' under the governing BIT include loans."[39] The Claimants add that the loans should "be viewed as part of an '*indivisible whole*' investment in ZN that was '*directed at the investment's overall economic goal*' of revitalizing and turning the second largest manufacturer within Montenegro into a going concern."[40]

116. The Claimants contest the argument of the Respondent that the Claimants' investments do not constitute investments for purposes of the Privatization Agreement. The Claimants contend that, when "the jurisdiction of an ICSID AF Tribunal is founded on a BIT, it is not for one of the Contracting Parties to provide a subsequent restriction of the scope of consent. Rather it is for the ICSID AF Tribunal to determine the scope of consent by both Contracting States as expressed in the terms of the BIT pursuant to the general rules of treaty interpretation …."[41] Claimants also point out that, although irrelevant to jurisdiction *ratione materiae*, Montenegro had agreed to MNSS' ability to fulfill its investment obligations pursuant to the Privatization Agreement.

117. The Claimants deny the Respondent's allegations that some of the investment loans were in fact not made.

118. The Claimants assert that the interpretation and application by the Respondent of the 2000 and 2011 MFI Laws is overly restrictive and inaccurate. According to the Claimants, it is necessary to examine both MFI Laws to determine the definition of protected investments under Montenegrin law since the law changed during the investment period.

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[39] *Id.*, para. 313. Emphasis in the original.
[40] *Id.*, para. 319. Emphasis in the original.
[41] *Id.*, para. 322.

119. As to whether the assignment by MNSS to RCA creates for RCA a protected investment under the BIT, the Claimants argue, based on their Montenegrin Law Experts' Opinion, that the 2000 and 2011 MFI Laws do not "distinguish among those who initially invest and those who step into shoes of the other investors pursuant to assignments and the like ...." Furthermore, according to the Claimants and based on the same Opinion, "[t]here is nothing in the law to suggest that a foreign 'investment' ceases to be an investment if it is taken over by another foreign 'investor'."[42]

e. <u>Investment Made Not in Accordance with Host State Law</u>

120. The Claimants point out that there is no requirement of legality under the BIT that would affect the exercise by the Tribunal of its jurisdiction. The Claimants further observe: "the Respondent raises its allegations of unlawful acts and lack of good faith against the Claimants for the first time in this arbitration, despite the investment having been made in Montenegro over a four year period."[43]

121. Similarly, as regards jurisdiction under the 2000 and 2011 MFI Laws, the Claimants argue, on the basis of the their Montenegrin Law Experts' Opinion, that "[u]nder Montenegrin law, neither of the Claimants' investments was illegal, in the sense that would bar them from seeking redress in this arbitration either by lack of jurisdiction or though inadmissibility. Such allegation of the Respondent is based upon an interpretation of the 'legality' requirement as contained in MFI Law which is erroneous and too broad."[44]

122. According to the Claimants, the long-standing acceptance by the Respondent of the Claimants' investments precludes on grounds of *estoppel* the use of the legality requirement to defeat the Tribunal's jurisdiction.

[42] *Id*., para. 344, quotation of the Montenegrin Law Experts' Opinion.
[43] *Id*., para. 358.
[44] *Id*., para. 360, quotation of the Montenegrin Law Experts' Opinion.

f. Exhaustion of Local Remedies

123. The Claimants assert, as held by abundant jurisprudence, that there is no pre-condition for a claimant to have to exhaust local remedies before being able to have recourse to an arbitration against a State that had previously given its consent.

3) Respondent's Rejoinder

124. The Respondent argues in its Rejoinder that the Assignment Agreement is the basis of MNSS' investment and Clause 7.4 is the key dispute resolution provision (See the text of Clause 7.4 in paragraph 150, below). The Respondent points out that the Claimants left a decisive pillar of the Respondent's arguments uncontested; namely, that Clause 7.4 of the Assignment Agreement, by using the phrase "arising out or in connection with," extends to contractual claims (*i.e.* disputes "arising out" of the Assignment Agreement) and to treaty claims (*i.e*. disputes arising "in connection with" the Assignment Agreement). The Respondent considers the Privatization Agreement and the Assignment Agreement as an indivisible whole; hence, disputes relating to the investment are disputes arising out of or in connection with the Assignment Agreement. Furthermore, Clause 7.4 is an advance written consent to UNCITRAL arbitration within the meaning of Article 9(4)(c) of the BIT and Clauses 11.1 and 11.2 operate as an exclusive arbitration clause covering contract and treaty claims.

125. As regards RCA, the Respondent argues that the Claimants have failed to meet the burden of proof to establish an investment of RCA qualifying for treaty protection. According to the Respondent, RCA has not made a contribution or incurred any risk; at most it incurred an ordinary commercial risk assumed by any party that enters into an agreement on the assignment of a receivable. The loan assignment is a mere tax driven transaction to the sole benefit of Claimants and with no economic effect on any other third party. Furthermore, the investment has not been made in the territory of the Respondent because:

> "[t]he loan assignment agreement was executed in Amsterdam on the part of MNSS and in Curacao on the part of RCA. Further, the loan assignment agreement is governed by the laws of the Netherlands and provides for the jurisdiction of the competent courts in Amsterdam. Finally, the loan assignment agreement provides that RCA shall issue a promissory note to MNSS as consideration for the receivable acquired by it under the agreement. Thus, there was no flow of funds into Montenegro resulting from the loan assignment agreement and no link whatsoever to Respondent was created by entering into of [sic] the loan assignment agreement."[45]

126. The Respondent also disputes that RCA has made an investment because it merely passively owned a loan receivable against ZN. On the basis of Articles 9(5), 10 and 14(3) of the BIT, all referring to an investment "made," the Respondent contends that the BIT "only offers protection in case of an active involvement in an investment activity and that such active involvement constitutes an inherent element of the definition of the term 'investment' under the BIT."[46]

127. According to the Respondent, MNSS' assignment of a loan receivable to RCA cannot transform the First Loan into an investment because no one can transfer what it does not have. The position of the Respondent is that the First Loan is not an investment, but, even if it were, RCA as assignee has not acquired the requisite property rights to support its claims against the Respondent. The Respondent does not deny that in certain circumstances this may be the case but the circumstances here do not concur to justify an exemption from the general principle that investor status and investor rights cannot be assigned to a third party. According to the Respondent, "[t]he identity of the investor in ZN was of paramount importance to Respondent, which is underscored by the specific requirements and strict selection criteria regarding potential investors already in the tender process and the express

[45] Rejoinder, para. 101.
[46] *Id.*, para. 110.

prohibition of assignment of MNSS' rights and obligations without prior consent provided for in Clause 10.4.1 of the Privatisation Agreement."[47]

128. The Respondent alleges that the assignment of the major part of the First Loan constitutes bad faith and forum shopping to undermine UNCITRAL arbitration as the exclusive forum for resolution of disputes with the Respondent. The Respondent calls the attention of the Tribunal to the fact that RCA was incorporated only ten days before the assignment, it was incorporated for the purpose of the loan assignment and it did not engage in the management of ZN or in any other activity. By the time of the assignment, the dispute with the Claimants over Prva Banka had already reached its peak and the Government had notified MNSS that it had failed to live up to its investment obligations under the Privatization Agreement. It is the Respondent's contention that the real reason for the assignment of the First Loan to RCA was not a tax reason but an "abusive attempt to create an additional dispute resolution forum and to circumvent the exclusive agreement to UNCITRAL arbitration by way of the loan assignment to RCA."[48] The Respondent pleads that the Tribunal should not validate such approach because it would result in fragmentation of an investment and of the jurisdiction for disputes arising in connection with such investment.

129. The Respondent contends that UNCITRAL arbitration must be also the exclusive forum for resolution of any disputes between RCA and the Respondent. For the Respondent, "[t]he assignment of the majority part of the First Loan … constitutes a bad faith forum shopping effort to undermine UNCITRAL arbitration ...."[49] The Respondent points out that the dispute had already arisen at the time of the loan assignment, and that, if the discretionary fragmentation of the investment by the Claimants was permitted, the Respondent would be faced with third party investors and potential parallel proceedings.

[47] *Id*., para. 119.
[48] *Id.*, para. 129.
[49] *Id*., para. 121.

130. The Respondent disputes that the Claimants' investment may be viewed as an indivisible whole because the investment agreements do not provide for the investment in ZN to be made in the form of loans, none of the loans were approved by the Government and the loans were not "directed at the investment's overall economic goal of revitalizing and turning the second largest manufacturer within Montenegro into a going concern;"[50] they merely overburdened the company with debt instead of actual investments. The Respondent finds that the loans of the Claimants do not meet the criteria for an indivisible investment as applied by international tribunals, as for example in the case of *CSOB v. Slovakia*.

131. The Respondent argues that it is not enough for a claimant to characterize a claim as a treaty claim; the State must act as a sovereign in order for an alleged breach of contract to represent the basis for a treaty claim. This, the Claimants have failed to show. The Respondent states that, in particular, the claims of headcount reduction and scrapping of equipment are rooted exclusively in the Privatization Agreement and the Assignment Agreement.

132. The Respondent points out that the Claimants and their Serbian Legal Experts agree that Clause 11.1 of the Privatization Agreement has the effect of preventing the elevation of contractual claims to the level of treaty claims through the operation of the umbrella clause. The Respondent also draws the attention of the Tribunal to the Claimants' Request for Arbitration of 6 November 2012, where the Claimants considered that their claims were rooted in contract:

> "The 'umbrella clause': Article 3(4) of the BIT provides as follows:
>
> '4) Each Contracting Party shall observe any legal obligation it may have entered into with regard to investments of investors of the other Contracting Party.'

[50] *Id*., para. 138.

133. This provision of the BIT imposes an obligation on the Respondent to respect any obligations that it has entered into concerning any investments protected by the treaty. In the present case, by way of example, this has the consequence that the Respondent is under a treaty obligation to ensure that it respects the obligations it has undertaken relating to the investments as set out in, *inter alia*, the Assignment Agreement. As explained briefly above, the Respondent has violated the terms of Clause 5.1.1, of the Assignment Agreement, and by operation of the umbrella clause this violation also constitutes a breach by the Respondent of its obligation set out in Article 3(4) of the BIT."[51]

134. The Respondent observes that the Claimants continue to blur the distinction between the 2000 and 2011 MFI Laws. The Respondent recalls that all of the alleged breaches of the 2000 and 2011 MFI Laws pre-date the MFI Law 2011 and that the Claimants had been granted access to the Additional Facility only in respect of the MFI Law 2011. According to the Respondent, this is a sufficient reason to reject the Claimants' attempt to rely on either of the MFI Laws. The Respondent confirms its previous arguments that Articles 39 and 30 respectively of the 2000 and 2011 MFI Laws do not constitute unilateral consent to arbitration. The Respondent refers to decisions of other tribunals related to consent to arbitrate in national legislation and notes their emphasis in that the consent must be unambiguous. According to the Respondent, "the dispute resolution provisions of the MFILs simply indicate that arbitration may be an option if the parties agree on such dispute resolution mechanism, which does not constitute a final consent to arbitration."[52]

4) Claimants' Rejoinder on Jurisdiction

135. In their Rejoinder on Jurisdiction, the Claimants address first the argument of the Respondent based on Clause 7.4 of the Assignment Agreement. The

[51] *Id*., para 173, quoting para. 60 of the RFA. Emphasis added by the Respondent.
[52] *Id*., para. 213.

Claimants argue that this clause does not purport to cover disputes arising out of or in connection with the Privatization Agreement but its reach is limited to disputes arising out of or in connection with the Assignment Agreement. According to the Claimants, it is incorrect to state as Respondent does that "**[a]ny dispute** arising in relation to MNSS' investment in ZN is, therefore, necessarily a dispute in connection with the Assignment Agreement."[53] The Respondent conflates a cause of action based on the BIT with contract claims that MNSS may bring against the Sellers. The Claimants point out that the Government's contractual undertakings can be found in Clause 9 of the Privatization Agreement and that none of the breaches alleged in this arbitration relates to breaches of these undertakings.

136. The Claimants then address the Respondent's argument that, since what is at a stake is the validity of Clause 11.1 of the Privatization Agreement, then this matter should be decided by an UNCITRAL tribunal pursuant to the exclusive jurisdiction of Clause 11.2 in conjunction with Clause 7.4 of the Assignment Agreement. According to the Claimants, this Tribunal and no other is competent to decide the question of its own jurisdiction: "in determining the merits of the treaty claims before it, this Tribunal is competent to determine whether to take into account the terms of the Privatisation Agreement, and the extent that such terms would be relevant."[54]

137. The Claimants dispute that MNSS accepted in advance an exclusive jurisdiction clause that limits treaty and contract claims to the forum of UNCITRAL arbitration. It is the Claimants' contention that "[n]either Clause 7.4 of the Assignment Agreement nor Clause 11.2 of the Privatisation Agreement contains clear and unequivocal language specifically waiving

[53] Rejoinder on Jurisdiction, para. 19, quoting para. 6 of the Rejoinder. Emphasis added by the Claimants.
[54] *Id.*, para. 41.

ICSID AF jurisdiction, and yet this is precisely what is required in order for any purported waiver of ICSID jurisdiction to have any legal effect."[55]

138. The Claimants assert that there is no drafting history that would support the Respondent's assertions as regards Clause 7.4 of the Assignment Agreement. This clause was simply not discussed.

139. The Claimants explain:

> "it is entirely unsurprising that the Government is singled out in Clause 11.1 of the Privatisation Agreement alongside the Sellers. The Respondent's explanation that the singling out of the Government is meant somehow to provide support for the scope of any purported waiver as including the Respondent's treaty obligations is, as explained above, wrong. As already noted, it is the State – and not the Government – that is the Contracting Party to the Bilateral Investment Treaties."[56]

140. As to RCA, the Claimants re-affirm that it made a "significant and continuing contribution to the continued operation of ZN."[57] For the Claimants, the key issue is whether ownership of the First Loan passed validly from MNSS to RCA. The English High Court confirmed such validity. As to risk, the Claimants argue that RCA incurred the same risks as MNSS and incurred additional risks when it agreed to extend the maturity date of the First Loan beyond that of the Crédit Suisse Loan. The Claimants contend that it is of no relevance where the assignment was executed for purposes of determining where the investment is located; the loan investment relates to ZN and ZN is located in Montenegro. The Claimants also rebut the argument that the investment needs to have a formal link with the Respondent.

141. The Claimants contest the forum shopping argument that would give the Claimants the procedural advantage of not facing counter-claims from Sellers other than the Government. According to the Claimants, this

[55] *Id.*, para. 47.
[56] *Id.*, para. 60.
[57] *Id.*, para. 70.

argument is based on the notion that Clause 11.2 of the Privatization Agreement contains a broad exclusive UNCITRAL arbitration clause that covers BIT claims besides contract claims. The Claimants observe that RCA had no contract with the other Sellers, the Government is designated as the direct beneficiary of MNSS' undertakings under the Privatization Agreement and the purchase price was payable solely to the Government. Furthermore, RCA made further loan investments after the assignment of the First Loan, the arbitration proceedings started about 21 months after the assignment and the Respondent guaranteed €26.3 million after it was informed of the assignment.

142. The Claimants dispute the assertion of the Respondent that the claims are essentially based on contract. The Claimants point out first that "[a]s a factual matter, the acts and omissions by the Respondent that provide the cause of action relating to breaches of the governing BIT may <u>also</u> constitute breaches of the Privatisation Agreement or indeed the Assignment Agreement. But this does not of course mean that the distinct causes of action should be conflated."[58] Second, "the **reason** for the State's act or omission is irrelevant in terms of whether the act or omission constitutes a breach by the State of its international/domestic law obligations … The only relevant question is whether the act or omission constitutes a breach by the State of its obligations under international/domestic law."[59] Third, the Claimants agree with the Respondent that "[a]s a matter of principle, a claim is to be considered a purely contractual claim 'where the Host State, party to a specific contract, breaches **obligations arising by the sole virtue of such contract**'."[60]

143. The Claimants take note of the acceptance by the Respondent that certain claims of the Claimants can be characterized as treaty claims, but that it still considers outside the competence of the Tribunal the Government's

[58] *Id.*, para. 94. Emphasis in the original.
[59] *Id.*, para. 96. Emphasis in the original.
[60] *Id.*, para. 101, quoting para. 152 of the Rejoinder. Emphasis added by the Respondent.

unreasonable refusal to allow ZN: (i) to make any significant reductions in the work force or involuntary redundancies; and (ii) to scrap certain obsolete machinery to generate crucial cash flow for the company. In this respect, the Claimants make a few additional points. The Claimants explain that the impugned acts were of an unreasonable and discriminatory nature and took place outside the context of any contract with the Claimants. The Claimants dismiss the argument that the Government's agreement was not decisive because the agreement of the other Sellers was necessary and the Claimant never sought their agreement. According to the Claimants, the Government had the final word given that the other Sellers were under the control of the Government. Furthermore, the Respondent influenced the reduction of the workforce beyond its role as a contractual party and did not act as a private party when it reached a deal with the ZN union on headcount reduction. Similarly, the Claimants explain that the refusal to scrap obsolete machinery was of an unreasonable and discriminatory nature that had a detrimental effect on ZN's ability to operate and manage its own business.

144. The Claimants observe in respect to the 2000 and 2011 MFI Laws that the Parties seem to concur in that from a procedural point of view the effect of the MFI Law 2011 was immediate. Therefore, there was a unilateral offer to arbitrate when the Claimants requested the ICSID Secretary-General's approval to access the Additional Facility. On the other hand, the Claimants note that the Parties appear to diverge on the temporal application of the substantive provisions of the 2000 and 2011 MFI Laws, and according to the Respondent, the dispute resolution provision in the MFI Law 2011 cannot be used to arbitrate guarantees given under MFI Law 2000.

145. The Claimants argue that the 2011 MFI Law did not dislodge vested substantive provisions of the MFI Law 2000. The Claimants agree with the Respondent that the first paragraph of Article 39(2) of MFI Law 2000 and Article 30(2) of MFI Law 2011 leaves "open the possibility of the parties agreeing that their foreign investment disputes shall be submitted to

domestic or international arbitration."[61] The Claimants disagree that "the second and third paragraphs then regulate that if such possibility is exercised, the contracting parties must opt in their investment agreement for ICSID Additional Facility."[62] The Claimants point out that the Respondent does not offer a plausible explanation for the legislator to limit the choice of arbitration forum by contracting parties. In this respect, the Claimants refer to Article 27 of the Vienna Convention on the Law of Treaties whereby "the Respondent cannot restrict by its national legislation a choice of forum already offered to foreign investors under its bilateral investment treaties."[63]

146. The Claimants dispute that their interpretation renders the final limb of the first paragraph redundant. The Claimants explain:

> "contracting parties are free to agree [sic] the arbitration of foreign investment disputes with the Respondent in any arbitral forum. Whether or not there is such an arbitration agreement, the foreign investor in a contractual relationship with the Government may initiate an ICSID AF arbitration against the Respondent without any further manifestation of consent by the Respondent. The added value of the final limb of the first paragraph is that if the investment agreement with the Government provides for an arbitral forum other than the ICSID Additional Facility, depending on the scope of such agreement, the foreign investor has the alternative of initiating a claim against the Government based on that agreement."[64]

147. The Claimants contend that the approach of *in dubio mitis* should be rejected on the basis of substantial jurisprudence and that, based on the principle of effectiveness, the Tribunal should reject interpretations that would render the text meaningless.

[61] *Id.*, para. 133.
[62] *Id.*, para. 134.
[63] *Id.*, para. 142.
[64] *Id.*, para. 143.

B. Analysis of the Tribunal

1) Explicit Waiver of ICSID AF Arbitration

148. The waiver objection is based on Clauses 11.1 and 11.2 of the Privatization Agreement, and Clause 7.4 of the Assignment Agreement. The arguments of the Parties raise the basic issue of the scope of these clauses, and the related issue of whether, in contracting with a State, a private party may waive any rights it may have under a BIT.

149. It will be useful for ease of reference to reproduce these clauses here. The Clauses 11.1 and 11.2 of the Privatization Agreement on Governing Law and Settlement of Disputes read as follows:

> "11. 1. Governing Law
>
> The law governing the rights and obligations of the Parties arising out of this Agreement shall be that of the Republic of Montenegro.
>
> The Buyer acknowledges that it has taken legal advice in relation to the rights and obligations of the parties under this Agreement and considers them to be fully consistent with any obligations of the Government of Montenegro and its agents under international law with respect to foreign investment, including without limitation, any applicable bilateral or multilateral investment treaties. Any act or acts of the Sellers or the GoM under or pursuant to this Agreement shall be deemed to be compliant with such international treaty obligations and the Buyer waives on behalf of itself any right which it might otherwise have under international law to assert claims against the Sellers or the GoM other than pursuant to the express terms of this Agreement.
>
> 11.2 Settlement of Disputes
>
> 11.2.1 Any dispute or difference arising out of this Agreement, or the breach, termination or invalidity thereof, which cannot be resolved by amicable negotiations within fourteen (14) Calendar Days of written notice of the dispute by one Party to another (or such further period as the Parties may agree) shall be

> referred to and finally resolved by ad hoc arbitration in accordance with the UNCITRAL Arbitration Rules without recourse to the ordinary courts of law."[65]

150. Clause 7.4 of the Assignment Agreement provides:

> "Any dispute arising out or in connection with this Assignment Agreement shall be exclusively settled by the dispute resolution provisions set forth in clause 11.2 of the SPA [the Privatization Agreement]. For the avoidance of doubt, it is hereby expressly agreed between the Assignee and the Sellers that the validity of the Arbitration Clause of the SPA shall remain in full force and effect."[66]

151. The first sentence of Clause 11.1 simply states that Montenegrin law is the law of the contract. By the first sentence in the second paragraph of Clause 11.1, MNSS confirms that it has sought legal advice on the rights and obligations of both parties to the Privatization Agreement and considers them to be "fully" consistent with any obligation of the Government and its agents under international law. The Respondent understands this stipulation as meaning that the Privatization Agreement is "in line with international law – notably with any obligations flowing from the applicable BIT."[67] The Claimants judge this sentence to be uncontroversial because the validity or enforceability of any provision of the Privatization Agreement under international law is not in dispute here.

152. The disagreement between the Parties concerns the scope of the last sentence in the second paragraph of Clause 11.1. For the Respondent, the waiver covers any possible claims under international law or Montenegrin law; for MNSS, the scope of the waiver is limited to disputes of a contractual nature in respect of the Privatization Agreement itself.

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[65] Privatization Agreement, Clauses 11.1 and 11.2 (Exhibit C-002).

[66] Assignment Agreement between (among others) MN Specialty Steels Limited, MNSS B.V. and Government of Montenegro, Clause 7.4 (Exhibit C-014).

[67] Counter-Memorial, para. 71.

153. The Respondent argues that Clause 11.1 covers treaty and contract claims, and concerns substantive obligations of the State under international law. Furthermore, when this clause refers to the obligations of the Government of Montenegro and its agents under international law with respect to foreign investment, it shows that "the contemplated obligations are international law obligations, and not the contractual obligations incumbent upon the GoM as one of the Sellers under the PA."[68]

154. On the other hand, the Claimants stress that the waiver only extends to acts of the Sellers or GoM under or pursuant to this Agreement – the Privatization Agreement. They also find support in the first sentence of the second paragraph of Clause 11.1 where the Buyer acknowledges the rights and obligations of the parties under this Agreement.

155. The Tribunal observes that the legal advice taken by MNSS is "legal advice in relation to the rights and obligations of the parties under this Agreement." The acts of the Government or the Sellers are acts "under or pursuant to" the Privatization Agreement. The acts of the Sellers or GoM to be deemed compliant with international treaty obligations are acts "pursuant to" the Privatization Agreement. The reference to international law by itself does not expand the coverage of the clause to include claims not based on acts under or pursuant to the Privatization Agreement. The text of the clause does not support the wide interpretation proffered by the Respondent.

156. Clause 11.1 needs to be read in conjunction with Clause 11.2.1 on dispute settlement. This Clause applies to disputes "arising out" of the Privatization Agreement or the breach or termination thereof. It does not apply to disputes beyond the confines of this Privatization Agreement. There is a lack of balance between the wide interpretation given by the Respondent to Clause 11.1 and the scope of the dispute settlement clause. If the scope of Clause 11.1 would be as extensive as claimed by the Respondent, then Clause 11.2 would have been drafted to be commensurably wider than it is. The Respondent seems to be aware of this imbalance, and it has argued in favor

[68] *Id.,* para. 73.

of reading the two clauses together and interpreting Clause 11.2 to match the Respondent's understanding of Clause 11.1. The Tribunal disagrees with the Respondent's interpretation, because it would mean to expand the consent to UNCITRAL arbitration beyond its scope.

157. The inference drawn by the Respondent from the reference to "the Government of Montenegro and its agents" in the second sentence of Clause 11.1 and to "the Sellers or GoM" in the third sentence is not convincing because the use of the term "agents" or "Sellers" in the context of references to international law is not consistent.

158. The dispute in respect of Clause 7.4 of the Assignment Agreement concerns the use of phrase "[a]ny dispute arising out or in connection with" as opposed to "[a]ny dispute or difference arising out of this Agreement" in the Privatization Agreement. The Respondent attributes a wider meaning to "arising out or in connection with" than to "arising out" by itself. The Tribunal observes that the plain meaning of "arising out" is "originating" or "resulting from," and "in connection with" means "in relation to." The Tribunal has difficulty in finding a meaningful difference between these terms in the context of this clause, particularly because the object of Clause 7.4 is to confirm the validity of Clause 11.2 of the Privatization Agreement not to expand it or in any way change it. For this reason, the Tribunal does not find merit in the argument that Clause 7.4 of the Assignment Agreement has a wider meaning than Clause 11.2 of the Privatization Agreement.

159. To conclude, the parties to the Privatization Agreement waived the ability to bring before other fora the same claims that they could bring before a tribunal constituted pursuant to Clause 11.2.1 of the Privatization Agreement. The scope of the waiver therefore encompasses all contract claims pursuant to the Privatization and Assignment Agreements. The waiver was not intended to, and does not, capture claims for breach of the BIT. These claims are separate from, and different to, claims concerning a breach of the Privatization and Assignment Agreements. In determining claims for breach of the BIT, the Tribunal may examine as a question of fact whether the

Privatization Agreement was breached, by way of background to a claim that does not have the nature of a contract or an umbrella clause claim. For example, the Tribunal is entitled to decide, as a question of fact, whether the Privatization Agreement was breached when deciding a claim for violation of the fair and equitable treatment standard in the BIT. It follows that the Tribunal lacks jurisdiction over any claims concerning breach of contract or of the umbrella clause, but has jurisdiction over claims concerning the alleged breaches of Articles 3, 5 and 6 of the BIT. Whether the claims advanced by the Claimants are not contractual claims and based on the BIT is a matter of appreciation by this Tribunal as part of its consideration of the merits of each of the claims.

160. The second issue is whether MNSS as a private party may waive rights under the BIT. Given the conclusion reached above, the issue is limited to the waiver of potential claims under the umbrella clause of the BIT. Article 3(4) of the BIT reads as follows: "Each Contracting Party shall observe any legal obligation it may have entered into with regard to investments of investors of the other Contracting Party."

161. The jurisprudence referred to by the Parties on the waiver of treaty rights by private parties is not entirely uniform. The Claimants have argued that private parties cannot waive rights derived from State rights based on the holdings of the *Loewen* and *ADM* tribunals. The Claimants also find support in *SGS v. Philippines* where the tribunal found it doubtful that

> "a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract."[69]

[69] Quoted by the Claimants in their Reply, para. 204.

This notwithstanding, the *SGS v. Philippines* tribunal applied the jurisdictional clause of the contract by finding the investor's claim inadmissible before it would be submitted to the Philippine courts. The Claimants have further developed the argument of the public interest served by investor-State arbitration, in particular by reference to Professor Schreuer's analysis of waivers and have requested that the Tribunal adopts that analysis.

162. Based on cases such as *Aguas del Tunari, Occidental Petroleum, TSA Spectrum, Corn Products* and *Duke Energy* as well as doctrinal writings, the Respondent has argued that the rights under a BIT are rights of the investor that may be waived provided the waiver is explicit and the investor has freely agreed to the waiver. The Respondent has further argued that the Claimants' assertion that a right established in public interest is not capable of being waived is unfounded. In this respect, the Respondent observes that even core human rights may be waived if the waiver does not prejudice other persons.

163. The Tribunal agrees that, as argued by the Respondent, investors may waive the rights conferred to them by treaty provided waivers are explicit and freely entered into by investors. As stated by the *Corn Products* tribunal:

> "[…] there is no question of the investor claiming on behalf of the State. The State of nationality of the Claimant does not control the conduct of the case. No compensation which is recovered will be paid to the State. The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees."[70]

But in the view of the Tribunal, the public interest may not be ignored. The Tribunal agrees with Professor Scheuer that "Investor-State arbitration serves not only the investor's interests but has an important function in the

[70] Quoted in para. 404 of the Rejoinder.

public interest for the relations between the States concerned."[71] Thus the question is not whether the rights may or may not be waived, but to what extent, if they have been waived, the waiver is in detriment of the public purpose pursued by the State parties to the BIT.

164. In the case before the Tribunal, it is undisputed that the waiver in question was freely negotiated and agreed to by MNSS by way of the Assignment Agreement. It is significant that, as interpreted by the Tribunal, the waiver is limited to contractual disputes and that MNSS may resolve contractual disputes arising from the Privatization and Assignment Agreements by "ad hoc arbitration in accordance with UNCITRAL Arbitration Rules without recourse to the ordinary courts of law."[72] The ability of the investor and the State to settle their contractual disputes by arbitration is evidently congruent with the public purpose pursued by the State parties to the BIT.

165. Based on these considerations the Tribunal concludes that MNSS validly waived its right under the BIT to pursue contractual claims based on Article 3(4).

2) Consent

166. The Tribunal will consider first issues related to the translation of Article 39 of MFI Law 2000 or Article 30 of MFI Law 2011. The Respondent has indicated that the translation provided by the Claimants is not entirely correct and has submitted its own version. The Claimants' version reads as follows:

> "Any dispute arising from foreign investment shall be resolved by the competent court in Montenegro, unless the agreement on investment i.e. decision on establishment stipulates that such disputes are settled before domestic or foreign arbitration, in compliance with international conventions.
>
> If a contracting party is the Government of the Republic of Montenegro, then until the Convention of the

[71] Christoph Schreuer, "Investment Protection and International Relations," quoted by the Claimants in their Reply, para. 206.

[72] Clause 11.2.1 of the Privatization Agreement is confirmed by Clause 7.4 of the Assignment Agreement.

International Center [sic] for the Settlement of Investment Disputes (ICSID) is signed, the disputes arising from the foreign investments shall be resolved before domestic or foreign arbitration in accordance with the additional rules of the ICSID Convention for countries that are not signatories of the ICSID Convention.

If the contracting parties are domestic and foreign legal entities and natural persons, then disputes arising from foreign investments shall be resolved before domestic or foreign arbitration in accordance with the United National Commission on International Trade Law (UNCITRAL) Rules.

The final award of the arbitration shall be enforced by a competent court."[73]

167. Article 30 of MFI Law 2011 is identical to the above-transcribed article except for the last paragraph that has not been included in the more recent law and the differences in the translation. The Respondent's version of this article reads as follows:

> "Any dispute arising from foreign investments shall be resolved before the competent court in Montenegro, unless the investment agreement or the incorporation act stipulates that such disputes shall be resolved in domestic or foreign arbitration in accordance with international conventions.
>
> Where the Government is a contracting party, the disputes arising from the foreign investments shall, until the signature of the ICSID (International Center [sic] for the Settlement of Investment Disputes) Convention, be subject to domestic or foreign arbitration in accordance with the Additional Facility Rules of the ICSID Convention for countries which are not signatories to the ICSID Convention.
>
> Where the contracting parties are domestic and foreign legal entities and natural persons, the disputes arising from the foreign investments shall be subject to domestic or foreign arbitration in accordance with the

[73] Law on Foreign Investments, Official Gazette of Montenegro 52/2000 (Legal Authority CLA-505).

> UNCITRAL (United Nations Commission on International Trade Law) Rules."[74]

168. The Respondent attributes the significance to the difference between the two versions in the second and third paragraphs. The Respondent's version says that "disputes arising from the foreign investments shall be subject to domestic or foreign arbitration," while the Claimants' version – incorrectly and misleadingly according to the Respondent – states that such disputes "shall be resolved before domestic or foreign arbitration." The Tribunal does not find this difference between the two versions to be significant to the interpretation of either article. The Respondent's version uses the expression "to be resolved" in the first paragraph in relation to the courts and arbitration, while the Claimants' version says in the first paragraph "are settled." It seems that the drafter used "subject to," "settled" or "be resolved" interchangeably. This understanding of the Tribunal is confirmed by the fact that, as pointed out by the Claimants and not denied by the Respondent, the verb "to resolve" is also used by the Government in the English version posted in its website.

169. The Parties have discussed applicable methods of statutory interpretation in Montenegro. The Respondent has explained that the primary method is textual and, if a provision is unclear or its meaning cannot be determined, systematic, historical and teleological interpretation would apply. The Claimants agree that the linguistic analysis is the starting point, but none of the methods listed by the Respondent is formally more important than the others – "their application is often synthetically combined in the course of the analysis."[75]

170. The difficulty in interpreting the text of these articles is to find meaning in each of the paragraphs that can be integrated in the article as a whole. The first paragraph of each article clearly provides for the courts of Montenegro

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[74] Respondent's Translation of the Montenegrin Law on Foreign Investments 2011 (Legal Authority RLA-010).

[75] Reply, para. 244, quotation of the Montenegrin Law Experts' Opinion.

to resolve investment disputes as the default option if the parties to an investment agreement have not provided for arbitration in accordance with international conventions. The second and third paragraphs distinguish between the rules of arbitration to be applied to the dispute subject to arbitration depending on who are the parties to the investment agreement. If one of the parties is the Government, then the ICSID AF Rules apply; if both parties are private parties, then the UNCITRAL Rules will apply. Does this mean that the Government gave its consent in advance to future investors with whom it would contract?

171. If the second paragraph truly meant that the Government has given its consent without the need to have an arbitration clause in an investment agreement, then the sentence in the first paragraph that starts "unless the investment agreement …" would be unnecessary. If Articles 39/30 had the reach argued by the Claimants, it would also be unnecessary to have a default option or a reference in the first paragraph to an investment agreement, since the second and third paragraphs of Articles 39/30 would suffice as an instrument of consent.

172. The Tribunal is further convinced of its understanding of Articles 39/30 by the fact that the third paragraph refers to agreements between private parties. As pointed out by the Respondent, the terms used in the second and third paragraphs are similar, but the Government may not impose the consent to arbitration to private parties in future investment agreements. The second and third paragraphs are not deprived of meaning if read as not including consent of the Government or, oddly, of private parties. These paragraphs provide for the applicable arbitration rules depending on who are the parties to the investment agreement should the parties choose to settle their disputes other than before the ordinary courts of Montenegro.

173. In view of the preceding considerations, the Tribunal finds merit in the objection raised by the Respondent and holds that it has no jurisdiction under the 2000 and 2011 MFI Laws.

3) Ratione Personae

174. The Tribunal reproduces here the relevant articles dealing with the Tribunal's jurisdiction *ratione personae*.

Article 1(b) of the BIT reads:

> "Article 1
>
> For the purposes of this Agreement:
>
> …
>
> b) the term "investors" shall comprise with regard to either
>
> Contracting Party:
>
> (i) natural persons having the nationality of that Contracting Party;
>
> (ii) legal persons constituted under the law of that Contracting Party;
>
> (iii) legal persons not constituted under the law of that
>
> Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)."[76]

Article 25(2)(b) of the Washington Convention reads:

> "…
>
> (2) "National of another Contracting State" means:
>
> …
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

[76] BIT, Article 1(b) (Legal Authority CLA-504).

175. The argument of the Respondent is based on two grounds, namely, that MNSS and RCA are shell companies without an effective link to the Netherlands, and that the dispute precedes the change of nationality of MNSS and RCA and, therefore, the acquisition of the Dutch nationality by the Claimants was driven by the search of a nationality that would permit the Claimants access to international arbitration under the BIT.

176. Article 1(b)(ii) of the BIT defines the term “investors” as comprising with regard to either Contracting State to the BIT “legal persons constituted under the law of that Contracting Party.” It is uncontroverted that MNSS is a legal person constituted under the laws of the Netherlands. It is equally uncontroverted that RCA is a legal person constituted under the laws of Curaçao to which the BIT was extended. The Claimants dispute as a matter of fact the allegation that they are shell companies and argue that the BIT has no further requirements for legal persons to be protected as investors under the BIT. The place of constitution of the company is the determinant factor without any other conditions to be met to qualify as an investor. The States parties to the BIT could have introduced such conditions, as some States have done, to avoid protecting companies with no link to the country of incorporation other than the incorporation itself. But the State parties to this BIT did not. It is not for the Tribunal to subject the definition of legal persons considered as protected investors under the BIT to undetermined conditions not contemplated in the BIT.

177. Notwithstanding the straightforward definition of investor, the Respondent argues that the aim of Article 1(b)(ii) of the BIT is not to protect mere shell companies because Montenegro’s incentive in entering into the BIT was to procure Dutch direct investment and “not to further raise the Netherland’s relevance as a haven for shell companies through which third country entities would funnel their investment into Montenegro ....”[77] Furthermore, such loose nationality requirements for legal persons would create an imbalance

[77] Counter-Memorial, para. 318.

with the strict requirements for the acquisition of nationality by individuals according to international law rules.

178. As already stated by the Tribunal, if Montenegro and the Netherlands had wished to limit the application of the BIT to legal persons having a genuine link with one of the Contracting States, they could have done so. In fact, the aim of the parties to the BIT seems to have been the opposite: to afford wide protection with only the requirement of incorporation. Allegedly, the Netherlands may now have second thoughts about covering under its BITs companies with no significant commercial activities in the Netherlands, but this is of no relevance to this Tribunal. As to the alleged imbalance generated by a literal reading of the text of the BIT in respect of the nationality of legal persons as opposed to the nationality of individuals, it is not a matter of interpretation of the BIT but of different international law rules applicable to the nationality of individuals and legal entities. It is not this Tribunal's role to even out such differences. This has also been stated by other ICSID tribunals; for example, the tribunal in *Waste Management v. Mexico* which explained:

> "Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise."[78]

179. The Respondent has also pointed out that the third alternative of who is an investor in Article 1(b)(iii) refers to "control by either a foreign (Dutch) national or a foreign (Dutch) company." The Respondent also refers to the mention of control in Article 9(6) in the context of Article 25(2) of the ICSID Convention. These references then lead the Respondent to submit that since MNSS is effectively controlled by British investors, "[t]he mere interposition of a Dutch corporate shell cannot … change this finding of nationality of the

[78] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, para. 85 (Legal Authority CLA-565 and RLA-090).

investor."[79] For the Tribunal, different situations are referred to in Article 1(b)(iii) on the one hand, and Article 9(6) of the BIT and Article 25(2) of the ICSID Convention, on the other hand. Article 1(b)(iii) concerns a company that is incorporated in neither one of the Contracting States, but it is controlled by nationals of one of the Contracting States. Article 9(6) of the BIT and Article 25(2) of the ICSID Convention, to the contrary, refer to a company that is a national of one of the Contracting States, but controlled by nationals of the other Contracting State. Contrary to what the Respondent argues, the aim of the States parties to the BIT seems to refer to control only in very specific circumstances. However, in this case, none of the situations in which control plays a role exists: MNSS and RCA are neither companies of a third State controlled by Dutch nationals nor companies of Montenegro controlled by Dutch nationals. According to the Respondent, they are merely Dutch companies controlled by UK nationals. The Tribunal cannot therefore take into account such control.

180. The second leg of the argument for lack of jurisdiction of the Tribunal *ratione personae* concerns the alleged manipulation of the nationality of MNSS for the sole purpose of obtaining the BIT protection after the dispute broke out between the Parties. The Respondent pleads that it had scant knowledge of the corporate restructuring of MN and that in economic terms there was no transfer of the investment but merely one more British investor. According to the Respondent, the dispute arose before MN assigned the Privatization Agreement to MNSS and it continued with MNSS: "At the heart of the present dispute between the investor – initially MNSS Limited and subsequently MNSS B.V. – and the Respondent lies a controversy about the content and scope of the parties' obligations under and in relation to the Privatisation Agreement."[80]

181. The Tribunal first observes that the parties are distinct. MNSS is not MN Specialty Steels Ltd. even if that company may have a stake in MNSS. The

[79] Counter-Memorial, para. 324.
[80] *Id*., para. 354.

facts alleged by the Claimants as the basis of their claims occurred after the date of the Assignment Agreement. More importantly, the parties to the Assignment Agreement acknowledge and confirm in Clause 4.2.1 that,

> "save for the specific historic breaches [of the Assignor] set out in Part A of the Schedule … they do not have any claim or action against or dispute with the Assignor or the Assignee, whether past, present or future, known or unknown, in relation to or in connection with or arising from any breach, potential breach or alleged breach of the SPA or any documents entered into or any actions taken or not taken pursuant to or as contemplated by the terms of the SPA on or prior to the Effective Time [the date of the SPA] ...."[81]

182. According to the Respondent, the need to include this confirmation in the Assignment Agreement shows that it was an important matter to clarify because of blatant breaches of the Privatization Agreement. This is correct as far as MN is concerned, but the Parties to this arbitration agreed that there was no dispute between them when the Assignment Agreement was entered into. As held by other tribunals, to structure an investment with the aim to seek protection of a BIT is not *per se* in breach of the good faith expected of an investor. Tribunals have found that an investor would not qualify for the protection of the BIT concerned only if the nationality is changed after the dispute has arisen or "when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy."[82] Thus, the *Aguas del Tunari* tribunal stated: "it is not uncommon in practice and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples [sic], of taxation or the substantive law of the jurisdiction, including the availability of a BIT."[83] In

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[81] Assignment Agreement between (among others) MN Specialty Steels Limited, MNSS B.V. and Government of Montenegro, Clause 4.2.1 (Exhibit C-014).

[82] *Pac Rim Cayman LLC v. Republic of El Salvador*, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para 2.99 (Legal Authority RLA-126).

[83] *Aguas del Tunari, S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 330 (Legal Authority RLA-098).

the instant case, the dispute with MNSS arose after the Assignment Agreement and the Respondent was party to the Assignment Agreement.

183. For all of these reasons, the Tribunal rejects the objection to its jurisdiction based on *ratione personae*.

4) Ratione Materiae

a. The Relationship of the Additional Facility Rules to the ICSID Convention

184. As a preliminary matter, the Tribunal will consider the relationship of the Additional Facility to the ICSID Convention for purposes of the determination of whether an investment qualifies as such under the Additional Facility Rules.

185. The Respondent has argued that the investment of the Claimants does not qualify under the Additional Facility Rules, because it does not meet the criteria for investment under the Convention. The Claimants have opposed this view by pointing out that Article 3 of the AF Rules clearly states that the Convention is not applicable to proceedings under the AF Rules.

186. The Claimants obtained the approval of the Secretary-General under Article 2(a) of the AF Rules. A proceeding under this article is not under the jurisdiction of ICSID because the State party is not a member of ICSID or the private party is not a national of a member State. The terms of Article 3 are clear and sweeping:

> "Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."

Nonetheless, this provision cannot be read out of the context of other AF Rules, in particular of AF Rule 4(2) that provides:

> "In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are

> fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted."

The implication of this rule is that the requirement that a "dispute arises directly arising out of an investment" is to be fulfilled at the time of approval by the Secretary-General and that the investment needs to be an investment under the ICSID Convention.

b. <u>Did MNSS Make an Investment?</u>

187. The Tribunal refers here the relevant articles dealing with the Tribunal's jurisdiction *ratione materiae*.

Article 1(a) of the BIT reads:

> "Article 1
>
> For the purposes of this Agreement:
>
> a) the term 'investments' means every kind of asset and more particularly, though not exclusively:
>
> (i) movable and immovable property as well as any other rights in rem, such as leases, mortgages, liens and pledges, in respect of every kind of asset;
>
> (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
>
> (iii) claims to money, to other assets or to any performance having an economic value;
>
> (iv) rights in the field of intellectual property (such as copyrights and related rights, patents, industrial designs or models, trade marks), technical processes, goodwill and know-how;
>
> (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources."[84]

[84] BIT, Article 1(a) (Legal Authority CLA-504).

Article 25(1) of the Washington Convention reads:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

It is well known that the ICSID Convention does not define what constitutes an investment, but that case law has developed the meaning of the concept.

188. As to what constitutes an investment under the ICSID Convention, the Respondent submits that the *Salini* test should be of application here at least "in a flexible, non-stringent fashion,"[85] including the concept of economic development. On the other hand, the Claimants consider that the Convention is not applicable for purposes of determining the jurisdiction of this Tribunal or the meaning of investment. The Claimants submit that, in any case, the loans to ZN are investments under the *Salini* test for purposes of Article 25 of the ICSID Convention. The discrepancy of views between the Parties is centered on whether loans are investments and the denial by the Respondent that the loans of the Claimants to ZN or the transfer of shares of MN to MNSS qualify as investments under the ICSID Convention or the BIT. The Respondent also has argued that the loans of the Claimants do not qualify as investments under the 2000 and 2011 MFI Laws. Since the Tribunal has upheld the objection to jurisdiction based on consent under the 2000 and 2011 MFI Laws, the Tribunal will not address this argument of the Respondent.

189. The Tribunal considers that, for the purposes of ascertaining the meaning of the term "investment" in Article 25 of the ICSID Convention, the elements of the *Salini* test need to be considered flexibly and as a whole in the context

[85] Counter-Memorial, para. 396.

of the specific facts of an investment operation.[86] The elements of a contribution for certain duration with the assumption of certain risk seem to be inherent to the plain meaning of the term "investment." To borrow the more precise wording of the tribunal in *Poštová Banka v. Greece*, it can be said that an investment is "a contribution to an economic venture of a certain duration implying an operational risk …."[87] How much contribution or risk and for how long will depend on the circumstances of the case. As to the element of a contribution to economic development, in most cases it would be difficult for a tribunal to ascertain whether such contribution has been made; in particular when the dispute arises shortly after the investment has been made and the effects on the development of the host State may be imperceptible. Moreover, the Tribunal agrees with the analysis presented by the tribunal in *Phoenix v. Czech Republic*, when it stated:

> "It is the Tribunal's view that the contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes 'development.' A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed.[88]

190. To the same effect, the tribunal in *Fakes v. Turkey* was not convinced that "a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention. …

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[86] Emmanuel Gaillard and Yas Banifatemi, "The Long March towards a *Jurisprudence Constante* on the Notion of Investment" in *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015), pp. 97-126.

[87] *Poštová Banka A.S. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 371.

[88] *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 85 (Legal Authority CLA-531 and RLA-113).

Such development is an expected consequence, not a separate requirement ....”[89]

191. The Tribunal will address now the three questions raised by the arguments of the Parties: Are the acquisition of the shares of ZN by MNSS and the loans made by MNSS to ZN investments under the ICSID Convention and the BIT? Were loans permitted under the Privatization Agreement? Should the various instruments through which the investment was made be considered as a whole or each separately?

192. The argument of the Respondent as regards the shares held by MNSS in ZN relies on the fact that allegedly MNSS did not inject fresh capital in ZN. The consideration for its shareholding in ZN was owed and provided to MN and not to ZN or Montenegro. The Respondent argues that none of the loans may qualify as an investment under the Privatization Agreement, and points out that not all of the loans were advanced by the Claimants to ZN – the Third and Fifth loans were advanced to different entities, including a Dutch company in the case of the Third Loan. Furthermore, the Fourth and Fifth loans were for a very short duration. According to the Respondent, the obligation under the Privatization Agreement was to invest capital, and this obligation and the social obligations were the true consideration that the investor had to pay for the majority shareholding in ZN.

193. The Claimants find that loans are included within the wide range of possible investments under the definition of this term in Article 1(a) of the BIT and point out that in Article 5 of the BIT the parties guarantee the free transfer of payments related to an investment including interest and funds in repayment of loans. This provision, argue the Claimants, “serves to reinforce further the position that the definition of ‘*investment*’ and the meaning of ‘*claims to money*’ under the governing BIT include loans.”[90] The Claimants allege the irrelevance of the Privatization Agreement for purposes of determining the

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[89] *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 111 (Legal Authority CLA-532 and RLA-120).

[90] Reply, para. 313.

covered investments because where “the jurisdiction of an ICSID AF Tribunal is founded on a BIT, it is not for one of the Contracting Parties to provide a subsequent restriction of the scope of consent. Rather it is for the ICSID AF Tribunal to determine the scope of consent by both Contracting States as expressed in the terms of the BIT pursuant to the general rules of treaty interpretation ....”[91] In any case, the Claimants allege that the Government had agreed that MNSS was able to fulfill its investment obligations through loans. In support, the Claimants refer, *inter alia*, to a decision of the Montenegrin State Aid Control Commission where it is recognized that “[u]p to this day, MNSS has invested over 45 million EUR in Zeljezara in the form of shareholder loan [sic].”[92]

194. The Government in Clause 4 of the Assignment Agreement approved the acquisition of the shares in ZN by MNSS. MNSS by this transaction became the majority shareholder of ZN and an investor in the capital of ZN. The fact that allegedly no new equity funds flowed to ZN does not mean that MNSS was not an investor by the transfer of the equity approved by the Respondent.

195. The Privatization Agreement and the Assignment Agreement do not specify the terms on which the investment needs to be made whether by a capital infusion as equity or in the form of loans. The BIT defines investments in the most generic terms. The acquisition of shares or a claim to money – a loan – is included in the definition. Whether the loans made to ZN by MNSS result in a company overburdened by debt is not an argument against the jurisdiction of the Tribunal. The financial terms may affect the viability of the investment, but, if permitted under the BIT, they would not by themselves disqualify a loan as an investment.

196. So far as the element of contribution is concerned, it cannot be analyzed in isolation. The reciprocal contributions made in a sale contract can, strictly speaking, be classified as contributions; some more precision needs to be

[91] *Id.*, para. 322.
[92] *Id.*, para. 326.

given to the kind of contribution that qualifies as an investment for purposes of the ICSID Convention, where the undefined term “investment” implies the creation of value. Thus, for purposes of the Convention, a loan in itself is not an investment. To be considered as an investment, it must contribute to an economic venture consisting of an investment. This has been recognized in the doctrine[93] and in ICSID case law.

197. For example, in the case of *CSOB v. Slovak Republic*, the CSOB loan was considered to be an investment, because the tribunal judged that it was part of an overall economic operation of restructuring and development of CSOB. The tribunal was clear that not all loans, standing alone, would qualify as investments:

> “Loans as such are therefore not excluded from the notion of an investment under Article 1(1) of the BIT. It does not follow therefrom, however, that any loan and, in particular, the loan granted by CSOB to the Slovak Collection Company meets the requirements of an investment under Article 25(1) of the Convention or, for that matter, under Article 1(1) of the BIT, which speaks of an ‘asset invested or obtained by an investor of one Party in the territory of the other Party.’
> …
>
> The contractual scheme embodied in the Consolidation Agreement shows, however, that the CSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB.
> …
>
> The basic feature of the Consolidation Agreement was not the financial consolidation of CSOB as such, but the development of the role and activities of CSOB in both Republics.”[94]

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[93] Emmanuel Gaillard, “*La jurisprudence du* CIRDI (ICSID Case Law),” (Pedone, 2004), p. 479: “*Trois éléments sont donc requis: l’apport, la durée et le fait que l’investisseur supporte, au moins en partie, les aléas de l’entreprise [...] Dans une telle conception,* ***un simple prêt dont la rémunération ne dépend en rien du succès de l’entreprise ne peut être qualifié d’investissement***.” Emphasis added.

[94] *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 24 1999, paras. 77, 80 and 83 (Legal Authority RLA-074).

198. The same distinction between a loan *per se*, and a loan participating in an investment operation has been adopted by the *Sempra v. Argentina* tribunal:

> "Under the broad definition of investment contained in the Treaty, loans are generally to be considered as a protected investment. The Tribunal has carefully considered whether in the light of the *Joy Mining* case, in which a distinction was drawn between a purely commercial operation and an investment, there could here be a situation in which the loans might, as argued by the Respondent, be considered a commercial operation not different from those normally made by financial institutions, and which would result in the loans not qualifying as a part of the investment. Despite the fact that the commercial papers, notes, bonds and negotiable instruments, as the instruments have been variously described, are not different from any other issuance of obligations, they were still made by a qualifying investor as a substitute for financial obligations previously undertaken in the context of the financing of the same investment. **Such loans were in fact part of the investment's continuing financing arrangements**, and were interposed at a moment when only the investor was available to make them … To the extent that the loans were made in connection with a legitimate business purpose, as they in fact were, there is no reason to exclude them from the protected investment."[95]

199. More recently, the tribunal in *Poštová Banka v. Greece* has confirmed the need for a loan to be linked to a process of value creation:

> "An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values or a subscription to sovereign bonds which is also a process of exchange of values *i.e.* a process of providing money for a given amount of money in return."[96]

[95] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 214-215 (Legal Authority CLA-529). Emphasis added.

[96] *Postová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 361.

200. The Parties disagree on whether the various instruments used by MNSS should be considered as a whole or each by itself. The Claimants emphasize that the loans should be viewed as part of an 'indivisible whole' investment in ZN that "was '*directed at the investment's overall economic goal*' of revitalizing and turning the second largest manufacturer within Montenegro into a going concern."[97] According to the Respondent, "in order for an instrument to be part of an indivisible whole investment such instrument must (i) have an integral function in the investment required to implement it and (ii) be provided in the transaction documentation forming the basis of the relevant investment."[98]

201. In the view of the Tribunal, the acquisition of the shares of MN by MNSS and the investment obligations of MNSS should be viewed as a whole. The loans are part of the fulfillment by MNSS of its obligations under the Privatization Agreement and the Assignment Agreement. It was an overall transaction, parts of which would be implemented over a period of time. Arbitral tribunals have recognized "the general unity of an investment operation" since the first ICSID case, *Holiday Inns v. Morocco*.[99] The parties did not provide in the Privatization Agreement the terms on which the investment needed to be made, but did require that MNSS invest certain amounts and provide a bond to the Government in the amount of the investment obligation for the first year after the transfer of shares.

202. To conclude, the Tribunal has no difficulty in finding that the acquisition of ZN's shares, together with the loans to ZN, qualify as an investment under the Convention and the BIT: in acquiring shares, the investor made a financial contribution, incurred risk and expected a return, and the investment was for a certain duration (no limit of time as a shareholder), and the five loans were intimately linked to the operation of ZN.

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[97] Rejoinder, para. 319.
[98] *Id*., para.139.
[99] Pierre Lalive, "The First 'World Bank Arbitration' (Holiday Inns v. Morocco) – Some Legal Problems," *BYBIL* 51 (1980), p. 159 (Legal Authority RLA-067).

c. The Assignment of the First Loan to RCA

203. The assignment of the First Loan did not change its terms in relation to ZN. The assignment changed the creditor. The arguments of the Respondent are based on the consideration of the assignment as a transaction in itself irrespective of what is assigned. The First Loan did not change its condition as an investment because of the assignment. The change of creditor changes the investor but not the substance of the investment. RCA made at least the contribution of extending the loan terms twice, the second time on the occasion of the guarantee granted by the Government to the Crédit Suisse Loan. The extension of the maturity of the First Loan is proof of the risk taken on by RCA.

204. The fact that the assignment was done in Amsterdam is irrelevant for the location of the investment. The investment continues to be in Montenegro. The fact that RCA was not an active investor because of the activity connotation of the expression "making an investment," as argued by the Respondent, does not mean that an investor, once a loan is made or equity in a company is acquired, needs to make further investments or be particularly active in the management of the investment.

205. As to the condition of RCA as an investor, RCA is a related company to MNSS; both companies are indirectly controlled by Ethemba. The Respondent has been aware of the assignment of the First Loan as a shareholder in ZN, when it approved on 3 February 2010 the restructuring and financing plan of ZN and when it guaranteed the Crédit Suisse Loan to ZN in June 2010. On both occasions, the extension of the maturity of the First Loan was a condition of the refinancing of ZN.

206. As explained by the Claimants, the assignment of the First Loan was done for tax purposes:

> "The amounts drawn down by ZN under the First Loan Agreement for capital expenditures were interest free, while the amounts drawn down for working capital purposes were interest-bearing. As a result of the Prva Banka episode (whereby €20.9 million of MNSS'

> CAPEX funds was redirected to settle ZN's unsecured liabilities to Prva Banka) ZN drew down on the interest-bearing working capital facility under the First Loan more than double what was intended under the First Loan agreement. This increased the tax exposure of MNSS."[100]

207. The Respondent has not shown that the Claimants had a different intent but to reduce their tax burden. The fact that the dispute had arisen in respect of the funds blocked in Prva Banka is precisely what prompted the assignment. As already concluded by the Tribunal, the Tribunal has jurisdiction for claims of a non-contractual nature based on the BIT. The Respondent's argument of forum shopping by the Claimants is linked to the interpretation given by the Respondent to the dispute resolution clause in the Privatization Agreement. If this clause is interpreted as understood by this Tribunal, then the issue of avoidance of UNCITRAL arbitration, forum fragmentation and forum shopping does not arise. Both Claimants have based their claims on the BIT.

208. To conclude, the First Loan continues to be an investment after the assignment and RCA is the investor in this respect.

d. Investment Not in Accordance with the Laws of the Host State

209. The Parties disagree on whether the BIT requires that the investment be made in accordance with the law of Montenegro. The Claimants observe that the "legality requirement" is absent from the definition of investment and from the entire text of the BIT. The Respondent argues that the requirement exists as a general principle of investment law even if it is absent in the BIT, but that the requirement can be found in Article 2 and in the Preamble of the BIT. The Respondent points out that the legal requirement is also expressed in the 2000 and 2011 MFI Laws.

[100] Claimants' Post-Hearing Brief, para. 55.

210. Article 2 of the BIT reads as follows: "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments."[101] The Tribunal observes that the first sentence in this article refers to the obligation of each State party to the BIT to promote investments and it is not addressed to the investors or the legality of the investments. Similarly, under the second sentence, each State undertakes to admit investments subject to the rights conferred by its laws and regulations.

211. The second leg of the argument of the Respondent is based on the reference in the Preamble to the object of investment protection to stimulate the flow of capital and technology, and the economic development of the State. According to the Respondent, "[i]f a foreign investor does not abide by the host State law, its investment will mostly not contribute to the development of the host State."[102] The Tribunal will limit itself to note that it would be far-fetched for a Tribunal to deny its jurisdiction based on such future possibility.

212. The Tribunal does not find in the BIT a requirement that the investments have to have been made in accordance to the law of Montenegro. Whilst the Tribunal does not express any views on whether there could be an implicit legality requirement in an investment treaty, in the instant case the Respondent has never before this arbitration claimed that the making of the investment of the Claimants was not in accordance with the law of Montenegro. More importantly, the Respondent approved and was party to the Assignment Agreement – the actual investment agreement.

213. The Respondent has also claimed that the Claimants willfully misrepresented to the Respondent their willingness to invest or their capacity to invest in ZN. This argument is based in part on the contention of the Respondent that no investments have been made by the Claimants because

[101] BIT, Article 2 (Legal Authority CLA-504).
[102] Counter-Memorial, para. 596.

the Respondent does not consider loans to be investments. The Tribunal recalls that it has already determined that it has jurisdiction *ratione materiae*, and the Respondent has not produced any evidence of the intention of the Claimants to mislead it at the time the Respondent entered into the Assignment Agreement.

214. The Respondent has also claimed that the Claimants broke Montenegrin law in the operation of their investment. Whether they did or did not and to the extent that it has any relevance, this is a matter to be determined as part of the consideration of the merits of this case should the Tribunal reject all the objections to its jurisdiction.

215. To sum up, the Tribunal concludes that the objection to jurisdiction based on the illegality in the making of the investment is without merit.

e. Failure to Exhaust Local Remedies

216. This objection to the jurisdiction of the Tribunal is articulated by the Respondent on the basis of customary international law, but ignores that the Respondent has not made its consent to arbitration under the BIT subject to the exhaustion of local remedies. The Respondent has advanced no argument to justify an interpretation of the BIT by the Tribunal that would incorporate the requirement of exhaustion of local remedies before the investor would have access to arbitration. The text of Article 9 of the BIT, its context or the object and purpose of the BIT do not support such addition when the State parties to the BIT did not include it.

217. The Respondent also ignores the consistent jurisprudence of arbitral tribunals in this respect. The Respondent's reliance on *Generation Ukraine* and *EnCana* is misplaced. The statement of the *Generation Ukraine* tribunal referred to by the Respondent is part of that tribunal's consideration of a claim of expropriation on the merits and not as a matter of jurisdiction. The *Generation Ukraine* tribunal was careful to point out that there was no requirement of exhaustion of local remedies:

> "In such instances, an international tribunal may deem that the failure to seek redress from national authorities

> disqualifies the international claim, *not because there is a requirement of exhaustion of local remedies* but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction."[103]

The tribunal in *EnCana* was also careful to note that the holding in the narrow point relied on by the Respondent in the instant case did not "amount to reimposing a requirement of the exhaustion of local remedies which the BIT does not as a general matter require."[104]

218. That the argument presented by the Respondent needs to be treated with caution is confirmed by the annulment of the holding in the *Helnan* award based on the statement in the *Generation Ukraine* award referred to by the Respondent. The *Helnan* Annulment Committee stated:

> "A requirement to pursue local court remedies would have the effect of disentitling a claimant from pursuing its direct treaty claim for failure by the Executive to afford fair and equitable treatment, even where the decision was taken at the highest level of government within the host State. It would leave the investor only with a complaint of unfair treatment based upon denial of justice in the event that the process of judicial review of the Ministerial decision was itself unfair. Such a consequence would be contrary to the express provisions of Article 26, incorporated into the parties' *compromis*, since it would have the effect of substituting another remedy for that provided under the BIT and the ICSID Convention … Such a requirement would also have the effect of leading to the dismissal of claims precisely on the ground that they should have been submitted to a national court. It was the unjustified imposition of such a requirement which led

[103] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.30 (Legal Authority RLA-086). Emphasis added.
[104] *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, Award, 3 February 2006, n. 138 (Legal Authority RLA-100).

> to the annulment of the first Award in *Vivendi v. Argentina*, cited above."[105]

219. Based on these considerations, the Tribunal has no difficulty in rejecting the objection on grounds of failure to exhaust local remedies and does not need to consider the extent to which the Claimants have pursued their grievances before the local courts as they claim they have.

220. Having rejected each of the objections to its jurisdiction other than those related to contract claims and claims under the umbrella clause and to consent to AF arbitration under the 2000 and 2011 MFI Laws, the Tribunal will now turn to the alleged breaches of the BIT.

VI. ALLEGED BREACHES OF THE BIT

221. The Claimants allege breach of the following obligations: (i) not to impair the operation, management, maintenance, use, enjoyment or disposal by the Claimants of their investment (BIT Article 3(1)); (ii) to accord fair and equitable treatment (BIT Article 3(1)); (iii) to provide most constant protection and security (BIT Article 3(1)); (iv) to accord the most-favored-nation treatment (BIT Article 3(2)); (v) to ensure free transfer of payments (BIT Article 5(1)); and (vi) not to expropriate except under the conditions set forth in the BIT (BIT Article 6(1)).

222. The Claimants base their allegations on the actions and omissions of the Respondent related to: (i) Prva Bank; (ii) refusal to reduce the headcount; (iii) Government's funding of the labor union; (iv) refusal to allow scrapping of old equipment; (v) the bankruptcy proceedings of ZN; (vi) refusal to allow a debt-equity swap; (vii) refusal to consent to the financing of ZN; (viii) refusal to allow withdrawals from ZN's special account; (ix) forced eviction of ZN's management; (x) the breach of the obligation to maintain a stable legal and business environment; and (xi) discrimination between CEAC and MNSS.

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[105] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, 14 June 2010, paras. 53-54 (Legal Authority RLA-161).

A. Summary of the Parties' Arguments

1) *Claimants' Memorial*

a. Breach of the Obligation Not To Impair the Operation, Management, Maintenance, Use, Enjoyment or Disposal by the Claimants of their Investment

223. As part of their allegation that the Respondent breached the obligation not to impair the operation, management, maintenance, use, enjoyment or disposal of the investment, the Claimants argue that Prva Banka refused to execute payment requests by MNSS during 2008 and 2009 and that such refusal had a crippling effect on MNSS. The Claimants contend that the Government and the Central Bank obstructed the transfers and at the very least refused to assist MNSS. According to the Claimants, the lack of assistance was unreasonable and discriminatory, particularly as regards the Central Bank which the Claimants allege had taken control of some aspects of Prva Banka's activities including payments.

224. The Claimants further allege that, given the changed market conditions caused by the global financial crisis, the refusal of the Respondent to amend ZN's business plan and allow ZN to reduce its workforce was unreasonable. The Claimants explain that there was a severe reduction in demand, prices dropped, producers of steel received significant Government support and employment levels were reduced. The Claimants also contend that the refusal of the Government was discriminatory because, once ZN was placed in bankruptcy, the number of employees was reduced to 345.

225. The Claimants argue that the secret meetings of the Government with the Union and the provision of secret loans to the Union to pay worker salaries impaired the ability of ZN's management to operate and manage its business. According to the Claimants, these actions were unreasonable and they point out that "[t]his situation was exacerbated by the Government's secret deal with the Union, involving funding of the Union, at a critical

juncture in ZN-Union negotiations relating to employee levels and voluntary redundancies."[106]

226. The Claimants further argue that the opposition of the Government to allow ZN to scrap obsolete machinery was unreasonable because the Government's position on this issue was unclear and certainly guided by the Union. The Government had already agreed in the Restructuring Plan that ZN close down the section of the plant where the machinery proposed to be scrapped was located, the machinery had not been used for ten years and was obsolete, and the scrapping of the machinery would have generated important benefits to ZN such as increased cash flow, reduced ongoing energy costs, among others. According to the Claimants, the Government gave no reasons for its refusal, which was also discriminatory, because, once ZN was in bankruptcy, the bankruptcy administrator decided to scrap and melt the production lines in question and use the proceeds to pay salaries.

227. The Claimants have also adduced as a breach of Article 3(1) of the BIT the Government's refusal to consider the offer to key creditors (including the Government) of the opportunity to convert their debt into equity as proposed in a board resolution of ZN in October 2010. In the circumstances of ZN, the Claimants contend that the refusal was unreasonable.

228. In addition, the Claimants contend that it was unreasonable for the Government to refuse to publicly support the Restructuring Plan to which it had agreed. According to the Claimants, this damaged the ability of ZN to operate and manage it business "since it allowed the Union to present to its members that the implementation of the Restructuring Plan was not the best way forward for the business, and that they could take measures to obstruct its implementation."[107]

229. The Claimants argue that it was also unreasonable for the Government to refuse payments by ZN from its account held in Erste Bank during the period

[106] Memorial, para. 579.
[107] *Id*., para. 627.

22 March 2011 to 7 April 2011, the refusal to approve essential third party funding for ZN in the amount of €20 million and the refusal to accept a further loan from MNSS.

b. Fair and Equitable Treatment (FET)

230. The Claimants assert that the FET standard is an autonomous treaty standard, which may require treatment beyond that of customary international law, and that the threshold to find a breach is lower than under customary international law. Based on arbitral awards, the Claimants summarize the duties covered in the FET standard as follows: to protect investors' legitimate expectations, to act transparently, not to act arbitrarily, not to subject the investor to discriminatory treatment, not to deny investor justice and to act in good faith.

231. The Claimants argue that the breach of the obligation in Article 3(1) amounted to a violation of the Claimants' legitimate expectations as did the failure of the Respondent to provide a secure environment and to act consistently with all its obligations under the BIT.

232. The Claimants further argue that the Respondent failed in its duty to act transparently because of its secret meetings with the Union and the secret financing of the Union, because of the refusal of the Government and the Central Bank to reply to requests for assistance in the so-called Prva Banka episode, and because of the complete lack of transparency in the Government dealing with MNSS' attempts to finalize potential funding of €20 million.

233. The Claimants also contend that the Respondent failed in its duty not to act arbitrarily or to discriminate against the investment. The Claimants refer to discriminatory treatment already mentioned under the breach of Article 3(1) and add that the Respondent acted unreasonably and in a discriminatory fashion in respect of the Claimants throughout the bankruptcy process.

234. The Claimants argue that the Respondent did not act in good faith when repeatedly alleging in public statements that MNSS had breached the Privatization Agreement but without exercising its right to terminate it. And

the other breaches alleged above are also breaches of the duty to act in good faith and to maintain a stable legal and business environment.

c. Most Constant Protection and Security

235. The Claimants argue that the words “most constant” indicate that a particularly high standard of treatment is required and claim that the Government and its police did not act with vigilance or take all measures necessary to protect the Claimants and their investments, but left

> “(i) the Claimants and their investments completely exposed to the invasion and occupation of ZN by the Union and workers; and (ii) ZN’s CEO completely exposed to the physical attack that he was subjected to during his escape from the hostile crowd of Union leaders and workers within ZN’s management building and premises on 13 December 2010, with all the fundamentally adverse consequences on the future management and operation of ZN that these events necessarily entailed.”[108]

d. Most-Favored Nation Treatment

236. The Claimants argue that the Respondent breached the obligation to treat the Claimants’ investments no less favorably than it treats investments of investors from third States in two instances. First, the Government afforded better treatment to CEAC (a Cypriot investor)’s investment in KAP: (i) by allowing KAP to reduce the number of employees; (ii) by assuming at least €22 million of KAP’s liabilities; (iii) by not intervening when KAP faced work protests by employees; and (iv) by affording KAP’s creditors a more “positive treatment” during the bankruptcy process by allowing them to vote and decide the number of members of the creditors’ committee.

237. In the second instance, the Respondent offered a prospective German investor in ZN – the Max Aicher Group – more advantageous terms than those offered by the Respondent to the Claimants.

[108] *Id.*, para. 742.

e. Obligation to Ensure the Free Transfer of Payments

238. The Claimants argue that the Respondent breached the free transfers obligation because: (i) the Respondent failed to approve payments by ZN from ZN's own account with Erste Bank with the result that it was the reason that initially caused ZN to face bankruptcy and resulted in the shutdown of ZN's electricity supply; and (ii) the Central Bank obstructed the transfers from MNSS' account in Prva Banka or at least persistently refused to assist MNSS.

f. Expropriation

239. The Claimants argue that the Respondent's measures adduced as the basis of the claim of breach of the Respondent's obligation not to impair Claimants' investments had the effect of indirectly expropriating them by depriving the Claimants of the economic use and benefit of their investments, neutralizing such economic use or benefit to the Claimants and causing a considerable diminution in value of the investments.

240. In the alternative, the Claimants have pleaded direct expropriation of the investment by the sale by the Respondent of ZN on 30 April 2012. According to the Claimants, their claims represented about 50 percent of all of the creditors' claims but because of the Respondent's acts and omissions, the Claimants have not recovered a single euro. For this reason, the Claimants argue that the expropriation was unlawful and also because it was not in the public interest, there was no due process of law and some acts of the Respondent were discriminatory.

2) Respondent's Counter-Memorial

a. Fair and Equitable Treatment

241. Concerning **the refusal to reduce the workforce**, the Respondent argues in its Counter-Memorial that it acted reasonably in respect of the ever-increasing requests to reduce the workforce. The Respondent blames MNSS for the failure to reduce the workforce of ZN and the failure to reach

an agreement with the Union. The Respondent recalls that it agreed to reduce the workforce of the steel mill to 1200 in the Refinancing Protocol, thus abandoning what had been one of the most important conditions of the privatization. The Respondent agreed to further reductions under the Restructuring Plan approved by the board of ZN on 3 February 2010 and by the Montenegrin State Commission the same day. By the Restructuring Plan, the Respondent was again willing to amend its contractual rights and even bear a substantial part of the costs caused by the planned redundancies. A further proposal was made by MNSS in July 2010 and a new Systematization Plan was considered by the board of ZN and approved in October 2010. This plan would have reduced the headcount to 662 employees. The Respondent was willing to consider the plan, but it needed to know first whether MNSS would provide the required finance for the social program. These funds were not forthcoming and hence the plan was impossible to implement regardless of the consent of the parties to the Privatization Agreement. As stated by the Respondent: "ZN did not have the required funds to finance the redundancies under the Reorganisation [Systematization] Plan and MNSS was unable to provide it."[109] A further plan – Alternative "3B" – was presented to the Respondent, whereby Respondent would have relinquished MNSS of its obligations under the Privatization Agreement, the headcount would have been reduced to 600 persons and the Government would have paid for redundancies to the extent that each exceeded €8,000. The Respondent did not agree, "but expressed that it might be acceptable provided that MNSS meets its obligations […] in particular that it could raise the required finance for ZN. MNSS never did."[110]

242. The Respondent explains that the initiation of bankruptcy proceedings constitutes a ground for termination of employment contracts, which can be exercised by the administrator without asking the consent of the Union or the Respondent. Thus, the bankruptcy administrator terminated all employment

[109] Counter-Memorial, para. 846.
[110] *Id.*, para. 850.

agreements and re-hired 1389 employees with the intention to determine on an individual basis which of the employees would be required for the further operation or winding down of ZN.

243. The Respondent denies that Claimants' nationality played any role in the bankruptcy proceedings. The Respondent justifies the funding of certain redundancies in order to maintain social stability in the region and thus it claims to have assumed an unfulfilled MNSS' obligation under the Privatization Agreement.

244. The Respondent denies that it engaged in **secret meetings with Union members** and supported MNSS to the extent it considered reasonable. The Respondent points out that by the time it made loans to the Union, negotiations of MNSS with the Union had been taking place for about six months and argues that it is difficult to believe the negotiations could be undermined, as they were already at a dead end. In fact, the loans were made to placate the workers who had received no salaries – to which they were lawfully entitled – for several months. The Respondent explains that what it did was "to re-establish the situation required under Montenegrin labor law and the Privatisation Agreement, both of which MNSS had clearly violated in the first place."[111]

245. The Respondent argues that, by providing the loans to the Union, it acted as a commercial party to the Privatization Agreement and its acts did not include any margin of the exercise of sovereign authority.

246. The Respondent claims that, for the reasons explained, the granting of the loans was not an arbitrary act and nationality was not a consideration in granting them.

247. As regards **the scrapping of obsolete material**, the Respondent asserts that it approved the scrapping as provided for in the Restructuring Plan, but that the Union prevented it. The Respondent denies that it was guided by the Union. The Respondent recalls that, on 21 December 2010, the Government and the other Sellers sent a notice of breach of the Privatization

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[111] *Id*., para. 903.

Agreement and on 13 January 2011, the Respondent withdrew for the time being its approval of the scrapping of material because "[i]t saw no reason at the time to make any concessions to its unreliable contract partner and hoped that it may by this way motivate MNSS to take its contractual obligations more seriously."[112] As regards the bankruptcy administrator, the Respondent explains that he was not bound by the Privatization Agreement and did not need to ask Respondent's permission for any of its decisions. The Respondent claims that its withdrawal of the approval was not unreasonable and not discriminatory; furthermore, the Respondent affirms that it acted in good faith and that there was no change of the legal and business environment.

248. The Respondent explains its **objections to the debt-for-equity swap** as follows: Firstly, the transaction would have diluted Respondent's and MNSS' share in ZN and that, in turn, would have made the implementation of the Privatization Agreement impossible. Secondly, MNSS had provided limited information to the Respondent in the 3 November 2010 letter. Thirdly, it was unclear whether the conversion of the key creditors' debt into equity would need to be considered a privatization.

249. The Respondent also explains its **refusal of the proposal of third party funding** presented by MNSS, because of its onerous conditions and because, from the Respondent's perspective, it meant to waive some of its most important rights under the Privatization Agreement while MNSS had at the time (March 2011) failed to ensure the payment of the workers' salaries for four months and had failed to provide the performance bond for its investment obligations for 2011.

250. The Respondent claims that the first and only time that it did not immediately approve a **withdrawal from the account in the Erste Bank** was related to payment instruction 16. Payments were to go directly to suppliers and in this case a substantial part of the payment was to be deposited in another account held by ZN in another bank and no explanation was given for the

[112] *Id.*, para. 934.

change. The Respondent approved the payment instruction on 1 April 2011, the day after it was corrected. Erste Bank insisted that payment instruction be stamped on behalf of the Government. The Respondent recounts the few days delay:

> "Mr. Vujovic, the former Minister of Economy, who had stamped the prior instructions, had recently been replaced in this function by Mr. Kavaric. The latter, however, had not deposited his signature with Erste Bank and therefore could not approve the payment. On 6 April 2011, Mr. A Jacobson then notified Erste Bank of the change in the signing authority. The latter then signed and stamped the payment instruction on 7 April 2011."[113]

The Respondent claims that this delay of a few days is wholly irrelevant. At most, the delay in approval would be a mere breach of contract.

251. As to the **refusal to approve two short-term loans** – the Fourth and Fifth Loans – in February 2011, the Respondent points out that by the time these loans were considered by the board of ZN, they had already been disbursed. The Respondent did not want to burden ZN with further debt and its representatives were outvoted at the board meeting that approved them. The Respondent wonders how to be out voted at a board meeting can constitute a breach of the BIT.

252. Then, the Respondent addresses **the alleged irregularities in the bankruptcy proceedings**. As regards the lack of standing of Mr. Vucinic – the head of the Union – the Respondent explains that he did not individualize each employee on whose behalf he was submitting the petition to initiate the proceedings; but in an amended statement filed on 11 April 2011, each individual creditor was listed and each granted a power of attorney to its representative.

253. The Claimants have alleged the lack of any valid monetary claims on which the petition was based. The Respondent explains that the court initiated the

[113] *Id.*, para. 989.

bankruptcy proceedings based on the unpaid salaries, and observes that the Claimants did not appeal the court's decision.

254. The Respondent points out that, after the Claimants had proven their claims in court proceedings, their claims in bankruptcy were accepted in full, a fact that the Claimants failed to mention in their allegations. The Respondent further points out, as regards the BlueBay Loan, that the Claimants do not mention that MNSS disputed the Respondent's claim at the examination hearing held at the beginning of the bankruptcy proceeding on 20 July 2011 and initiated litigation to prove their case. According to the Respondent,

> "[t]he Commercial Court in Podgorica expeditiously ruled on the matter and rendered a judgment on 30 December 2011 adopting MNSS' claims and determining that the GoM's claim for approximately EUR 1.6 million was ungrounded, while in fact MNSS is the holder of this claim. This decision was also upheld by the Appellate Court on 4 September 2012. The acknowledgment of MNSS' claim of EUR 1.6 million was registered in the corrected final list of claims in bankruptcy which served as a basis for compiling the draft decision on division of the bankruptcy estate."[114]

255. As to the acceptance of the loan granted to the Union by the bankruptcy administrator, the Respondent explains that the bankruptcy administrator accepted this claim because the Respondent had made a payment for ZN and was entitled to seek recourse by raising a claim in the same amount against ZN. The Respondent notes that the Claimants did not object to the recognition of this claim of the Respondent and did not dispute it at the examination hearing.

256. The Respondent disputes the assertion that the administrator breached Article 79(1) of the Bankruptcy Act by re-engaging the dismissed workforce. The Respondent claims that the administrator had this right, exercised it and then gradually reduced the workforce.

[114] *Id.*, para. 1010.

257. MNSS challenged in court as a decision *ultra vires* the decision of the administrator to sell scrap material to Neksan. The Respondent points out that the court found against MNSS.

258. As part of its allegations, the Claimants have included **the dismissal of the Reorganization Plan**. The Respondent points out that MNSS submitted a Reorganization Plan on 15 August 2011 to the Commercial Court of Podgorica. MNSS amended it twice on 30 September 2011 and 6 October 2011. The Court appointed an expert to assess the Reorganization Plan. The expert considered this plan to be unrealistic and flawed for many reasons. The Commercial Court rejected the Plan on 2 November 2011.

259. The Respondent argues that the acts of the administrator are not attributable to the Respondent, the Claimants failed to exhaust local remedies and the Respondent did not act negligently and did not discriminate against the Claimants.

260. The Respondent disputes that it ever had any obligation to make any statements in support of the Restructuring Plan and claims that, in fact, it stated publicly that the Restructuring Plan would benefit ZN.

261. As regards **the dispute with Prva Banka**, the Respondent first notes that Prva Banka is a private commercial bank, and that at the request of ZN, it granted ZN four overdraft facilities of an aggregate €20 million for working capital in April 2008 with a pledge over raw materials and ZN's production. Thus, these loans were substantially under-secured. The Respondent acknowledges the liquidity shortage that affected Prva Bank by the summer of 2008. The reluctance of Prva Banka to transfer funds set aside by MNSS for CAPEX's obligations was due to ZN's outstanding debts for which ZN did not provide security. The Respondent affirms that the Central Bank took all the necessary steps to supervise Prva Banka as required by law. The Respondent recounts how it kept MNSS informed about the Prva Banka's situation after MNSS approached the Central Bank and facilitated the negotiations that led to the Financing Protocol in April 2009.

262. The Respondent argues that it is not responsible for Prva Banka's conduct; a private company's acts may be attributed to the State only if the State uses it as a vehicle to commit acts in breach of international law. The Central Bank never exercised control of Prva Bank that would justify the attribution of the Prva Banka's acts to the Respondent. The Respondent explains that, when in December 2008, Prva Banka informed MNSS that it could not transfer payments from the deposit securing the performance bond it had issued for MNSS' investment obligations, Prva Banka was acting in accordance with Clause 8.4.1(a) of the Privatization Agreement, and not responding to any measure taken by the Respondent or the Central Bank. According to the Respondent, the Central Bank issued general measures to improve Prva Banka's liquidity and never ordered Prva Banka to delay or refuse MNSS' payment orders; the delay in payments was only a consequence of Prva Banka's liquidity shortage.

263. The Respondent observes that it is unclear what loss the Claimants incurred as a result of the conduct of Prva Banka. The Respondent also observes that, under Article 5 of the Financing Protocol, MNSS agreed to waive any of its claims against Prva Banka for the alleged breaches of contract. This notwithstanding, MNSS submitted its claims against Prva Banka to the Commercial Court in Podgorica. The claims were rejected because MNSS failed to substantiate its losses. MNSS successfully appealed the decisions and the case was remanded to the court of first instance for re-trial. MNSS did not pursue the matter, because it believed that it would be futile due to unsubstantiated "political connections."

264. The Respondent addresses the allegation of omissions by the Respondent. The Respondent recalls that the Claimants were not a party to the administrative proceedings against Prva Banka. The Respondent explains that under the Montenegrin Banking Act "a third party in supervisory proceedings does not have the right to participate or be kept informed, or to be informed at all, about the status of these proceedings."[115] Furthermore,

[115] *Id.*, para. 1149.

the information collected by the Central Bank is confidential. The Respondent contends that the Claimants have failed to show that under the FET standard "a third party which is not party to the proceedings and which is not entitled under the national law of the host State to any information on administrative proceedings against a third party is entitled to any measure of transparency in this regard."[116]

b. Most-Favored Nation Treatment

265. As to the alleged breach of the most-favored nation treatment, the Respondent argues that the Claimants have not shown that the circumstances in which CEAC was allegedly more favorably treated were comparable to those in the case of ZN. The Respondent considers the claim related to the Max Aicher Group opaque and it is unclear to Respondent how the letter of the Ministry of Economy to the Max Aicher Group would constitute better treatment of that group than that of the Claimants.

c. Obligation to Ensure the Free Transfer of Payments

266. The Respondent refutes the allegation of breach of the obligation to ensure the free transfer of payments because: (i) in the case of ZN's account held in Erste Bank, the Respondent withheld its approval as it was contractually permitted to do; and (ii) in the case of payments transfers delayed by Prva Banka, the delays were due to liquidity problems of Prva Banka and not due to any measure taken or omitted by the Respondent.

d. Most Constant Protection and Security

267. The Respondent denies that it breached the obligation to provide protection and security. As regards the claim related to the first strike on 28 September 2010, the Respondent claims to have exercised due diligence and taken reasonable measures. According to the Respondent, "[t]hat these measures

[116] *Id.*, para. 1150.

turned out to be insufficient is not relevant for assessing whether or not a breach took place."[117] The Respondent asserts that the

> "Respondent's police forces took all measures they could within the few hours available to organise their operations at the plant. Within the little time left they did everything that was reasonably possible and sent police to the plant who were present when the strikers entered the management offices and able to deter any acts of violence against Claimant's [sic] representatives."[118]

As to the second strike on 13 December 2010, the Respondent could not have taken any measures because Mr. Jacobson wrongly stated to Minister Vujovic that the police had been informed of the strike when in fact the police had not been informed.

e. Expropriation

268. The Respondent refutes the allegation of indirect expropriation of MNSS' investment based on the aggregation of all the acts and omissions previously addressed by the Respondent. The Respondent argues that since the measures complained by the Claimants are factually unfounded, the claim of expropriation fails; in any case, the Claimants' claim fails because most of the purported measures invoked by the Claimants did not involve the exercise of the Respondent's sovereign powers. As to the omissions by the Respondent, the Respondent argues that mere omissions or refusals of a host State to take necessary acts do not constitute expropriation; the State "must take actions which are directed at obtaining the control or at least the fruits of an investment."[119]

269. Similarly, the Respondent disputes that the purported irregularities during the insolvency proceedings directly expropriated the Claimants through the eventual sale of ZN's assets by the bankruptcy administrator. The

[117] *Id.*, para. 1181.
[118] *Id.*, para. 1184.
[119] *Id.*, para. 1212.

Respondent relies on the *ELSI* case before the ICJ to argue that "insolvency proceedings do not amount to an expropriation unless they are collusively used to expropriate an investor."[120] The Respondent recalls that the Claimants did not allege that the Respondent acted collusively as part of the irregularities already addressed under the allegations of breach of the FET obligation. The Respondent takes issue with the statement by the Claimants that Mr. Perovic, the expert engaged by the Commercial Court, was affiliated with the Government and points out that the Claimants have not substantiated this allegation.

3) Claimants' Reply

270. In their Reply, the Claimants note that the Respondent did not address in the Counter-Memorial any of the breaches of its obligation not to impair the operation, management, maintenance, use, enjoyment or disposal of the Claimants' investment under Article 3(1) of the BIT. Then, the Claimants dispute the Respondent's proposition that breaches of a contract by a host State cannot give rise to a violation of its FET obligation. The Claimants argue:

> "the reason for the State's act or omission is irrelevant in terms of whether the act or omission constitutes a breach by the State of its international obligation, thereby engaging the State's responsibility. The only question is whether the act or omission constitutes a breach by the State of its obligation under international law. The fact that an act or omission may be committed by a State pursuant to a contract is irrelevant where the consequence of that act or omission is to place the State in breach of pre-existing obligation under international law."[121]

271. The Claimants further argue that because the Respondent had exclusive knowledge of Prva Banka's irregularities since mid-2007, "the Respondent assumed the risk of Prva Banka's default and cannot escape liability for the

[120] *Id.*, para. 1218.
[121] Reply, para. 29. Emphasis in the original.

corresponding losses suffered by the Claimants."[122] The Claimants point out that the Respondent admits that it exercised control through its Central Bank over Prva Banka when the Central Bank ordered Prva Banka to take general measures aimed at increasing its liquidity. The Claimants further note that the Government exercised direct control of Prva Banka as part of the credit support package of €44 million in December 2008, but the Government provided the financing without setting up a mechanism to control the use of the funds as the Central Bank had recommended.

4) Respondent's Rejoinder

272. In its Rejoinder, the Respondent first addresses the Claimants' allegation that the Respondent in the Counter-Memorial ignores the alleged breach of the obligation "not [to] impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal" of the investments by the investors. The Respondent explains in the Rejoinder that this obligation is subsumed in the obligation of fair and equitable treatment and that it has fully replied to the Claimants' allegations. The Respondent asserts that none of the actions taken by the Respondent were unreasonable or discriminatory and to the contrary were in accordance with Respondent's rights as a contract partner. Furthermore, the supervision of Prva Bank and the bankruptcy proceedings were in full compliance with the law.

273. The Respondent re-affirms that it has not exercised sovereign powers in connection with the impugned acts. The Respondent comments that, notwithstanding the Claimants' references to arbitral awards to show that the respect of legitimate expectations forms part of the obligation of fair and equitable treatment, the Claimants fail to present any specific legitimate expectations in their Reply. The Respondent refers to the ever increasing demands of the Claimants and argues that it had not "created any expectations towards investors prior to, or during, the privatisation process

[122] *Id.*, para. 65.

that it would approve amendments to the Privatisation Agreement, or accommodate any investor demands ….”[123]

274. The Respondent observes that the Claimants fail to mention that the time for assessing the legitimate expectations is at the time when the investment is made. As recognized by MNSS, Montenegro was a State in transition when it invested in ZN. As regards the legitimate expectations of RCA, the Respondent rhetorically asks itself, “what legitimate expectations could RCA have had being conscious of the Prva Banka issue and the headcount reduction issue already at the time of its ‘investment’?”[124] The Respondent adds: “Again, Claimants remain silent as to any explanation of their legitimate expectations, in particular with respect to RCA.”[125]

275. According to the Respondent, the refusal to approve workforce reductions was not unreasonable. The Claimants entered willfully into the Privatization Agreement in the knowledge of the need of the Respondent’s consent to reduce the headcount. The Respondent takes issue with the connection made by the Claimants between the headcount reduction and the Prva Bank episode. According to the Respondent, the Claimants fail to show how this episode “obliged Respondent to approve any headcount reductions or how it made the denial of such reduction unreasonable. There simply was no such obligation imposed upon the Respondent by the Privatisation Agreement.”[126]

276. The Respondent recalls that the argument of improper insolvency proceedings has to meet the stricter standard of denial of justice rather than the standard of fair and equitable treatment and observes that the Claimants have failed to allege the requisite finality or futility of courts proceedings in Montenegro for establishing a claim of denial of justice.

277. As regards the breach of the “most constant protection and security” obligation, the Respondent disagrees with the Claimants that the BIT

[123] Rejoinder, para. 518.
[124] *Id.*, para. 535.
[125] *Ibid*.
[126] *Id.*, para. 540.

requires a higher standard of protection because of the words "most constant." According to the Respondent, these words only "stress that protection and security shall be accorded to foreign investors permanently throughout the existence of the BIT." [127] Furthermore, the applicable standard of due diligence depends on the circumstances and resources of the State in question, and the Claimants were well aware of and acknowledge the business environment in which they decided to invest. According to the Respondent, its police forces reacted adequately and with sufficient due diligence to the labor strikes.

278. The Respondent argues that the Claimants have failed to establish that KAP and ZN were situated in like circumstances and that the Respondent accorded KAP more favorable treatment on account of nationality. Similarly, the Claimants have failed to prove that the Max Aicher Group was in like circumstances or treated more favorably. Furthermore, the Respondent points out that the standard under Article 3(2) of the BIT applies to investments and not to investors. According to the Respondent, the Claimants have failed to show the specific investments in KAP that should form the basis for a proper comparison. The Respondent affirms that, in fact, the allegations of the Claimants are belied by the many concessions made by the Respondent such as guarantees, waiver of breaches of contract, reduction of MNSS' investment obligations, etc.

279. The Respondent also contests the claim that it breached the obligation to ensure free transfer of payments because the payments at issue do not constitute transfers under the BIT; these payments were commercial transactions between private parties not subject to the terms of Article 5 of the BIT. The Respondent asserts that Montenegro cannot be held liable for actions of Prva Banka and that the Claimants have suffered no loss.

280. As regards the claim of indirect expropriation, the Respondent argues that the Claimants' own actions diminished the value of the investment since they increased the debt of ZN tremendously instead of actually investing in ZN.

[127] *Id.*, para. 575.

The Respondent observes that the gravity of deprivations in the cases relied by the Claimants to support their arguments shows that the alleged acts in the case before the Tribunal cannot constitute an indirect expropriation. Similarly, the omissions alleged by the Claimants do not constitute internationally wrongful acts. According to the Respondent, the Claimants have failed to establish the obligation of the Respondent to perform the alleged omitted acts.

281. As to the claim of direct expropriation, the Respondent argues that it must fail because the alleged irregularities in the bankruptcy proceedings are unfounded, the acts of the bankruptcy administrator are not attributable to the Respondent, and insolvency proceedings amount to expropriation only if used collusively to expropriate an investor. The Respondent observes that the Claimants in their Reply have not addressed the absence of collusion asserted by the Respondent in its Counter-Memorial.

B. Analysis of the Tribunal

5) Fair and Equitable Treatment and Obligation of Non-Impairment

282. The Tribunal starts by referring to Article 3(1) of the BIT:

> "Article 3
>
> 1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments the most constant protection and security."[128]

283. The Claimants have presented separately their claims of breach of the obligation to accord fair and equitable treatment and of not impairing the operation, management, maintenance, use, enjoyment or disposal by the

[128] BIT, Article 3(1) (Legal Authority CLA-504).

Claimants of their investment. To avoid repetition, the Tribunal will consider these two claims together. The Claimants themselves have observed in their Post-Hearing Brief that the causes of action in relation to the non-impairment standard apply with equal force to the fair and equitable treatment under the BIT.[129] In addition, the Claimants have pleaded as breaches of the FET the failure of the Respondent to prevent ZN's management evictions, the Respondent's facilitation of the bankruptcy of ZN and the failure of the Respondent to provide a secure environment.

284. The Tribunal will consider each of the measures adduced by the Claimants. The majority of the Tribunal, mindful of the Tribunal's decision on the Respondent's objections to jurisdiction, will first distinguish, as a preliminary matter, between claims that it considers to be essentially treaty claims and those that it considers as essentially contract claims. Then, it will consider the FET standard against which non-contractual measures need to be judged, and thirdly determine whether those breach the FET obligation.

a. Which of the Claims Pleaded in Breach of the FET Obligation are Essentially Treaty Claims?

(i) Prva Banka

285. The Claimants have argued that the Respondent failed to warn MNSS about Prva Banka's irregularities; failed to ensure the release of funds held in Prva Banka and refused the transfer to Fortis Bank of funds held in Prva Banka.

286. The question for the Tribunal is whether the Respondent's failure to warn MNSS was "unreasonable or discriminatory" in the circumstances of the case. The starting point for the majority of the Tribunal is that a respondent has no duty to warn an investor about the condition of the financial system or of a particular bank. Does the fact that MNSS and the Respondent were co-shareholders of ZN, that MNSS, the Respondent and its Government were parties to the Assignment Agreement, that the Central Bank was aware of Prva Banka's liquidity problems before MNSS' deposit, or that Prva Banka

[129] Claimants' Post-Hearing Brief, para. 70.

was largely owned by the family of the Prime Minister, make the failure to warn MNSS unreasonable?

287. To answer this question, the Tribunal has considered relevant that the Respondent or the Central Bank did not intervene in MNSS' choice of bank, that MNSS continued the banking relationship of MN with Prva Banka and deposited the funds in Prva Banka after MNSS carried out its own due diligence, that the contractual relationship was exclusively between MNSS and Prva Banka, that witness Mr. Mark Jacobson admitted in his Second Witness Statement that, "[i]n February 2008 MNSS had a choice as to where it deposited funds intended to be invested in ZN,"[130] and that MNSS itself chose as its counsel a member of the Prime Minister's family. More importantly, the Tribunal has considered the concern that the Government may have had in disclosing information privy to the Government that may have a detrimental effect on the largest bank in Montenegro.

288. Based on these considerations, the majority of the Tribunal concludes that the failure to warn MNSS about the financial condition of Prva Banka was not unreasonable and was not in breach of Article 3(1) of the BIT.

289. The second element of the claim is the failure of the Central Bank and the Government to assist MNSS and order Prva Banka to release the funds from the collateral account to execute payment orders of MNSS, and the attribution of responsibility to the Central Bank for the delays in the release of such funds when Prva Banka was under the direct control of the Central Bank. There are two aspects in this element. First, while delays in the execution of payment orders may have been due to the scarce or lack of liquidity of Prva Banka, they need to be considered against the background of the overall contractual commercial relationship of MNSS and ZN with Prva Banka, which went beyond the deposit made by MNSS to secure the capital expenditures of ZN and the execution of payment orders. The second aspect concerns the regulatory function of the Central Bank and bears on the issue

[130] Second Witness Statement of Mr. Mark Jacobson, para. 69.

of the alleged direct control of the Central Bank and its and the Government's alleged refusal to honor the payment orders of MNSS.

290. To understand the context of the overall relationship of MNSS and ZN with Prva Banka, it will be useful to describe their banking operations with Prva Banka and provide a chronology of events.

291. ZN had been a client of Prva Banka and its predecessor since before ZN's privatization. The first ground for complaint occurred the day after MNSS deposited €28 million in its account with Prva Banka. On 29 February 2008, Prva Banka withdrew from MNSS' account €8 million without requesting any authorization from or informing MNSS. Eventually, Prva Banka explained that it had used the funds so withdrawn to reduce ZN's liabilities owed to Prva Banka by ZN under a pre-existing overdraft facility and that it considered MNSS and ZN as a group.

292. As early as April 2008 and at the request of MNSS, Prva Banka granted ZN four overdraft loan facilities for a total amount of €20 million to cover ZN's working capital needs. ZN was obliged to provide a pledge to Prva Banka in ZN's contracts for movable property to secure the overdraft loan facilities. As Respondent explains, "the pledges over the raw materials and the produce of ZN were of little value, as the pledge could only be granted over the items physically with ZN at the time of conclusion of the contract and they would be sold on in the course of the business. Hence, the loans granted to ZN were substantially under secured."[131]

293. Upon becoming a shareholder of ZN, MNSS assumed a loan made by Prva Bank to MN in the amount of €1,955,000 on 15 February 2008. The loan was unsecured and due one year later on 15 February 2009.

294. Prva Banka had issued a guarantee in favor of MNSS in relation to the purchase by MNSS of 46.8 percent of the shares of Radvent AD Niksic ("**Radvent**") from Montenegro in May 2008.

[131] Counter-Memorial, para. 1058.

295. On 9 December 2008, Prva Banka gave as a reason for not executing two payment orders of MNSS their mutual business problems. To solve them, Prva Banka had proposed to the Privatization Agency the application of the accumulated interest on MNSS' deposits in Prva Banka towards the repayment of the loan and as cash collateral of the unsecured guarantee referred to in the paragraph above. This action by Prva Banka was in response to the order by the Central Bank after the previous inspection that it "[appropriated] high potential credit loss provisions given that loans by MNSS were completely unsecured."[132]

296. Prva Banka had also made a loan to ZN to fund ZN's initial redundancies in the context of ZN's privatization in 2006. In the Privatization Agreement, MN undertook to pay as part of the purchase price the difference between ZN's working capital and ZN's debt as of the closing date. The difference amounted to €3 million. On the other hand, the Sellers undertook to fund ZN's initial redundancies or to indemnify ZN if ZN paid for them. ZN paid for the redundancies and borrowed €3.5 million from Prva Banka to finance them ("**social loan**"). When MNSS became a shareholder of ZN, the Respondent allowed MNSS to pay back the social loan directly to Prva Banka instead of paying the €3.5 million difference between ZN's working capital and ZN's debt.[133]

297. We turn now to the chronology of the interaction between the Central Bank, the Government, MNSS, ZN and Prva Banka:

On 12 November 2008, MNSS wrote to the Central Bank about the non-executed payment orders.[134]

On 26 November of 2008, Prva Banka sought the financial assistance of the Government to improve its liquidity.[135]

[132] Letter from Prva Banka CG to MNSS B.V. dated 12 September 2008 (Exhibit C-045).
[133] Respondent's Post-Hearing Brief, para. 9.
[134] Letter from MNSS B.V. to Central Bank of Montenegro, attached to email from Mr. Alan Jacobson to Mr. Bojana Uskokovic and others dated 12 November 2008 (Exhibit C-030).
[135] Letter from Prva Banka to the Ministry of Finance dated 26 November 2008 (Exhibit R-026).

On 1 December 2008, the Ministry of Finance wrote to the Central Bank to enquire about the situation of Prva Banka.[136]

On 3 December 2008, the Central Bank confirmed Prva Banka's inability to operate because of its liquidity problems.[137]

On 3 December 2008, Mr. Vujovic, then President of the Privatization Authority, wrote to MNSS noting that it had forwarded to Prva Banka MNSS' request for payment of obligations under the investment program and that Prva Banka promised to pay by 5 December 2008.[138]

On 4 December 2008, Mr. Alan Jacobson met with the Vice-Governor of the Central Bank. He advised Mr. Jacobson that "Prva Banka would be put in funds and would be able to action MNSS' payment requests."[139]

On 9 December 2008, Prva Banka settled the CVS instruction of 7 November 2008 and the payment instruction of 31 July 2008. It did not pay €363,000 from the foreign exchange account of MNSS because of mutual business problems.[140]

On 11 December 2008, Prva Banka informed MNSS that it was suspending execution of new payment orders because of unpaid obligations to Prva Banka.[141]

On 12 December 2008, the Respondent granted a loan to Prva Banka of €44 million. On the same day, the Central Bank issued a new decision ordering Prva Banka to prepare a detailed plan for the use of those funds. The Central Bank kept Prva Banka under comprehensive supervision thereafter as detailed in the Counter-Memorial.[142]

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136 Letter from Ministry of Finance to Central Bank dated 1 December 2008 (Exhibit R-027).
137 Opinion of the Central Bank of Montenegro dated 3 December 2008 (Exhibit R-028).
138 Letter from Privatisation Authority to MNSS B.V. dated 12 March 2008 (Exhibit C-041).
139 Witness Statement of Mr. Alan Jacobson, para. 40.
140 Email from Mr. Alan Jacobson to Mr. Velimir Bogdanovic dated 9 September 2008, attaching letter from MNSS B.V to Prva Banka CG (Exhibit C-044).
141 Letter sent from Prva Banka CG to MNSS B. V. dated 11 December 2008 (Exhibit C-049).
142 Counter-Memorial, paras. 1077-1080.

On 18 December 2008, Prva Banka requested ZN to pay immediately its outstanding debt of €3,549,949.30, which included 13 overdue repayment instalments of the social loan in an aggregate amount of €1.7 million, plus fees and interest for October-November, and a deficit of €1.8 million in the foreign exchange account.[143]

During January 2009, Prva Banka reiterated on various occasions that it would not honor payment instructions of MNSS until the issues addressed in the letter of 11 December 2008 were solved.[144]

On 13 February 2009, MNSS wrote to the Central Bank alleging that the Prva Banka had defrauded it.[145]

On 16 February 2009, the Central Bank replied that it "performs the supervision of banks on the basis of determining the risk profile of the bank, without specific powers to perform mediation and the settlement of the disputes between the clients and the banks."[146]

298. The issues between MNSS and Prva Banka persisted until the Prva Refinancing Protocol and even then Prva Banka failed to honor a payment order to CVS. MNSS commenced a debt claim in the Commercial Court in Podgorica, which rejected the claim. MNSS appealed the decision but no progress was made, because of ZN's bankruptcy and surrounding circumstances. MNSS explains that, "it did not pursue the matter vigorously due to its understanding and belief that any appeal would have been futile given the high-level political connections behind Prva Banka and the lack of independence of the Montenegrin judiciary."[147]

143 Email from Mr. Daniel Brol to Mr. Mark Jacobson and others, attaching and summarizing letter from Prva Banka CG to Zeljezara Niksic A.D., dated 19 December 2008 (Exhibit C-053).

144 *See* Memorial, paras. 464 *et seq*.

145 Letter from MNSS B.V. to Central Bank of Montenegro dated13 February 2009, attached to email from Mr. Alan Jacobson to Mr. Rad Vukcevic (Exhibit C-064).

146 Letter from Central Bank of Montenegro to MNSS B.V., enclosing Law on the Central Bank of Montenegro dated 16 February 2009 (Exhibit C-065).

147 Memorial, para. 474.

299. In the view of the Tribunal, the detailed factual background described above shows that this part of the Prva Banka claim is based on the contractual relationships among Prva Banka, MNSS and ZN, and it does not arise from the Privatization Agreement or the Assignment Agreement. However, Prva Banka is a private bank whose conduct cannot, without more, be attributed to the Respondent. As the Tribunal explains below, although Prva Banka was under the Central Bank's supervision, it was not under the Central Bank's control for the purposes of Article 8 of the ILC Articles, other than for a short period during which Prva Banka made transfers to the Claimants. It follows, therefore, that the Respondent is not responsible for Prva Banka's actions in this respect. The Tribunal turns now to the issue of the alleged refusal of the Government and the Central Bank to assist MNSS.

300. According to the Claimants, "the persistent refusals by the Government and the Central Bank to take action against Prva Banka to ensure that MNSS was able to make payments in Montenegro was unreasonable."[148] Furthermore, in the case of the Central Bank, "the unreasonable nature of such refusals is exacerbated because of the broad mandatory powers possessed by the Central Bank in relation to payment operations and commercial operations,"[149] and their discriminatory nature because the Central Bank had taken control over some aspects of Prva Banka's activities including in relation to payments.

301. This Claimants' complaint is about the regulatory failure of the Respondent and the Central Bank in relation to Prva Banka. The regulatory supervision of Prva Banka is a governmental function, and the majority of the Tribunal finds that, as such, it falls within the scope of the Tribunal's jurisdiction. Hence, the Tribunal will consider it as a possible breach of the FET standard further below.

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[148] *Id.*, para. 478.
[149] *Id.*, para. 479

302. The third leg of the claim is the refusal of the Government to agree to the transfer of the account of MNSS in Prva Banka to Fortis Bank. According to the Claimants, this bank had agreed to issue to the Privatization Authority the performance bond related to ZN's investment program. Under Clause 8.4.1(a) of the Privatization Agreement and as a guarantee of performance, MNSS had the obligation to

> "deposit in a Bank with the seat in Montenegro the amount of 14 million Euro into a cash collateral account (the "Cash Collateral Account") to cover the investment for the first Investment Period. The Bank will issue a Performance Bond in the full amount in favour of the GoM substantially in the form set out in Annex 8a hereto, on such terms that as, if and when the GoM approves that, the Investment Liabilities are reduced the principle amount of the Performance Bond reduces accordingly."[150]

303. When Mr. Jacobson made this request in a meeting with the Minister of Economy on 17 December 2008, the Minister stated: "if MNSS withdrew €26.4 million it had deposited with Prva Banka, the bank would not survive."[151] But the Government was also concerned that, if MNSS' CAPEX deposit was transferred to another bank, Prva Banka may foreclose on ZN's movable assets pledge to Prva Banka. At the hearing, Mr. Vujovic was asked:

> "What, in your view, at the time would have happened to ZN if Prva Banka had foreclosed on these assets [movable property, raw materials, inventories]?
>
> I think the production at ZN would have stopped totally."[152]

304. In the circumstances, the Tribunal finds that the Government's refusal to agree on the transfer of MNSS' funds from Prva Banka to Fortis Bank was

[150] Privatization Agreement, Clause 8.4.1(a) (Exhibit C-002).
[151] Witness Statement of Mr. Alan Jacobson, para. 44.
[152] Transcript, Day Five, p. 192, lines 4-6.

neither unfair and inequitable, nor unreasonable or discriminatory: the Government had no duty to agree to the transfer of the account to a foreign bank. The Government's concern was not limited to the liquidity issue in Prva Banka emphasized by the Claimants, but, reasonably, extended to the likelihood that it may affect the operation of ZN itself because of the overdraft facilities granted by Prva Banka to ZN.

(ii) Refusal to Reduce the Headcount

305. Under Clause 8.1.4 of the Privatization Agreement, the Buyer undertook "to ensure that the number of Company's employees shall not be reduced below the amount of 1.500 employees …." The majority of the Tribunal finds that the basis of MNSS' claim is clearly contractual, including whether the refusal to reduce the headcount was reasonable given the change of the circumstances. As stated by the Respondent in its Counter-Memorial, "what Claimants are complaining about is nothing but an alleged breach of the Privatisation Agreement."[153] The majority of the Tribunal concludes that, in view of the decision of the Tribunal on its jurisdiction, the Tribunal will not consider the refusal to reduce the headcount as part of its appreciation of whether Article 3(1) of the BIT has been breached.

(iii) Secret Meetings with and Financial Support to the Union

306. The Respondent has denied that the meetings with the Union were secret. As regards the First Loan, the Respondent has explained that,

> "when granting the loan, [it] was acting in its function as a party to the Privatisation Agreement and as commercial party. It was seeking to facilitate the ongoing negotiations between the union and its contract partner MNSS. In order to do so in [sic] adopted measures that were also available to any private party: it concluded a loan agreement with the

[153] Counter-Memorial, para. 859.

union. Its acts did not include any margin of the exercise of sovereign authority."[154]

307. The Respondent has further explained that, "[t]he reason why the loan was not provided to ZN was that this would have only created further debt on ZN's balance sheets and would further have been considered state aid. Hence Respondent opted to circumvent the problems connected with the granting of a loan directly to ZN and chose to grant the loan to the union."[155] On 17 March 2011 and on 31 March 2011, the Respondent provided further financial support to the Union out of the budget reserve and as one-term aid to the workers of ZN and other enterprises. According to the Government's decisions, these "funds shall be counted as an advance payment of the social programme in case of the Government's participation in its realization."[156]

308. The Claimants in their Reply stated that "the fact that acts or omissions by the Respondent were done pursuant to the Privatisation Agreement is irrelevant …. "[157] For the majority of the Tribunal, it is not irrelevant because the Claimants have waived any claim under international law based on acts of the Government "pursuant" to the Privatization Agreement. For the majority of the Tribunal, therefore, the issue is whether the Respondent in providing financial support to the Union acted as a sovereign or a contractual party.

309. It is clear from the conclusions in respect of the financial support granted twice to the Union in March 2011 that the Respondent was acting as the sovereign in providing "one-term aid" that required the redirection of funds from the "subventions" category of the Ministry of Economy to the "current"

[154] *Id*., para. 909.
[155] *Id*., para. 902
[156] Government Conclusions No. 03-2597 dated 17 March 2011 (Exhibit C-555); Government Conclusions No. (illegible) dated 31 March 2011 (Exhibit C-583).
[157] Reply, para. 81.

budget reserve.[158] Furthermore, the funds were intended as an advance of the Government's financing for the social program.

310. As regards the loan of December 2010, the fact that the financial support has been characterized as a loan does not necessarily mean that, in providing it, the Respondent did not act as a sovereign. In this respect, the Tribunal notes that the Government had no contractual obligation to provide financial assistance to the Union under the Privatization Agreement, and, as explained by the Government, the financial support was instrumented as a loan to circumvent restrictions on State aid, "a rational public interest objective."[159] Furthermore, the loan was not on commercial terms – it was interest-free – and it is unknown from which Government pocket the loan funds came from; they may have come from the same reserve as in the case of outright aid but provided on different terms. For these reasons, the majority of the Tribunal considers that the financial support to the Union was provided in the exercise of the *puissance publique* of the Government and, hence, the Tribunal is competent to determine whether these measures, including the allegation of secret meetings, which is intimately linked to the funding of the Union, were in breach of the FET standard.

(iv) Refusal to Allow ZN to Scrap Obsolete Machinery

311. Under Clause 8.2.1.3 of the Privatization Agreement, the Buyer needed the consent of the Sellers to dispose of any assets of ZN. This clause provides that the Sellers' consent shall not be unreasonably withheld. The majority of the Tribunal concludes that the disposal of obsolete machinery is essentially of a contractual nature related to compliance with the Privatization Agreement and, hence, outside the competence of the Tribunal.

[158] Government Conclusions No. 03-2597 dated 17 March 2011 (Exhibit C-555); Government Conclusions No. (illegible) dated 31 March 2011 (Exhibit C-583).
[159] Respondent's Post-Hearing Brief, para. 96.

(v) Refusal to Support Publicly the Restructuring Plan

312. The Claimants' complaint concerns public statements of the Government that, in the view of the Claimants, undermined the Restructuring Plan agreed to by the Government itself. This ground adduced by the Claimants reflects the ambivalence of the Government as contract partner and sovereign, but the Government had no obligation to publicly support the Restructuring Plan and it had shown its support by guaranteeing the Crédit Suisse Loan to ZN, which was part of the Restructuring Plan. While the Tribunal understands the desire of the Claimants for more support from the Government, it is also true that the Government had to manage its support among different constituencies with opposing interests. How it decided to allocate its support and by which means where it had no obligation to provide it, it is not a matter for the Tribunal to judge.

(vi) Acts Committed During the Bankruptcy Proceedings

313. The Claimants have listed eight items in support of their claim of breach of Article 3(1) of the BIT by the Respondent. Seven relate to decisions of the bankruptcy administrator. The preliminary question here is whether the acts of the bankruptcy administrator can be attributed to the Respondent. Usually a bankruptcy administrator is a representative of the debtor and not of the State. This is indeed the position in Montenegrin law. Article 24.1 of the Montenegrin Bankruptcy Act states: "The bankruptcy [administrator] manages and represents the bankruptcy debtor, unless differently stipulated by the law."[160] The Tribunal is persuaded by the argument of the Respondent that reference in the Montenegrin Criminal Code to the bankruptcy administrator as an official serves the purpose of protecting the administrator as if he were an official of the State. Furthermore, as argued by the Respondent, if the bankruptcy administrator were an organ of the State, such reference would be superfluous.

[160] The Bankruptcy Law, Official Gazette of Montenegro No.1/2011 dated 22 December 2010 (Legal Authority CLA-519).

314. This conclusion by the Tribunal is in line with the concept of the bankruptcy administrator in most European civil law systems and supported by investment treaty tribunals,[161] most recently in the case of *Yukos*.[162] The facts of the present case do not warrant a departure from this approach.

315. The eighth item on the list relates to the initiation of the bankruptcy proceedings by the Union because of the unpaid salaries to ZN's workers. This is not a Government act and, at that time, the Claimants did not object to it.

316. None of the acts in relation to the bankruptcy proceedings complained of by the Claimants may be attributed to the Respondent. Hence they cannot be the basis for a finding of liability under Article 3(1) of the BIT.

(vii) Respondent's Objections to the Debt-to-Equity Swap and the Issue of Convertible Loans

317. This transaction required the consent of the Government because of its effect on the implementation of the Privatization Agreement. The Government was concerned that, because of the resulting dilution of the existing shareholders, the Government and MNSS would become minority shareholders and could not ensure that the Privatization Agreement be implemented. The majority of the Tribunal concludes that this, again, is a contractual matter between the parties to the Privatization Agreement and, therefore, the Tribunal will not consider these claims as part of the actions of the Respondent allegedly in breach of Article 3(1) of the BIT.

(viii) Refusal to Approve Third Party Funding

318. This transaction involved the waiver of substantial obligations of the parties to the Privatization Agreement. The Government explained on 17 March 2011 that the Government was not prepared to grant this waiver when MNSS

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[161] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 253 (Legal Authority RLA-109); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award, 23 April 2012, para. 157 (Legal Authority RLA-180).
[162] *See* Rejoinder, paras. 464-467.

had failed to pay the workers' salaries for four months and to provide the performance bond for its investment obligations for 2011. The majority of the Tribunal concludes, again, that this is a contractual issue among the parties to the Privatization Agreement, which falls outside the Tribunal's jurisdiction.

(ix) Refusal to Allow ZN to Withdraw Funds from its Account with Erste Bank

319. The Respondent and MNSS had agreed in the Protocol on Oversight signed on the occasion of the Crédit Suisse Loan that a payment instruction signed by MNSS, ZN and the Respondent was required to withdraw funds from ZN's account with Erste Bank where the proceeds of the loan were deposited. The complaint relates to one of a total of seventeen payment instructions. The approval of the Government was delayed by nine days. The Government did not refuse the transfer but requested an explanation because the request did not meet the Protocol conditions for transfers. The majority of the Tribunal finds that this matter is contractual in nature, and, therefore, outside the Tribunal's jurisdiction.

(x) Refusal to Approve Short-Term Loans

320. The complaint relates to the Fourth and Fifth Loans. The Respondent's representatives on the board of ZN voted against them. By the date of the vote, 17 February 2011, the funds had already been disbursed. As stated by the Respondent, "[i]t remains wholly open from Claimants' submission how being outvoted on the decision on a loan agreement that have [sic] already been concluded could possibly constitute a breach of the BIT."[163] This is a matter between shareholders without involvement of the State as such, and therefore cannot constitute a breach of the BIT.

[163] Counter-Memorial, para. 996.

(xi) Obligation to Maintain a Stable Legal and Business Environment

321. If proven, this is a cause of action that would pertain to the exercise of the sovereign authority of the State; however, it is not clear from the submissions exactly what change in the legal and business environment occurred. This seems to be an item more in the list that needed to be ticked-off, but for which no proof has been submitted by the Claimants.

322. To conclude, of the list of measures adduced by the Claimants in support of the claim that the Respondent breached the FET standard, the majority of the Tribunal retains some aspects of the Prva Banka episode and the support of the Government to the Union. The Tribunal will now determine the content of the FET standard against which to judge these measures and whether they amount to a breach of the obligation in Article 3(1) of the BIT.

b. The FET Standard against which to Judge Non-Contractual Measures

323. The relevant part of Article 3(1) of the BIT provides: "Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party […]."

324. The Claimants note that Article 3(1) of the BIT has no reference to international law and contend that "the FET is an autonomous treaty standard that encompasses, but which is nonetheless separate from, the FET standard under customary international law; the customary standard including, but not being limited to, the evolving concept of an '*international minimum standard*.'"[164] From this reading of the meaning of the FET, the Claimants draw two consequences. First, that the BIT may require a treatment by the Respondent additional to or beyond that of customary international law; and second, that the threshold for the finding of breach of this standard is lower than the applicable threshold to find a breach of customary international law.

[164] Memorial, para. 663. Emphasis in the original.

325. The Respondent does not elaborate on this point or generally on its understanding of the FET other than to note that the "Claimants have selectively reviewed numerous awards to posit an overly broad interpretation of the FET standard,"[165] and to deny that this is the applicable standard. The thrust of the Respondent's argument is that the facts of the case don't support a claim of breach of the FET standard even if understood in the Claimants' terms.

326. As held by the *El Paso* tribunal, this Tribunal "considers this discussion to be somewhat futile, as the scope and content of the minimum standard of international law is as little defined as the BITs' FET standard, and as the true question is to decide what substantive protection is granted to foreign investors through the FET."[166] The futility is confirmed in this case by the Claimants' reliance, among others, on the understanding of the *Waste Management II* tribunal, which places the FET in the context of the minimum standard of treatment:

> "[...] the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[167]

327. The Tribunal concurs with this description of State conduct in breach of the FET standard. Furthermore, the Tribunal notes that, in the Claimants'

[165] Rejoinder, para. 501.
[166] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 335 (Legal Authority CLA-793).
[167] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, para. 98 (Legal Authority CLA-565 and RLA-090).

summary of their review of arbitral awards, the Claimants list as constituent duties of a State under the FET standard precisely those that would be breached by the State conduct describe above.

328. The Parties have also argued whether or not a breach of contract may be a breach of the FET standard. As held by the *Noble Ventures* tribunal and consistently held by other tribunals, it is a "well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State."[168] To be congruent with its decision on jurisdiction, the majority of the Tribunal finds that the Tribunal need not further consider this matter.

c. Did the Respondent Breach Its Duties Under the FET Standard?

329. The majority of the Tribunal has retained for consideration as a possible breach of the FET standard the refusal of the Respondent and the Central Bank to make sure that Prva Banka would execute payment orders of MNSS, and the support of the Union by the Respondent. The Tribunal will consider them in turn.

(i) The Refusal of the Respondent and the Central Bank to Ensure MNSS Could Make Payments from its Prva Banka Bank Account

330. The Claimants allege that the Respondent is responsible for their losses for the delayed execution of payment orders by Prva Banka, because "the Government and the Central Bank refused to exercise its [sic] authority over Prva Banka to ensure that MNSS' funds were able to be used by MNSS for ZN's CAPEX payments and operations."[169] The Respondent, for its part,

[168] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 53 (Legal Authority RLA-097).
[169] Memorial, para. 475.

considers that “the Central Bank took all steps required by it under Montenegrin law.”[170]

331. The Central Bank started to monitor Prva Banka’s performance in 2007, long before the financial crisis broke out. In a report to the European Commission (“**Report to the Commission**”) in reply to an enquiry about Prva Banka, the Central Bank stated that “the acting by [Prva Banka] has been to a more significant extent incompliant with regulations”, and that, therefore, it “decided to demand that [Prva Banka] … make commitments as to removing the irregularities.”[171] In view of the irregularities, the Central Bank entered into an agreement with Prva Banka on 6 July 2007 and reviewed Prva Banka’s compliance in November 2007. The Central Bank found that Prva Banka had not fully complied with the agreement and, on 13 February 2008, ordered Prva Banka, *inter alia*, to maintain a liquidity ratio of 15 percent and to provide the Central Bank with monthly reports on the steps taken for the implementation of its decision. The Central Bank conducted an in-depth investigation in July 2008 and issued a warning on 2 October 2008, requiring daily reports.

332. Despite the Central Bank’s monitoring, Prva Banka ran into liquidity problems and was unable to effect numerous payment instructions sent by its customers among which MNSS and ZN.[172] In November 2008, the Central Bank performed a new in-depth investigation of Prva Banka. On 21 November 2008, the Central Bank ordered Prva Banka to immediately take measures to improve its liquidity, among others, through the collection of outstanding debts.

[170] Counter-Memorial, para. 1066.
[171] Memorial, para. 94.
[172] The problems of Prva Banka affected all customers. In the Decision of 21 November 2008, it is acknowledged that: “The Bank currently has ca. 30 million of outstanding payment orders in the domestic and foreign payments … The balance in the clearing account of the Bank is insufficient for settling daily liabilities … it has been determined that, as of 10/11/2008, the Bank has 1,777 unrealized payment messages … ”. (Decision No. 0104-32/1 of the Central Bank of Montenegro dated 21 November 2008 (Exhibit C-674 and R-025)).

333. The Claimants use the Report to the Commission to assert that the Central Bank was exercising the type of control needed under Article 8 of the ILC Articles in order to attribute the acts of the "controlled" entity to the State. The report reads:

> "On 3 November 2008, the Central Bank started **direct control** of [Prva Banka's] operations … aimed at determining whether the Bank has removed the irregularities identified by **the Report on control** (the act strictly confidential 03-26/1 of 29 August 2008). During the control, in the first two weeks already, the Central Bank has established that the Bank's liquidity was critically insufficient due to the Bank's incapacity to meet all of its due liabilities, and that the liquidity risk of the Bank is high due to mismatch between maturities and cash flows of assets and liabilities."[173]

334. The Decision of the Central Bank of 21 November 2008 refers to the "direct supervision" of Prva Banka in the Respondent's translation[174] and to "direct control" in the Claimants' translation.[175] The Decision explains that, "the Central Bank shall establish whether the Bank has eliminated the irregularities identified by in the *Report on control* [/*Supervisory Report*]."[176] It appears that whatever the wording, the type of control/supervision is part of the monitoring function of the Central Bank and not a compulsory control over the activities of Prva Banka in general or specifically over the delays in payment complained by MNSS. The aim of the "control/supervision" was to determine whether the irregularities found in the confidential report of 29 August 2008 had been removed.

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173 "Questionnaire - Financial Markets" (undated), p. 13 (Exhibit C-483). Emphasis added.
174 Respondent's Exhibit R-025 reads: "...through direct supervision of the Bank's operations, the Central Bank shall determine whether the Bank has remedied the irregularities identified by the Supervision Report."
175 Claimants' Exhibit C-674 reads: "…in the direct control of the Bank [Prva Banka] business, the Central Bank shall establish whether the Bank has eliminated the irregularities identified by in the Report on control."
176 Decision No. 0104-32/1 of the Central Bank of Montenegro (Exhibit C-674 and R-025), referring to the confidential report of the Central Bank, dated 29 August 2008. Emphasis added.

335. In any case, even if the Central Bank had exercised “direct control,” this would utmost concern decisions taken during a brief period, from 3 November 2008 to 12 December 2008. The Tribunal observes that during this period Prva Banka requested a short-term loan from the Respondent, the Respondent granted it and Prva Banka honored the payment orders of MNSS of July and November to CVS and ABB.[177]

336. According to the Respondent, the Central Bank could have introduced compulsory management of Prva Banka under Montenegrin law, but as indicated in the reply to a Questionnaire from the European Commission (“**Questionnaire**”), “the Central Bank did not assess as justified and purposeful to introduce compulsory management to Prva banka ....”[178] The Central Bank did, however, request a change of management, as indicated in the just mentioned Questionnaire, which in effect occurred: “Having in mind that, due to negative effects of the global financial crisis, *Prva banka* faced a liquidity crisis in the second half of 2008, the Central Bank took measures towards *Prva banka* already in October 2008, aimed at management replacement, cease in the risk profile growth, and provision of additional liquid assets.”[179] The IMF acknowledged that “[t]he authorities pointed to their prompt response to the financial turmoil … the [Central Bank] has prohibited new lending, demanded the installation of new management and commissioned an independent external audit.”[180]

337. The Claimants analyze the financial assistance to Prva Banka as exclusively in favor of Prva Banka and assert that “[t]he Government was guided by its desire to save Prva Banka.”[181] But the assistance was not just for the benefit of Prva Banka, the Claimants also benefited from this assistance as did other customers. The Claimants have further argued that the amount of the loan was insufficient to bail out Prva Banka and “the Respondent took an effective

[177] See detailed chronology in para. 297 above.
[178] “Questionnaire - Financial Markets” (undated), p. 10 (Exhibit C-483).
[179] *Ibid.*
[180] Extract from IMF Country Report No. 10/155, pp. 11-12 (Exhibit C-453).
[181] Claimants’ Post-Hearing Brief, para. 63.

decision to continue using MNSS' funds to improve the liquidity of Prva Banka."[182] No proof of such decision is in the record, but there is ample proof of the ongoing dispute between MNSS and Prva Banka in the context of their commercial relationship, as considered earlier in this Award.

338. Even if the assistance had not benefited the Claimants and other customers, the fact that at the onset of the 2008 financial crisis the Government assisted the largest bank in the country was reasonable in the circumstances. In the words of the *Saluka* tribunal the standard of reasonableness requires "a showing that the State's conduct bears a reasonable relationship to some rational policy …."[183] The short-term loan was provided at a time when many other governments tried to save their banks, whether private or public.

339. As to the complaint that the funds deposited by MNSS served to boost the liquidity of Prva Banka and made up for assistance that should have been provided by the Government, the Tribunal has already considered this aspect of the complaint. It relates to the complex relationship of MNSS with Prva Banka. To the extent that in some instances Prva Banka followed orders of the Central Bank to prop up liquidity of Prva Banka, these orders did not single out MNSS or ZN but the institution as a whole. The funds deposited by other customers may have also boosted Prva Banka's liquidity.

340. In sum, the Tribunal finds that, rather than refusing to assist MNSS, the Government and the Central Bank provided limited support to Prva Bank from which MNSS, ZN and other customers benefited. This limited assistance was not tailored to MNNS' needs and may have been insufficient, but MNSS had no right to special assistance from the Central Bank or the Government.

[182] Reply, para. 63.
[183] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 460 (Legal Authority CLA-553 and RLA-101).

(ii) Support of the Union

341. The Claimants have argued that the Government conspired with the Union to bankrupt the company, and interfere with their ability to manage ZN with the financial support provided to the Union and by meeting secretly with the Union. The first thing to note is that the meetings took place in the context of strikes by the workers. In the case of the loan, the strike had been going on since September and the funding had been discussed in Parliament, hardly a secret venue. The head of the Union, Mr. Vucinic, explained to Mr. Mark Jacobson on 19 December 2010 that "we have stopped the general strike and protests in the Big Hall of Zeljezara, today on 19.12.2010 at 11am, on the basis of the accomplished agreement with Minister of Economy, Mr. Branko Vujovic, at whose insistence we have accepted to talk to you about the future work in Zeljezara Niksic."[184] Whether the agreement was reached or the discussions conducive to it were conducted without the prior knowledge of MNSS, their objective was to stop the strike and bring management and workers to the negotiating table, a result that the withholding of salaries of the workers had not achieved.

342. The further support to the Union in March 2011 may have been arranged without MNSS' knowledge but again it took place in the context of a strike and shortly before ZN went bankrupt. The support of the Government needs to be placed in the context of the social obligations of MNSS under the Privatization Agreement and the expectations that MNSS could have legitimately had in relation to them.

343. It should be noted first that the strategy of ZN to achieve an agreement with the Union on the reduction of the headcount by withholding salaries of striking workers had failed whether or not the Government provided support to the Union.

[184] Email from Ms. Ivana Vavic to Mr. Mark Jacobson and others, attaching letter from Mr. Janko Vucinic dated 19 December 2010 (Exhibit C-292).

344. In the Privatization Agreement, the Buyer acknowledged the significant importance attached by the Sellers to the Buyer's commitments in relation to, *inter alia*, the social program. The Buyer also undertook not to allow "obligations of the Company towards employees to be delayed or to remain unpaid."[185] Furthermore, the Sellers could "terminate this Agreement without further formalities including acquiring [*sic*] arbitration award or court decision in the following circumstances: (i) if the Buyer delays payment of salaries and reimbursement to employees for two months or more …."[186]

345. By MNSS permitting ZN to withhold the salaries of employees, it created an event that would have permitted the Government to terminate the Privatization Agreement. If the Privatization Agreement would have been terminated under Clause 8.5.4, the Buyer was obliged to return "the Sale Shares and any shares acquired through share capital increases and the Buyer shall not be entitled to the reimbursement of any investment made. Outstanding obligations toward the Company and employees shall be collected by enforcement of the Performance Bond."[187] Faced with the risk of possible termination by the Government, whether the Government chose to influence the Union by way of financing a post-bankruptcy social program or terminating the Privatization Agreement, would seem immaterial in light of MNSS' commitments. The situation in this case resembles that considered by the *Noble Ventures* tribunal where the Government initiated judicial reorganization proceedings of the claimant:

> "the situation of the Claimant, CSR and its employees was such that the judicial proceedings seemed to be the only solution to an otherwise insoluble situation. Bearing in mind the interests of the approximately 4,000 employees who depended on CSR and their prospects at that time, the initiation of the proceedings was neither unfair nor inequitable. This conclusion is reinforced by the consideration that the Respondent is not to be blamed for having violated any obligations under international law in connection with the

[185] Privatization Agreement, Clause 8.2.1.7 (Exhibit C-002).
[186] *Id.*, Clause 8.5.4.
[187] *Ibid.*

> indisputably dramatic economic situation at that time. Therefore, no violation of Art. II(2)(a) and its fair and equitable treatment standard has occurred."[188]

346. The Tribunal has no difficulty in reaching a similar conclusion, particularly if the overall assistance, including the financial assistance, provided by the Government to ZN is taken into consideration. The Government guaranteed the BlueBay Loan and the Crédit Suisse Loan; both guarantees were called. While in the case of the BlueBay Loan, the Government in compensation received 25 percent of the shares of MNSS in the capital of ZN, the Government did not receive compensation for paying back the Crédit Suisse Loan, which with interest exceeded €31 million.

347. The Tribunal concludes that the Respondent did not breach the obligation to accord the Claimants fair and equitable treatment.

6) Most Constant Protection and Security

348. Article 3(1) of the BIT provides in relevant part that "[e]ach Contracting Party shall accord to such investment the most constant protection and security."

349. The Parties disagree on the content of this obligation. The Claimants argue that the use of the expression "most constant" indicates a higher standard of protection equivalent to "full protection." They also claim that the Respondent's obligation extends to ensuring a stable investment environment. For the Respondent, the term "most constant" only adds a temporal element and it does not have the effect of increasing the standard of protection and security. The Respondent contends that the protection and security standard is limited to the protection of the physical integrity of an investment.

350. The Tribunal does not need to engage in a theoretical discussion of whether the scope of this standard includes, as argued by the Claimants, "ensuring

[188] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 53, para. 182 (Legal Authority RLA-097).

a stable protection environment" because no claim has been made that the investment environment has been changed.

351. As regards the meaning of "most constant," the plain meaning of "constant" is "unchanging," "that remains the same." [189] Thus, the level of protection and security should not change for the duration of the investment. But the expression "most constant" does not increase the level of protection and security as understood under international law. This standard has been understood not to impose on the Government a strict obligation but only an obligation of vigilance and due diligence taking into account the circumstances and resources of the host State. [190]

352. The specific claim of failure by the Respondent to protect the Claimants is based on the events that occurred in September 2010 and December 2010. Union members occupied the administration building of ZN for seven days as from 28 September 2010. It is disputed between the Parties as to when the Respondent was informed of the planned demonstration by the workers. The Respondent claims that it was informed on 28 September and the police had no time to organize police protection. The only protection provided consisted of two plain cloth policemen in an unmarked car. Irrespective of when the police was advised of the demonstration, the police took no action to dislodge the occupiers during the seven days that the occupation lasted.

353. On 7 December 2010, the Respondent was advised of a forthcoming strike on 13 December 2010. On 12 December 2010, the head of the Union advised Minister Vujovic of the workers' intent to occupy the administrative building the next day. Again, this building was occupied as announced and

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[189] The Concise Oxford Dictionary.

[190] *See*, for instance, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.05 (Legal Authority CLA-576); *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 50 (Legal Authority RLA-178); *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, para. 522 (Legal Authority CLA-793); *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 81 (Legal Authority RLA-186).

the CEO was physically assaulted while escaping from the angry workers. No police protection was provided.

354. Whether the police was advised in advance or not does not seem to have made any difference in terms of preparation of the police to protect the premises. According to ZN's CEO, the police informed him that they would not attend ZN in the event of labor unrest because ZN was a private business on private property.[191] The Respondent has not disputed this information.

355. It is surprising that the police would not ensure the physical integrity of buildings and persons irrespective of their location or ownership. It is also surprising that Minister Vujovic saw no reason to take steps in response to ZN's police protection request. This is even more so because the Government owned a substantial portion of ZN.

356. To conclude, the standard of "most constant protection and security" requires the Government to have a more pro-active attitude to ensure the protection of persons and property in the circumstances of ZN, particularly when it had been forewarned, as it was certainly the case in December 2010.[192] Nonetheless, the Claimants have failed to show that they suffered damage as a result of the Respondent's actions. As a consequence, while the standard in Article 3(1) of the BIT was breached, there is no basis for an award of damages in relation to the behavior of the police during the two strikes at the end of the year 2010.

7) Most-Favored Nation Treatment

357. This standard of treatment is to be found in Article 3(2) of the BIT, which provides:

> "Article 3
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> …
>
> 2. More particularly, each Contracting Party shall accord to such investments treatment which in any

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[191] Second Witness Statement of Mr. Les Kwasik, para. 7.

[192] *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 84 (Legal Authority CLA-577).

> case shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned."[193]

358. The breach of this standard requires proof that investments in like circumstances have been discriminated on the basis of their nationality. In the case before the Tribunal, the alleged breach concerns the treatment accorded to CEAC, owner of KAP, and to the Max Aicher Group of Cypriot and German nationalities, respectively.

359. The Respondent has argued that, "the standard does not apply to *investors*, but specifically to investments. Notably, Claimants' investment is not ZN itself, which was accorded the treatment that Claimants challenge as discriminatory, but the equity and loan positions as regards ZN."[194]

360. The Tribunal notes that the investment, and in particular the equity investment, materialized through ZN. ZN is the vehicle through which the investor made the investment. Thus, treatment of the equity, the loans or ZN are included in the treatment to be accorded to investments. In general, the submissions of the Respondent seem to agree with this observation of the Tribunal, particularly in the case of CEAC, the Respondent does not distinguish between KAP and the equity of CEAC in KAP.

361. The Parties disagree on whether ZN is in *like circumstances* to KAP. The Respondent has emphasized the differences because CEAC and ZN are in different economic sectors. The Claimants find that they are in like circumstances because they are two companies affected by the economic crisis and in bankruptcy. The Claimants' complaint is that the Respondent permitted KAP to reduce the number of employees in 2010, assumed €22 million in liabilities, did not interfere in negotiations of management and employees, and that KAP received more favorable treatment in the bankruptcy proceedings.

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[193] BIT, Article 3(2) (Legal Authority CLA-504).
[194] Rejoinder, para. 624. Emphasis in the original.

362. Arguably, KAP and ZN are comparable even if they operate in different sectors in the sense of being affected by the economic crisis, being the two largest employers in the country and both being in bankruptcy. But there may have been reasons for the different treatment. The labor-management issues pervading in ZN may have been absent in KAP. There is evidence of substantial support by the Respondent to ZN before it became bankrupt as detailed by the Respondent. [195] As to the different treatment in the bankruptcy proceedings, the Tribunal has already determined that the actions of the bankruptcy administrator are not attributable to the State.

363. The Max Aicher Group was a new investor and this by itself places this group in circumstances different from the investor whose company is in bankruptcy. Moreover, the Tribunal notes that only KAP is mentioned in the Claimants' Post-Hearing Brief under the violation of the MFN clause. There is no reference to the Max Aicher Group.

364. To conclude, the Tribunal dismisses the claim for breach of MFN treatment.

8) Breach of the Obligation to Ensure the Free Transfer of Payments

365. This obligation is provided for in Article 5 of the BIT, which states in relevant part:

> "Article 5
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> 1. Each Contracting Party shall guarantee to the investors of the other Contracting Party the free transfer of payments related to their investments. The transfers shall be made in a freely convertible currency, without restriction or delay. Such transfers include in particular though not exclusively:
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> a) capital and additional amounts to maintain or increase investments;
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> b) profits, interests, dividends and other current income;

[195] *See id.*, para. 626.

> c) funds in repayment of loans;
>
> d) the proceeds of sale or liquidation of the investment;
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> e) royalties or fees;
>
> f) unspent earnings of persons working in connection with the investment in the territory of the Contracting Party;
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> g) payments arising under Article 7."[196]

366. The Claimants base the allegation of breach of the obligation to ensure the free transfer of payments on the issues that have been already considered by the Tribunal relating to payments from ZN's account with Erste Bank and to payments from MNSS' account with Prva Banka. As regards the case of payments by Erste Bank, the majority of the Tribunal has already decided that the complaint of the Claimants is a contractual matter outside the jurisdiction of the Tribunal.

367. As regards Prva Banka, the majority of the Tribunal has also decided that, for the most part, the allegations of the Claimants concern contractual matters that fall outside of the Tribunal's jurisdiction. To the extent that the allegations relate to the regulatory function of the Central Bank, even if it is accepted that the Central Bank was in "direct control" of Prva Banka in the sense argued by the Claimants, this only occurred for a limited period of time, from 3 November 2008 to 12 December 2008. It is precisely during this period that payment orders of MNSS were honored. Hence, there is no merit in the claim that the Respondent breached its obligation to guarantee free transfer of payments.

[196] BIT, Article 5(1) (Legal Authority CLA-504).

9) Expropriation

368. The Tribunal refers to Article 6 of the BIT, which provides in relevant part for the following:

> "Article 6
>
> 1. Investments by investors of either Contracting Party shall not be nationalized, expropriated or subjected to any other measure having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except where expropriation is:
>
> a) for a purpose which is in the public interest;
>
> b) carried out under due process of law;
>
> c) non-discriminatory, and
>
> d) against prompt, adequate and effective compensation, which shall be effected without delay."[197]

369. The Claimants have argued that they were indirectly or directly expropriated. The claim of indirect expropriation is based on the cumulative effect of the measures taken by the Respondent that the Tribunal has considered under the preceding claims. The majority of the Tribunal has determined that these are contractual claims and thus outside its competence. As regards the cumulative effect of the other remaining claims, the Tribunal does not consider that they could have had the effect of depriving the Claimants of the economic use and benefit of their investments.

370. The Claimants also contend that they have been directly expropriated through the bankruptcy proceedings. Most of the acts at the base of their claim are acts of the bankruptcy administrator, including the sale of ZN's assets to Toscelik, which the Tribunal has already determined not to be attributable to the Respondent on the facts of the present case. The other ground for the claim is the dismissal of the Reorganization Plan by the

[197] BIT, Article 6(1) (Legal Authority CLA-504).

Podgorica Commercial Court upheld by the Montenegrin Court of Appeal and the fact that these courts "relied in part on an expert report submitted by an expert affiliated with the Government."[198] A court decision cannot be considered a direct expropriation unless a denial of justice is found. In the instant case, denial of justice has not been pleaded. Therefore, the Tribunal rejects the claim of expropriation of the Claimants' assets.

VII. COSTS

371. The Claimants have requested that, "the Tribunal exercise its discretion pursuant to Article 58(1) of the ICSID AF Arbitration Rules, and apply the general principle that costs shall follow the event."[199]

372. The Respondent has requested that the Tribunal grants them the fees and expenses related to the proceeding, those of the members of the Tribunal and the charges for the use of the facilities of ICSID.[200]

373. The fees and expenses of the Tribunal and ICSID's administrative fees and expenses are the following (in USD):[201]

Arbitrators' fees and expenses:	
Andrés Rigo Sureda	$207,611.11
Emmanuel Gaillard	$134,325.00
Brigitte Stern	$128,165.90
Christoph Schreuer	$3562.50
ICSID's administrative fees and expenses (estimated)[202]	$223,409.13
Total	**$697,073.64**

[198] Memorial, para. 821.
[199] Reply, para. 522.
[200] Rejoinder, para. 811.
[201] The ICSID Secretariat will provide the Parties a detailed Financial Statement of the case account as soon as all invoices are received and the account is final.
[202] The amount includes estimated charges of $1,000 (courier, printing and copying) in respect of the dispatch of this Award.

374. The Tribunal recalls that the Respondent has only in part been successful in its objections to the jurisdiction of the Tribunal. On the other hand, the Claimants have failed on the merits. The Tribunal also recalls that the Claimants have paid all advances requested by the ICSID Secretariat.

375. Taking into account the preceding considerations and all of the circumstances of the case, the Tribunal in use of its discretion determines that each Party shall pay for its own costs of the proceeding, and the Claimants shall pay for the fees and expenses of the Members of the Tribunal and for the expenses and charges of the ICSID Secretariat.

VIII. DECISION

For the reasons stated above, the Tribunal has decided:

1. To uphold the objections to its jurisdiction in respect of contract claims arising from the Privatization Agreement and the Assignment Agreement.
2. To uphold the objection to its jurisdiction for lack of consent under the 2000 and 2011 MFI Laws.
3. To dismiss all other objections to its jurisdiction.
4. To uphold the claim that the Respondent failed to ensure the protection of persons and property, but without granting any compensation, as the Claimants have failed to show that they suffered damages as a result.
5. At a majority, to dismiss the claim that the Respondent's failure to warn MNSS of the financial condition of Prva Banka breached the Respondent's obligations of fair and equitable treatment and non-impairment of the Claimants' investment.
6. To dismiss all other claims on the merits or, at a majority, because they fall outside its jurisdiction.
7. To apportion the cost of the proceedings as follows: each Party shall pay for its own costs, and the Claimants shall pay for the fees and

expenses of the members of the Tribunal and for the expenses and charges of the ICSID Secretariat.

Emmanuel Gaillard
Arbitrator

Date: 27 April 2016

Brigitte Stern
Arbitrator

Date: 25 April 2016

Andrés Rigo Sureda
President of the Tribunal

Date: 4 May 2016

PLACE OF ARBITRATION: Paris, France